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EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113796/21

Heard in Edinburgh on the 15, 16 and 17 May 2023 and on the CVP/Kinly
platform on the 18 May 2023

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Employment Judge Porter

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Sadie Trivett

Claimant
Represented by:
Mr Clarke,
Solicitor

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West Lothian Council

Respondents
Represented by:
Ms Beattie,
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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It is the judgment of the Employment Tribunal to dismiss the claimant's claim of
unfair constructive dismissal.

REASONS

Introduction

1. The claimant was employed by the respondents from the 14 April 2003 to the 15 September 2023, latterly as a Senior Procurement Officer. In these proceedings the claimant initially claimed unfair constructive dismissal and disability discrimination; however, by judgment of EJ Sutherland dated the 30 June 2022 the claimant was found not to be a disabled person in terms of s6 of the Equality Act 2010 and her claim of disability discrimination was dismissed.
2. The case was thereafter listed for a Hearing on the Merits on the 15-18 May 2023. At the Hearing on the Merits the claimant was represented by Mr Clarke, solicitor and the respondents were represented by Ms Beattie, solicitor. The parties intimated a Joint Bundle of Documentation numbered **1-429**. The parties also intimated a Joint List of Issues and Joint Statement of Facts, which are to be found at **Appendices 1** and **2** to this judgment.
3. The Tribunal heard in evidence from the claimant herself. For the respondents, the Tribunal heard evidence from Tom Henderson, Procurement Business Manager and the claimant's Line Manager, Angela Gray, Corporate Procurement Manager and Tom Henderson's Line Manager, and Julie Whitelaw, Head of Corporate Services and Angela Gray's Line Manager.
4. The Tribunal made the undernoted essential Findings in Fact from the evidence of the witnesses and from the documentation. In addition, the Tribunal referred to the Joint Statement of Facts in their decision-making process.
5. The claimant's case on the 'Last Straw' is set out in paragraph 29 of her revised ET1 (**109**). In that paragraph the claimant relies upon an email sent by Angela Gray to herself on the 2 July 2021 as constituting the 'Last Straw'. After the evidence of the claimant, Mr Clarke submitted that the claimant no longer relied upon paragraphs 29(2) and (3). The 'Last Straw' was therefore defined as: *"(1) Ms Gray was still placing barriers in the way of the claimant's return to work and would not give an unequivocal commitment to the claimant that she would*

not have to undertake Social Policy work and Ms Gray's insistence that the claimant's request was challenging to manage; (4) Ms Gray seemed to be challenging the opinion of OH and/or not accepting their findings."When giving her evidence the claimant's position on this matter was further revised as referred to in the Tribunal's reasons.

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6. The Tribunal noted that a great deal of evidence was heard in this case. The Tribunal did not consider it appropriate to make Findings in Fact in respect of all of that evidence, only in respect of evidence pertinent to a determination of the agreed List of Issues.

10 **Findings in Fact**

7. In early 2020 there were discussions between Julie Whitelaw and Angela Gray regarding a restructuring of the respondent's procurement. The purpose of the restructuring exercise was to make cost savings. The interim restructure agreed is to be found at **123**. Essentially, procurement was restructured into two teams- one headed by Meriel Maddison, and the other headed by Tom Henderson.

8. The claimant was line managed by Meriel Maddison whose team managed Business Services contracts and construction among other matters. Meriel Maddison's Team involved procuring commodities. Tom Henderson's Team was known as the 'Social Policy' Team which involved procuring services. The Tribunal accepted the evidence of Tom Henderson that on average Social Policy took up about two thirds of his workload. However, Tom Henderson's Team also covered Education, Corporate Services and Planning & Economic Development.

9. The claimant's responsibilities within Meriel Maddison's Team included Business Services Contracts.

10. It was known to Tom Henderson that working on Social Policy contracts caused the claimant considerable distress due to historic issues in her past. Angela Gray was also aware of this, although she did not have the background knowledge of Tom Henderson who had been appraised by the claimant

herself. The claimant had, however, been involved in Social Policy issues in the past and notably had been the Council's Community Benefits Champion.

11. On the 5 of October 2020 the claimant phoned Angela Gray. She was in tears and said that she could no longer work with Meriel Maddison. There had been a buildup of tension between the claimant and Meriel Maddison and the working relationship had broken down between them. Angela Gray was aware of the tensions between the claimant and Meriel Maddison and had been involved in previous exchanges between them.
12. The Tribunal accepted the evidence of Angela Gray that she felt she had a duty of care to the claimant and considered that she had no option but to move her to Tom Henderson's Team, being the only other team in procurement. In reaching this decision Angela Gray was aware that the claimant had a good working relationship with Tom Henderson.
13. IT procurement also lay within the remit of Tom Henderson's Team and generated a large amount of work. As of 5 October 2020, Angela Gray was unaware that the claimant was unable to work in IT as the claimant's working relationship had broken down with Anita Bainbridge, the Senior Procurement Officer for IT.
14. The approach to be taken on the claimant joining Tom Henderson's team was agreed between Tom Henderson and Angela Gray. The terms of that agreement were repeated in an email from Tom Henderson to Jane Ridgway, the claimant's Union representative in an email of the 29 January 2021. The email **(230)** contained the propositions: *"Where practically possible, allocate a workplan that is sensitive to Sadie's known issues within the scope of my Workplan allocation whilst understanding that within my small team it may not always be practicable to accommodate entirely; Support Sadie to work through her known issues to provide assurance that she would only be working on the procurement aspects of any tender in her portfolio and would not be expected to deal directly with delivery of any of the projects."*
15. The evidence of Tom Henderson was consistent in that he could not guarantee that the claimant could avoid Social Policy matters altogether. The claimant held the role of Senior Procurement Officer in a small team of 13 people, and

he could not exclude the possibility of her being asked a question with regard to a Social Policy contract. The Tribunal accepted the evidence of Tom Henderson that the claimant had been able to work on some Social Policy contracts in the past without difficulty- notably contracts related to Drug and Alcohol Abuse and Safe Working for Families. The claimant had also been the respondents' Community Benefits Champion which would have necessitated Social Policy involvement.

16. The Tribunal accepted the evidence of Tom Henderson, that, as reflected in the email of the 29 January 2021, at worst the claimant would only be working on the procurement aspects of any Social Policy contract she was involved in and would not be expected to deal with delivery of such contracts- in other words, she would have no contact with the service users.

17. Tom Henderson's evidence accorded with the evidence of Angela Gray in that there was a willingness to agree a workplan with the claimant which avoided, where possible, Social Policy but that she could not exclude the possibility that the claimant would avoid contact with Social Policy issues within Tom Henderson's Team. The Tribunal accepted this evidence, which was reflected in the wording of Angela Gray's email of the 2 July 2021 **(342-343)**. when she stated that: *7 am unable to guarantee that you will never be asked a question on any other contract, whether that is Social Policy or any other contract that Tom is responsible for, such as IT which you have also advised you are unable to work on.*"

18. On the 12 October 2020 the claimant committed a Data Breach. She informed Angela Gray immediately **(192-193)**. In her communication to Angela Gray of the 12 October the claimant stated: *"Since being told I would be moving to Social Policy I have not slept, which is partially down to grinding my teeth and in constant pain because of the grinding, brought on by recent events and worrying about dealing with Social Policy issues."* In response, Angela Gray stated: *"I have listened to all of your concerns to date. Based on the points you have raised, and all of our discussions and emails to date, I advise you, again, that I am left with no other option but to move you to Tom's area. However, I advise again that all of your concerns are noted with regard to social policy and the meeting is in the diary with Tom to discuss and agree the way forward with*

your new portfolio of activity. I, again, point out to you that Tom covers 3 other non social policy areas that can be considered for your portfolio.” (194). The three other non Social Policy areas which lay within Tom Henderson’s Team were Education, Corporate Services and Planning and Economic Development.

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19. The claimant was absent on sick leave between the 23 October 2020 and the 15 July 2021. In evidence, she stated that she went on sick leave as *“she knew they wanted her to take on social policy.”* The Tribunal noted that shortly before the claimant went off sick, she had been notified of disciplinary proceedings brought against her, arising from the incident on the 12 October 2020. In the event, the disciplinary proceedings never went ahead. The original cause of the claimant’s absence from work was ‘stress’- however, the majority of her sick notes featured ‘anxiety’ as the cause.

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20. At the time the claimant went off sick no work plan had yet been agreed with her. By email dated the 23 October 2020 to Angela Gray the claimant stated that moving to ‘Social Policy’ held *‘huge mental challenges* for me. **(213-214)**. In response, Angela Gray stated: *‘Looking to the future, Tom is developing a portfolio commensurate with your Senior Procurement Officer grade which, as far as practical, will be sensitive to your concerns on your preferred work allocation. You have been advised on a number of occasions in writing by me and verbally by both Tom and I that Tom works across 4 service areas and your portfolio will be compiled sensitively to accommodate your concerns as far as practical.’(212-213)*

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21. In the period to October 2020 to May 2021 the claimant was contacted by her line manager Tom Henderson by telephone at least once a week. Their telephone conversations lasted up to 30 minutes. During these calls work was discussed but they would also exchange social conversation on a variety of topics such as their mutual hobby of golf. Tom Henderson would meet with Angela Gray every Monday to appraise her of the calls with the claimant. Angela Gray was not responsible for line management of the claimant at that time; however, the claimant did contact her by email on the dates agreed in the Joint Statement of Facts.

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22. There was a dispute on the evidence in that Tom Henderson stated that Angela Gray's position in this time was always that she could not guarantee that the claimant would have no contact with issues around Social Policy contracts whilst working in Tom Henderson's team and he relayed this information to the claimant. Angela Gray said that she did not categorically state this to Tom Henderson during their Monday catch-ups in the period October 2020-May 2021.
23. The Tribunal did not find it necessary to resolve this dispute on the evidence given that the evidence of Tom Henderson and Angela Gray was at one in stating that, whilst working in Tom Henderson's team, the claimant could not completely avoid dealing with Social Policy contracts.
24. There were Occupational Health Reports on the claimant throughout this period. On the 24 December 2020 an OH report was issued by Lorraine Danaher, Occupational Health Adviser. The report stated: *"From the employee's account today there would appear to be an impasse in regard to managing the perceived workplace issues. The move to a new team is causing the employee anxiety. Today the employee advised she has significant concerns over the different contracts managed by this team and the need to interact with a new team of colleagues. There would also appear to be historical issues with one member of this team. From the employee's account today it would appear that any suggestion she makes in regard to a solution to the situation is regarded as unsuitable. ... I am optimistic that with further discussion and possibly HR involvement, progress can be made and the employee will be able to consider a return to work."* (221-223). The 'historical issues with one member of this team' was a reference to Anita Bainbridge, the Senior Procurement Officer with IT.
25. The reference to the 'solutions' proposed by the claimant was a suggestion that the claimant take her work with Building Services from Meriel Maddison's Team to Tom Henderson's Team. By letter dated the 28 January 2021 to Tom Henderson, Angela Gray explained why this was not feasible: *"My understanding is that Sadie has requested that responsibility for some service area tenders moves around. You advised that the proposal is for Building Service tenders to transfer to your team and that Corporate Services tenders*

5 *move to Meriel Maddison's Team. I believe Sadie also proposes that she would work on Building Services contracts, as she did whilst working in Meriel's Team. Unfortunately, for business reasons the proposal cannot be supported. The current organisational structure, which was implemented only very recently*

10 *after a great deal of consultation with CPU and Service areas, aligns tenders in such a manner to have consistent CPU customer service contacts with Service areas. Because Building services is just one area of HCBS, if Building Services were aligned to you, that would be an inefficient use of Procurement Business Partner (PBP) time as I would then need to allocate two PBPs to HCBS overall, rather than just one- as it is now. We have finite resource and cannot afford duplication. Also, although we are no longer operating a category management model, the current structure also means that those contracts that are similar in nature eg works/construction and trade are aligned to, and dealt with by, one PBP and the more services/health and social care/economic*

15 *development related aspects of our tendering are also aligned to, and dealt with one PBP. Under the model proposed by Sadie, this overview and the synergy of this grouping would be lost. In addition, as Meriel remains responsible for both Building Services and those contracts of a similar nature, Sadie would still require to work with Meriel on a day to day basis, which Sadie*

20 *has advised that she is unable to do, hence the move to your team." (232-233)*

26. In evidence, Angela Gray summarised (with reference to this letter) why the claimant's proposal was not feasible. She stated that, in essence, there were 3 reasons why this suggestion would not work. Firstly, the present structure had come about through the restructuring process which in turn had involved

25 considerable consultation with the relevant unions. She explained that to disrupt the agreed structure without further consultation with the unions would be extremely difficult, if not impossible. Secondly, the structure proposed by the claimant would involve customers dealing with two business partners which would be confusing and could have a considerable impact on delivery. Thirdly,

30 and importantly, the claimant had stated that she could no longer work with Meriel Maddison. The suggestion made by the claimant would involve her working again with Meriel Maddison who would remain in charge of Building Services Contracts.

27. The Tribunal accepted this evidence which was clearly and articulately expressed.
28. For his part, Tom Henderson stated that he would have supported the claimant's proposal simply as a means to get her back to work. However, he stated in evidence that he understood the difficulties articulated by Angela Gray in implementing this proposal and, further, stated that the claimant's proposal would impose a considerable burden on his colleague Meriel Maddison. Tom Henderson confirmed that the claimant's proposal would involve her working again with Meriel Maddison.
29. The Tribunal accepted the evidence of the claimant that from January 2021 she wished and felt able to return to work.
30. There was a further Occupational Health Report issued by Lorraine Danaher, Occupational Health Adviser, on the 29 March 2021 **(284-285)**. It was noted that: *"The employee is keen to return to work but the proposed role in Social Policy is continuing the impasse The employee advised she has put forward an alternative proposal for a return to work. The employee advised that it was viewed as a viable proposal but was declined by senior management."* It was confirmed that the reference to the *'alternative proposal'* was the suggestion by the claimant that she take her work on Building Services from Meriel Maddison's Team to Tom Henderson's Team.
31. It was put to the claimant in cross examination that the final paragraph of the OH Report of the 29 March 2023 was inserted in the Report at her request and the words there stated were the claimant's words. The claimant said that she was responsible for some, but not all of the wording in the final paragraph of this Report. After consideration of the wording of the final paragraph in contrast to the wording of the OH report as a whole, the Tribunal disbelieved the evidence of the claimant and concluded that the final paragraph were her words, inserted at her request.
32. In May 2021 Tom Henderson went off work with stress. Angela Gray then commenced line managing the claimant.

33. There was a Stage 2 absence review meeting between the claimant, Jane Ridgway the claimant's union representative, Angela Gray and Brenda Kirby of HR on the 19 May 2021 **(302-306)**. A summary of that meeting by Angela Gray and of the options for the claimant to return to work are to be found at 5 **307-308**. The summary commenced with the statement: *7 am pleased to note at the meeting that you are keen to return to work and I very much welcome a positive approach to making that possible.*" The options for the claimant to return to work were summarised as being threefold: firstly, to return to work within Meriel Maddison's Team and to consider mediation with Meriel; secondly 10 to work on an assigned portfolio within Tom Henderson's Team, and thirdly to implement the claimant's proposal to move her Building Services work to Tom Henderson's team. A detailed explanation was provided as to why the 3rd proposal was not feasible.
34. Insofar as the second proposal was concerned, Angela Gray stated: "As noted 15 *in the description, Tom covers 4 service areas, I/we have been unable to discuss your potential portfolio with you due to your absence. However, Tom has indicated to you that he would carefully consider the allocation of the portfolio to be as considerate as possible to support your perceived barriers.*"
35. The third and final Occupational Health Report on the claimant was issued on 20 the 7 June 2021. **(315-316)**. This report was compiled by Monika Dobrowolska, Occupational Physician. The report suggested a phased return to work. The report went on to state that: "As you know, there has been a relationship issue with her previous line manager, and she is afraid that working with this particular person will cause further deterioration in her mental health. I 25 understand that some resolution, like for example mediation has been already discussed, however in my medical opinion in the longer perspective the best option would be to permanently relocate her to a different manager." In evidence, it was established that the reference to the claimant's 'previous line manager' was a reference to Meriel Maddison.
- 30 36. The report went on to state: "*The best option here, from a medical perspective, seems to be returning to the contract on which she used to work before, and not to the Social Policy contract....Working with a Social Policy contract is likely to trigger her mental health problem further.*"

37. On receipt of this report Angela Gray faced a dilemma. As she said in evidence, she was *“caught between a rock and a hard place.”* On the one hand, the medical advice was clear that the claimant should permanently be relocated to a manager other than Meriel Maddison. There were only two teams in procurement - therefore the only option was for the claimant to remain within Tom Henderson’s team. Further, by the time of the report, Meriel Maddison had intimated that she was not prepared to engage in mediation with the claimant with a view to the claimant returning to her team. For her part, the claimant had expressed willingness to engage in mediation despite the terms of the OH reports. However, the OH report also stated that working with Social Policy contracts was likely to exacerbate the claimant’s mental health further.
38. Angela Gray’s evidence was accepted by the Tribunal that had it not been for the terms of Dr Dobrowolska’s report then she would have given further consideration to relocating the claimant back to Meriel Maddison’s Team to undertake work on Building Services.
39. Angela Gray reverted to Dr Dobrowolska to request clarification of her report. By email of the 18 June 2021 to the claimant **(322)** Angela Gray stated: *“As advised at the meeting on Tuesday, I have gone back to OH to raise some points of clarification on their report. I expect that, if OH amend the report, they will ask you to view it prior to finalising it.”* The points raised by Angela Gray are to be found at **320**. The points there raised included the issue that relocating the claimant from Meriel Maddison’s team would of necessity involve working with Tom Henderson’s team which dealt with Social Policy. Further the OH report contained errors- for example, the bulk of the claimant’s absence was due to ‘Anxiety’ not ‘Stress’ as recorded in the OH report, and a reference was made in the Report to ‘Wellbeing Services’, which was a term which Angela Gray was unfamiliar with.
40. The Tribunal accepted the evidence of Angela Gray that in reverting to OH she was seeking clarification of the report, particularly with regard to the conflict in the recommendations there made. In her evidence Angela Gray was taken to an email sent by her to Julie Whitelaw on the 14 June 2021 in which she states: *7 have rejected the OH report for Sadie.”* **(319)**. The Tribunal accepted the evidence of Angela Gray that this statement represented poor use of language

on her part in that she had not 'rejected' the OH report- she simply needed Dr Dobrowolska to comment on the points raised by her before taking a final view on it.

41. The letter of 18 June 2021 from Angela Gray to the claimant **(322)** also stated:
5 *"We also discussed, at the meeting on Tuesday, that I would confirm the make up of Toms portfolio. Currently in the 2021/22 work plan there are 80 tenders in Toms areas. 43 of them are Social Policy, leaving 37 contracts in the other service areas. 16 of the 37 contracts would involve framework call offs leaving 21 contracts of varying complexity. All of the contracts have a range of values up to around £2m."*
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42. By email of 30 June 2023 the claimant wrote to Angela Gray and stated: *"I understand that the contracts you are proposing are low value/low risk and will exclude all Social Policy (SP) contracts. As well as forwarding my contract portfolio, it would be appreciated if you could please advise how you intend managing SP enquiries in Toms absence ie who will be the point of contact for all SP enquiries?... You and the council have been aware that I have wanted to return to work since January 2021. I have been consistently seeking a way for the council to support my return to the workplace... As my Service Manager you had a duty of care to facilitate this, however, you continued to insist that I must take on SP contracts even though you were informed by Tom and me before I went on sick leave that this would cause me additional stress and anxiety due to personal traumas... You considered another option in June and included mediation. I agreed to this option, even though the OH Doctor did not recommend this as I would be returning to Meriel as my Line Manager, which was the reason for my sick leave. ... I will be returning to work and will manage contracts normally managed at Procurement Officers Grade which is below my status and skills set, and this will no doubt have an adverse impact on my future job prospects and future development with West Lothian Council."* **(339)**
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43. Angela Gray wrote back to the claimant by email at 7.34 am on the 2 July 2023 **(342-343)**. The claimant's case is that this email was the 'Last Straw' resulting in her resignation. The letter commenced with the statement: *"I have held off my response until this morning in case the Occupational Health (OH) response arrived for our meeting that was due to take place today at 10am. However, at*
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this point in time, we have not received the OH report. As the meeting today would need to be informed by the OH report, I have cancelled the meeting and have sent a meeting request, for 23 July at 10.30am, in anticipation of the OH report being returned by that date.”

- 5 44. In response to questions from the Employment Judge the claimant stated that the email of the 2 July 2023 was the 'Last Straw' because in that email Angela Gray cancelled a meeting scheduled with the claimant for that day and, further, rescheduled that meeting for the 23 July 2023 at which point in time the claimant would be at a later stage in the respondents' absence management process. The claimant re-iterated this evidence in re-examination, stating that the 'Last Straw' consisted of the cancellation of the meeting of the 2 July coupled with the rescheduling of that meeting on the 23 July, which together formed 'barriers' for her return to work in terms of paragraph 29(1) of her amended ET1 **(109)**. The Tribunal accepted the claimant's evidence and concluded that this element alone of the email of the 2 July 2023 constituted the 'Last Straw' relied upon by the claimant.
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45. The Tribunal accepted the evidence of Angela Gray that she cancelled the meeting as she wished clarity on the points raised by her to Dr Dobrowolska, particularly with regard to the fact that returning to the contracts that the claimant wished to work on would mean working with the manager that Dr Dobrowolska said she should be permanently relocated from. The date of 23 July 2021 was selected for the reconvened meeting for the simple reason that by then Angela Gray would be back from holiday.
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46. The email of the 2 July 2021 enclosed a Work Plan for the claimant. It was accepted by the parties and by the Tribunal that this was the first time that a Work Plan detailing the work which the claimant would be undertaking on her return had been produced by the respondents. The Work Plan is to be found at 349-354. The Work Plan did not contain Social Policy contracts. In evidence Angela Gray could provide no explanation as to why no Work Plan had been produced for the claimant until the 2 July 2021 in circumstances where the claimant was seeking to return to work from January 2021. To this end it was noted by the Tribunal that in the period January to May 2021 the claimant was line managed not by Angela Gray but by Tom Henderson.
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47. In the email of the 2 July 2021 Angela Gray confirmed that she would be managing Tom Henderson's Team in his absence and that Social Policy contracts would be allocated to other Team Members. Angela Gray did, however, state that: *"In terms of other contracts, I am unable to guarantee that you will never be asked a question on any other contract, whether that is Social Policy or any other contract that Tom is responsible for, such as IT which you have also advised you are unable to work on. All I can do is to allocate a portfolio of contracts to you."* **(342-343)**.
48. The claimant's reaction to the 'Last Straw' email which, in her evidence, constituted 'barriers' to her return to work, was to respond by return and ask to return to work, requesting that a date be set for that return. In terms of an email of the 2 July 2021 sent at 09.02am the claimant stated: *"I am asking to return, and I am pleased to see that you have now provided a portfolio, which supports my swift return, I repeat my previous requests for my return date to be arranged before you go on holiday ie today's meeting or by email today?"* **(341-342)**. In that email the claimant confirmed her statement in her email of 30 June 2021 **(339)** that the reason she went on sick leave in October 2020 was because of Meriel Maddison's line management.
49. The claimant commenced back at work with the respondents on the 15 July 2023 after liaising with Julie Whitelaw in the absence of Angela Gray. She took accrued annual leave and returned to the workplace on the 23 July 2023. On the 26 July 2023 the claimant wrote to Angela Gray and stated that: *"I am pleased to return to work and look forward to supporting Tom as Senior Procurement Officer. May I take this opportunity to thank you once again for providing the assurance that Social Policy will not form part of my contract portfolio, and any Social Policy enquiries should be directed to you in Tom's absence. This assurance ensures my personal traumas are kept at bay, and I am returning to a safe working environment, keeping my personal traumas at bay."* **(363)**.
50. The claimant's evidence was that she commenced looking for alternative employment following Angela Gray's email of 2 July 2021 being the 'Last Straw.' The Tribunal did not find this evidence credible, given the content of her email to Angela Gray of 26 July 2021.

51. The claimant worked in Tom Henderson's team without complaint until she resigned by letter to Angela Gray dated the 18 August 2021. In her letter of resignation the claimant stated: "*As you are aware, your insistence that I must manage Social Policy contracts was instrumental to my long term sick leave, having maintained a perfect sickness absence record for nearly 14 years; these decisions have been detrimental to my health, mental well being and at a financial cost to West Lothian Council...*" In her letter of resignation the claimant also referred to the respondents' "*challenging Occupational Health Doctors recommendations.*" **(385)** The claimant left the employment of the respondents on the 15 September 2021 .
52. In evidence, the claimant stated that she had started looking for alternative employment following the 'Last Straw' and that she could not resign immediately as she has financial commitments. The Tribunal accepted the evidence of the claimant that she resigned on the 18 August 2021 as she obtained a job offer that day which she intended to accept. In evidence the claimant said that the job offer was from Ineos, was at a higher salary and involved a shorter commute when she had to go to the office. The Tribunal accepted the claimant's evidence, however, that she had to make additional pension contributions to match the respondents' pension scheme.
53. The claimant was asked why she did not raise a grievance in the period October 2020-August 2021. She was cross examined on why she did not raise a grievance in the period following her return to work in July 2021 and her resignation in August 2021. Her explanation for that was because she '*knew she was already going.*'
54. The Tribunal did not consider this evidence to be credible, in circumstances where the claimant was clearly aware of her rights and noted that throughout the relevant period the claimant had the assistance of Jane Ridgway, her union representative.
55. The Tribunal noted that the evidence of Angela Gray was that she was sorry to lose the claimant as she was a valued employee.

Observations on the Evidence

56. The principal witnesses in this case were the claimant and Angela Gray. The Tribunal considered the evidence of these witnesses to be worthy of comment.

The claimant

- 5 57. The claimant was considerably distressed during passages of her evidence. The Tribunal did not doubt the claimant's very real upset, but did, however, find key areas of her evidence to be contradictory and confusing. For example, the claimant was clear in her evidence that the email of the 2 July 2023 was the 'Last Straw' because in that email Angela Gray put up 'barriers' for the claimant's return to work by cancelling a meeting scheduled for that day and rescheduling it to 23 July 2023. No cogent evidence was provided, however, as to why, if that was the claimant's belief, her response to the email was to respond by return, asking to come back to work.
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- 15 58. Neither was explanation provided as to why the claimant emailed Angela Gray on the 26 July 2023 thanking her for providing assurances that Social Policy would not form part of her contract portfolio only for the claimant to resign on the 18 August 2021 citing Angela Gray's *"insistence that I must manage Social Policy contracts."*
- 20 59. There was no clear explanation given by the claimant as to why she did not raise a grievance in the period October 2020- August 2021. The claimant was clearly conversant with her rights and throughout the relevant period had the assistance of Jane Ridgway, her union representative.
- 25 60. The claimant was insistent that she could have returned to work had she been allowed to carry out procurement work on Building Services contracts within Tom Henderson's Team. The Tribunal found this evidence to be inconsistent with the claimant's acknowledgement both to Angela Gray on the 5 October 2020 and to Dr Dobrowolska that she could not work with Meriel Maddison.
- 30 61. There were further inconsistencies in the claimant's evidence in that in her evidence in chief she stated that in October 2020 she went on sick leave due to a build up of stress as *"she knew they wanted her to take on social policy."* Later in her evidence she clarified that the real reason that she went on sick

leave in October 2020 was because of the breakdown in her working relationship with Meriel Maddison which was confirmed by her in her email of the 30 June 2021 **(339)**.

5 62. The Tribunal noted that the evidence demonstrated that the claimant felt able to return to the workplace on receipt of a Work Plan which accompanied Angela Gray's email of the 2 July 2023. The Work Plan did not include Social Policy contracts. The Tribunal noted that it is not the claimant's case that the respondents were in breach of their obligations to the claimant by failing to intimate a Work Plan to her in advance of 2 July 2020. The Tribunal observed
10 this issue is not specified in the pleadings and Tom Henderson was not cross examined on the same. The evidence Angela Gray gave on the failure to produce a Work Plan was brief, and incidental to other matters she was being cross examined on.

Angela Gray

15 63. Angela Gray is at present on sick leave from her role with the respondents due to stress. In advance of the Hearing on the Merits the respondents made an application to have Angela Gray's evidence heard by video link due to her health. In the event, Angela Gray attended the Tribunal and gave evidence on the 16 and 17 May 2023. Notwithstanding the fact that she was clearly very
20 anxious, the Tribunal considered that Angela Gray gave her evidence in a measured, logical and consistent manner, withstanding a lengthy cross examination.

25 64. Angela Gray presented as an individual who did not want to lose a valued employee such as the claimant but who was presented with limited options given that the claimant could not work with Meriel Maddison or Anita Bainbridge and could not work in Social Policy. The Tribunal accepted that the email of 2 July 2021 was designed not to put barriers in the way of the claimant's return to work but to facilitate that return- and as such, was successful.

Tom Henderson

30 65. Tom Henderson came across as an honest and measured individual.

66. He was clearly supportive of the claimant but equally understood and supported the respondents' position at each step of the process.

Julie Whitelaw

5 67. The relevance of Julie Whitelaw's evidence was limited in scope at the Hearing on the Merits. Nevertheless, it is worthy of note that she presented as a truthful and credible witness.

The Law

10 68. S95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

15 69. The leading case in this area remains **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA**. There, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

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70. In order to claim constructive dismissal therefore the employee must establish that there was a fundamental breach of contract on the part of the employer; the employer's breach caused the employee to resign; and the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

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71. In **Weathersfield Ltd t/a Van and Truck Rentals v Sargent 1999 ICR 425, CA** the Court of Appeal held that it is for the Tribunal in each case to determine as a matter of fact whether the employee resigned in response to the employer's breach rather than for some other reason. In the leading judgment Pill LJ stated: *'Industrial tribunals will, on the other hand, be astute to discover*

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the true reason for the employee leaving and reject those claims in which alleged conduct by the employer is no more than a pretext or cover for leaving on other grounds.'

72. In their decision making process, the Tribunal had regard to the case of
5 **Novakovic v Tesco Stores Ltd (2016) 3 WLUK28** on the issue of affirmation.
At paragraph 13 of the judgment the Honourable Mr Justice Supperstone
stated: *"The legal principles to be applied are not in dispute. W E Cox Toner
(International) Ltd v Crook (1981) IRLR 443 remains the leading case in the
10 doctrine of affirmation as it applies where an employer is in fundamental breach
of an employee's contract, Mr Justice Browne- Wilkinson in his judgement said
so far as it is material:"*¹³ *if the innocent party himself does acts which are only
consistent with the continued existence of the contract, such acts will normally
show affirmation of the contract. However, if the innocent party further performs
15 the contract to a limited extent but at the same time makes it clear that he is
reserving his rights to accept the repudiation or is only continuing so as to allow
the guilty part to remedy the breach, such further performance does not
prejudice his right subsequently to accept the repudiation."*

Submissions for the claimant

**The undernoted submissions are a summary of the claimant's full
20 submissions, prepared by her solicitor.**

Summary of written submission

The claimant submits that the respondent breached the implied term of trust and confidence; that she resigned in response to that breach; and that she did not waive the fundamental breach and affirm the contract.

25 The claimant's position is that on 05 October 2020, Angela Gray moved the claimant into Tom Henderson's team (which would have required the claimant to work on social policy contracts) in the mistaken belief that the only reason the claimant had not previously undertaken this work was due to "personal preference".

30 However, from 12 October 2020 (at the latest) Angela Gray became aware that undertaking social policy work created real challenges for the claimant and likely

would be injurious to her health, due to the claimant's personal history and personality type.

Angela Gray accepted in evidence that the respondent owed a duty of care to the claimant and an obligation to provide the claimant with a safe place of work; that she
5 always had these obligations in mind when making decisions in relation to the claimant; that an employer should not allocate work to an employee that they know *might* cause the employee harm; and that if the claimant had undertaken work on social policy contracts the claimant *would* have suffered injury to her health.

Despite these admissions, Angela Gray continued to *insist* in the period from 12
10 October 2021 to 02 July 2022 that the claimant should undertake work on the social policy contracts, notwithstanding the claimant's protestations, OH advice, the pleas made by the claimant's trade union representatives and the feedback of Tom Henderson, all to the effect that the claimant could not undertake this type of work, and that it would be injurious to her health to do so.

15 The claimant's position is that Angela Gray could and should have found an alternative and not insisted that the claimant undertake work on the social policy contracts; she could, for example, moved the claimant back into Meriel Maddison's team or allocated a portfolio to the claimant (which did not include social policy work) on a temporary basis until a longer-term solution could be found. Angela Gray could
20 at the very least have assuaged the claimant's concerns.

Instead of finding a rapid solution, Angela Gray, by her actions, effectively prevented the claimant from returning to work (which she wanted to do from January 2021) and allowed the claimant to *languish* at home during which time she became ill.

The treatment of the claimant in the period from 05 October 2020 to 02 July 2021
25 was so bad and the conduct of Angela Gray so egregious that there can be no doubt that there was a repudiatory breach of the implied term of trust and confidence.

By 30 June 2021 the claimant's patience was at an end and she placed the respondent on notice that she was "considering taking legal advice."

The claimant regarded the Gray Email as the 'last straw' and on receipt of this email
30 *immediately* decided that she would have to resign.

The Gray Email considered objectively was more than “entirely innocuous”. Given that after almost 9 months, Angela Gray was still saying, *inter alia*, that “before agreeing a return-to-work date there will need to be agreement on your areas of work and responsibilities” the claimant was quite right to say that in the
5 circumstances the parties were no further forward and that the Gray Email was of itself a repudiatory breach of contract.

The claimant did not affirm the contract. On receipt of the Gray Email she looked for another job and resigned once she received final confirmation of the job offer. The job offer was the *proximate* cause of the claimant’s resignation, but not the *effective*
10 cause of the termination -per **Meikle**. Having regard to the guidance in **Buckland** and **Chindove** the claimant did not affirm the contract.

Submissions for the respondents

The undernoted submissions are a summary of the respondents’ full submissions, prepared by their solicitor.

15 In respect of the claim of constructive dismissal under section 95(1)(c) of the Employment Rights Act 1996, the Respondent’s submission is as follows:

The Respondent did not commit a breach of any express or implied term of the Claimant’s contract of employment, repudiatory or otherwise. The “course of conduct” upon which the Claimant relies for the purposes of her claim was
20 reasonable in the circumstances and did not amount to a material breach of the Claimant’s trust and confidence.

If/where there is a discrepancy between the evidence of Angela Gray and any other witness, including the Claimant, the evidence of Angela Gray is to be preferred.

The Claimant’s evidence with regard to the last straw event changed significantly
25 and is therefore unreliable.

The last straw identified in the Claimant’s written pleadings (the “Gray Email”) was wholly innocuous (*Omilaju* considered).

If the tribunal is not with the Respondent on that and finds that the actions of the Respondent leading up to and including the Gray Email amounted to a repudiatory
30 breach of contract, the Claimant did not resign on 18th August 2021 in response to

that breach. The effective cause of the Claimant's resignation was her securing of a new job (*Meikle* considered).

Further, and in the alternative, the Claimant did not accept any (alleged) repudiation of her contract on 2nd July 2021. Her actions demonstrated plainly that she waived
5 the (alleged) breach and treated the contract as continuing. Specifically, the Claimant repeatedly expressed a verbal and written preference to return to work immediately after receipt of the Gray Email; she ultimately did return to work on 22nd July 2021; and she raised no complaint or grievance with the Respondent throughout that time.

10 Further, and in the alternative, the Claimant delayed too long in resigning following the alleged last straw event (*Buckland* considered). This, coupled with her actions in the intervening period as per paragraph 5 above, demonstrate plainly her affirmation of her employment contract.

Respectfully, it is our submission that the claim for constructive dismissal should be
15 dismissed.

Discussion and Decision

73. The Tribunal reminded themselves that in cases of unfair constructive dismissal the onus lies on a claimant to prove his or her case.

74. The Tribunal turned to the issues as agreed by the parties, starting with the
20 factual issues.

1 Did the following alleged acts or omissions take place:

(a) Did the Respondent in the period from October 2020 to June 2021 fail to agree that the Claimant should not work on Social Policy contracts;
(b) Did the Respondent insist in the period from October 2020 to June
25 **2021 that the claimant would have to work on Social Policy contracts;**

75. The Tribunal considered it apt to determine the first two factual issues together.

76. Firstly, the Tribunal noted that the evidence of the claimant was that she was in a position to return to the workplace in January 2021.

77. In order to determine these issues the Tribunal noted the terms of the email sent by Tom Henderson to Jane Ridgway and Brenda Kirby on the 29 January 2021. That email stated: " *Where practically possible, allocate a workplan that is sensitive to Sadie's known issues within the scope of my Workplan allocation whilst understanding that within my small team it may not always be practical to accommodate entirely; Support Sadie to work through her known issues to provide assurance that she would only be working on the procurement aspects of any tender in her portfolio and would not be expected to deal directly with delivery of any of the projects.*" **(230)**.
78. As of January 2021 (being the date the claimant was able to return to the workplace), therefore, the respondents were providing assurances to the claimant's Union representative that a Work Plan would be allocated to the claimant that was sensitive to her issues and that in any event, should the claimant have to deal with a Social Policy contract she would not have contact with the service users.
79. The Tribunal considered it critical in determination of this issue that the first time a Work Plan was produced to the claimant was on the 2 July 2023, accompanying Angela Gray's email of that date. This was the first time that the respondents had advised the claimant of exactly what work she was expected to undertake within Tom Henderson's Team. The Work Plan produced did not include a reference to Social Policy contracts. On receipt of the Work Plan the claimant requested to return to work.
80. Following receipt of the Work Plan and the claimant's consequent return to work on the 23 July 2021 the claimant wrote to Angela Gray by email on the 26 July 2021 and stated: "*May I take this opportunity to thank you once again for providing the assurance that Social Policy will not form part of my contract portfolio, and any Social Policy enquiries should be directed to you in Tom's absence. This assurance ensures my personal traumas are kept at bay, and I am returning to a safe working environment, keeping my personal traumas at bay.*" **(363)**
81. After consideration of all the evidence, therefore, the answer to these questions is that the respondents did not fail to agree that the claimant should not work

on Social Policy contracts in the period October 2020 to June 2021 nor did they insist that she would have to work on Social Policy contracts.

82. In reaching this conclusion the Tribunal noted again that any failure on the part of the respondents to produce a Work Plan in the period January to July 2021 does not form part of the claimant's case.

(c) Did the Respondent fail to heed and act upon the advice of Occupational Health as set out in their reports dated 24 December 2021, 29 March 2021 and 07 June 2021 to the effect that from a medical perspective the Claimant should not work on Social Policy contracts and that from a medical perspective the best option was for the Claimant to return to the contract on which she used to work ie the Building Services contracts;

83. The medical advice given to the respondents was unequivocal in stating that the claimant could not work with Meriel Maddison. The OH report of the 7 June 2021 stated: *"As you know there has been a relationship issue with her previous line manager and she is afraid that working with this particular person will cause further deterioration in her mental health. ...in my medical opinion in the longer perspective the best option would be to permanently relocate her to a different manager."* **(315-316)**

84. The evidence of Angela Gray and Tom Henderson was clear that were the claimant to work on Building Services contracts then she would have to work with Meriel Maddison, even if she remained located in Tom Henderson's Team. The evidence of Angela Gray was that if the OH reports had not been so clear then she would have considered relocating the claimant back to Meriel Maddison to work on Building Services contracts.

85. As referred to in answer to questions 1 (a) and (b), the Tribunal did not find that the respondents insisted that the claimant should undertake work on Social Policy contracts following her move to Tom Henderson's Team. They could not rule out altogether the possibility for example of the claimant being asked a question about a Social Policy contract while working in the Team responsible for such contracts. This did not amount to a "role in Social Policy".

86. In all the circumstances the Tribunal concluded that the respondents did not fail to heed and act upon the advice of Occupational Health Reports. In particular they took account of the clear advice given that the claimant could not from a medical perspective work with Meriel Maddison. Angela Gray sought clarification from OH on their advice. She did not fail to heed it.

(d) Did the Respondent fail in the period from January 2021 to June 2021 to enable the claimant to return to work by removing the requirement for the claimant to work on Social Policy Contracts;

(e) Did Angela Gray fail to heed and act upon the content of the numerous emails sent by the Claimant to her to the effect that the Claimant could not undertake Social Policy work and that it would be injurious to her health if required to undertake such work

87. The Tribunal considered it appropriate to consider these two issues together. In deliberating these issues the Tribunal noted that there is considerable overlap with issues 1(a) and 1(b).

88. The Tribunal noted that no specification is given by the parties as to how Angela Gray failed to 'heed and act' upon the content of the emails provided to her by the claimant, aside from taking the actions already taken by herself and Tom Henderson. This lack of specification rendered it impossible for the Tribunal to fully determine this issue.

89. The Tribunal noted that assurances were given to the claimant's union representative Jane Ridgway in terms of the email of the 29 January 2021 **(230)**. That email was clear in its terms in stating that, where practically possible, a Workplan would be issued to the claimant that was sensitive to her issues. The email went on to provide assurances that in any event the claimant would only be required to work on the procurement aspect of any contract and would not be expected to interact with Service Users.

90. The evidence demonstrated that the respondents did not produce a Work Plan for the claimant in the period January to July 2021. On receipt of the Work Plan the claimant returned to work and thanked the respondents for providing the assurances that she needed **(363)**. However, the respondents' failure to

provide a Work Plan in the period January to July 2021 does not form part of the claimant's case.

91. In all the circumstances the Tribunal concluded that the respondents did not fail in the period January 2021 to June 2021 to enable the claimant to return to work by removing the requirement for the claimant to work on Social Policy Contracts, nor did Angela Gray fail to act upon the content of the emails sent by the claimant to her.

(f) Did the Respondent refuse to agree the claimant's proposal (which was agreed by Mr Henderson) that she should continue to work on Building Services contracts (which was also the recommendation of Dr Dobrowolska)?

92. The Tribunal noted that there is considerable overlap between this issue and issue (c).

93. The evidence of Angela Gray and Tom Henderson was that the claimant would have to work with Meriel Maddison on Building Services contracts if the same were allocated to her. While Tom Henderson supported the claimant's proposal, he acknowledged the difficulties that this would present in particular for the claimant given that it would involve her having to work again with Meriel Maddison.

94. The terms of Dr Dobrowolska's report were unequivocal in stating that the claimant should be '*permanently relocated*' to another manager **(315-316)**.

95. The evidence of Angela Gray was that had the report of Dr Dobrowolska not been unequivocal in its terms then she would have considered re allocating the claimant to work on Building Services contracts with Meriel Maddison.

96. The respondents did not agree to the claimant's proposal but in doing so were acting in compliance with OH advice. The Tribunal concluded that as such this does not amount to a breach, let alone a material breach of their contract of employment with the claimant.

2 Did the email sent by Angela Gray to the claimant on the 2 July 2021 at 07.34am ("the Gray email") place barriers in the way of her return to work?

97. In evidence, the claimant's case was clearly articulated in that she stated that the reason why the Gray email was the 'Last Straw' was the cancellation of the meeting between herself and Angela Gray that day and the rescheduling of that meeting on the 23 July 2023 **(342-343)**. The claimant stated that these actions placed further barriers to her return to work.

98. In answering the question posed in this issue in the negative, the Tribunal noted that it was not disputed that the claimant's response to the Gray email was to email Angela Gray by return and ask to return to work **(342)**. The Tribunal concluded that these were not the actions of an employee for whom barriers were being placed to prevent their return to work. The claimant returned to work on 15 July 2021.

3 In the Gray email, did Angela Gray not provide the claimant with an unequivocal commitment that she would not have to undertake Social Policy work?

4 In the Gray email, did Angela Gray insist that the claimant's request was challenging to manage?

99. The Tribunal considered these issues to be no longer live in this case. The claimant's case was clearly articulated in that the reason the Gray email was the 'Last Straw' was that the cancellation of the meeting between herself and Angela Gray that day and the rescheduling of that meeting placed further barriers to her return to work.

5 In the Gray email did Angela Gray challenge the opinion of Occupational Health and/or not accept their findings?

100. The Tribunal heard no evidence on the content of the Gray email to the effect that it challenged the opinion of Occupational Health. Indeed the Gray email only made reference to OH at the outset of the report when Angela Gray stated that: *"As the meeting today would need to be informed by the OH report, I have cancelled the meeting and have sent a meeting request, for 23 July at 10.30am in anticipation of the OH report being returned by that date."* **(342-343)**

101. For these reasons, the Tribunal concluded that Angela Gray did not challenge the opinion of Occupational Health or refuse to accept their findings in her email of the 2 July 2023.

6 Did any of the alleged actions by the Respondent at 1(a)-(f) above, if proven, taken separately or cumulatively and in conjunction with the Gray email amount to a breach of any express or implied term of the claimant's employment contract?

7 If yes to question 6, did this amount to a material breach?

102. As the Tribunal has concluded that none of the alleged actions by the respondents in 1(a) to (f) are proven, it follows that question 6 must be answered in the negative and that question 7 becomes redundant.

8 What was the reason for the claimant's resignation on 18 August 2021?

103. The Tribunal commenced their deliberations on this issue by reminding themselves that the onus lies upon the claimant to establish that she resigned in response to a fundamental breach or breaches of contract on the part of the respondents.

104. It is the determination of the Tribunal that the claimant has not discharged this onus and established that she resigned in response to a fundamental breach or breaches of contract on the part of the respondents. To this end, the Tribunal disbelieved the claimant's evidence that she resigned in response to the Gray email of the 2 July 2021, being the 'Last Straw.'

105. In reaching this conclusion the Tribunal had regard to the fact that following her return to work on the 23 July 2023 the claimant emailed Angela Gray on the 26 July 2021 and stated: "*May I take the opportunity to thank you once again for providing the assurance that Social Policy will not form part of my contract portfolio...This assurance ensures my personal traumas are kept at bay, and I am returning to a safe working environment; keeping my personal traumas at bay.*" (363) No evidence was provided to the Tribunal that might lead them to conclude that the claimant was coerced into sending this email,

or that it was anything other than a true expression of how the claimant felt on returning to the workplace.

106. The Tribunal found it therefore impossible to conclude that in the light of the wording in the email of 26 July 2021 **(363)** the claimant resigned for the reasons stated in her letter of resignation of the 18 August 2021- in other words that she resigned as a result of the respondents' *'insistence that I must manage Social Policy contracts'* and the respondents' *'challenging Occupational Health Doctors recommendations'* **(385)**. The Tribunal found it a relevant factor that the claimant did not raise a grievance on her return to work despite continuing to have access to support from Jane Ridgway, her union representative.

9 If the reason for the claimant's resignation was a material breach by the respondents did the claimant waive the breach through her conduct by returning to work in the interim and/or did she delay too long in resigning in response so as to affirm the contract?

107. The decision of the Tribunal is that the reason for the claimant's resignation was not a material breach of contract on the part of the respondents. Accordingly, this question must be answered in the negative.

108. For the sake of completeness, it is the decision of the Tribunal that in any event the claimant affirmed her contract of employment by the cumulatively returning to work; sending the email of 26 July 2023 **(363)**; and continuing to work until her resignation without protest or grievance. In reaching this decision the Tribunal had regard to the decision in Novakovic.

109. The parties also agreed legal issues to be determined by the Tribunal. These are:

Legal Issues

1 Did the claimant resign in circumstances in which she was entitled to treat herself as having been constructively dismissed? (s95(1) (c) Employment Rights Act 1996 ("ERA") and per Western Excavating Ltd v Sharp (1978) IRLR 27)

2 Was there a fundamental breach of the claimant's employment contract by the respondents and if so, did the claimant resign in response to that breach?

3 Did the claimant waive any fundamental breach of contract and affirm the contract?

5 110. The Tribunal noted that there was considerable overlap between the legal and factual issues. The Tribunal concluded that, in view of their answers to the factual issues agreed between the parties the answer to these questions must be negative.

10 111. In all the circumstances of the case and having had regard to the material evidence, the Tribunal was not persuaded that the claimant had established conduct on the part of the respondent that either separately or cumulatively amounted to the breach of an express or implied term of the claimant's contract of employment. In the absence of specific reference to any express term having been breached, the Tribunal considered whether the respondent's conduct
15 amounted to a breach of the implied term of trust and confidence. The Tribunal was not persuaded that this was the case.

112. The Tribunal did not find that the respondent, without reasonable and proper cause, had conducted itself in a manner calculated and likely to destroy or seriously damage its relationship of trust and confidence with the claimant. In
20 terms of the alleged conduct by the respondents, the Tribunal did not find that the respondents had insisted that the claimant work on Social Policy contracts, The respondents had been unable to rule out altogether the possibility of the claimant having to have some interaction with Social Policy contracts given her transfer to the Team responsible for this work but it was to be indirect, limited
25 and avoided if possible. The Tribunal found that the respondents had taken into account the difficulties that such work would cause the claimant and their response in the context of transferring the claimant to another Team where she would work on contracts allocated to that Team was reasonable and not repudiatory.

30 113. The Tribunal was satisfied that the respondents had regard to the advice provided by OH in relation to the claimant. As referred to above, they responded to the claimant's circumstances by seeking to accommodate her

difficulties in working with other employees while at the same time being unable to undertake certain areas of work. The Tribunal did not find that the respondents had unreasonably refused to agree to the claimant's proposal that she should be permitted to continue working on Building Services contracts after her transfer to another Team. The claimant was employed in procurement. There was no evidence to support any assertion that she was contractually entitled to undertake only procurement for Building Services contracts. Her move to another Team, necessitated by the breakdown in relations with another employee, made it not practicably possible for her to continue working on Building Services contracts in part as this was not the responsibility of the Team to which she had been transferred.

114. The Tribunal considered whether the "Gray e mail" either separately or cumulatively amounted to a breach of the implied term of trust and confidence. The Tribunal did not find this to be the case. The e mail was relied on by the claimant as the "last straw" in a series of acts by the respondents. For the reasons given above, the Tribunal was not persuaded that the conduct of the respondents before Angela Gray's e mail to the claimant on 2 July 2021 either separately or cumulatively amounted to a breach of the implied term of trust and confidence. Similarly, the Tribunal did not find that the e mail on its own was of itself a repudiatory breach of contract. As referred to above, the basis on which the claimant complained about the e mail was as stated in her evidence - the cancellation of the meeting scheduled for later that day with Angela Gray and its delay to later that month. In all the circumstances, which included Angela Gray seeking clarification from OH before holding the meeting and the e mail enclosing a proposed workplan for the claimant, the Tribunal was unable to conclude that when viewed objectively the e mail amounted to a breach of trust and confidence.

115. For the reasons given above in response to the factual issues, the Tribunal was not persuaded that the claimant resigned in circumstances in which she was entitled to conclude that she had been constructively dismissed. The Tribunal did not find in all the circumstances of the case that the respondents' conduct either viewed separately or cumulatively including the e mail from Angela Gray amounted to a fundamental breach of contract.

116. If the Tribunal is wrong about the above and the respondents' conduct did amount to a fundamental breach of contract entitling the claimant to resign and claim constructive dismissal, as referred to above, the Tribunal found that the claimant had affirmed the contract and therefore lost the right to claim
5 constructive dismissal.

117. The Tribunal was not persuaded from all the evidence that having returned to work on 15 July 2021 the claimant was performing her work under protest either in response to earlier breaches or a continuing breach. The terms of the claimant's mail to the respondents of 23 July 2021 were inconsistent with her
10 returning to work and continuing to work under protest.

118. It is for all these reasons that the claimant's claim of unfair constructive dismissal is dismissed.

15

Employment Judge: J Porter
Date of Judgment: 19 July 2023
Entered in register: 19 July 2023
20 **and copied to parties**

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Appendix 1**Joint List of Legal and
Factual Issues****CONSTRUCTIVE UNFAIR DISMISSAL**5 **Legal Issues**

1. Did the Claimant resign in circumstances in which she was entitled to treat herself as having been constructively dismissed? (s.95(1)(c) Employment Rights Act 1996("ERA") and per Western Excavating v Sharp [1978] IRLR 27)

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2. Was there a fundamental breach of the Claimant's employment contract by the Respondent and if so, did the Claimant resign in response to that breach?

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3. Did the Claimant waive any fundamental breach of contract and affirm the contract?

20 **Factual Issues**

In order to determine the legal issues outlined above, the tribunal will need to consider, without limitation, the following:

1. Did the following alleged acts or omissions take place:

25

- a. Did the Respondent in the period from October 2020 to June 2021 fail to agree that the Claimant should not work on Social Policy contracts;

- b. Did the Respondent insist in the period from October 2020 to June 2021 that the Claimant would have to work on Social Policy contracts;
- 5 c. Did the Respondent fail to heed and act upon the advice of Occupational Health as set out in their reports dated 24 December 2020, 29 March 2021 and 07 June 2021 to the effect that from a medical perspective the Claimant should not work on Social Policy contracts and that from a medical perspective the best option was for the Claimant to return to the contract on which she used to work ie the Building Services contracts;
- 10 d. Did the Respondent fail in the period from January 2021 to June 2021 to enable the Claimant to return to work by removing the requirement for the Claimant to work on Social Policy contracts;
- 15 e. Did Angela Gray fail to heed and act upon the content of the numerous emails sent by the Claimant to her to the effect that the Claimant could not undertake Social Policy work and that it would be injurious to her health if required to undertake such work; and/or
- 20 f. Did the Respondent refuse to agree the Claimant's proposal (which was agreed by Mr. Henderson) that she should continue to work on Building Services contracts (which was also the recommendation of Dr Dobrowolska)?
- 25
2. Did the email sent by Angela Gray to the Claimant on 2nd July 2021 at 07.34am ("the Gray Email"), place barriers in the way of her return to work?
- 30
3. In the Gray Email, did Angela Gray not provide the Claimant with an unequivocal commitment that she would not have to undertake Social Policy work?

4. In the Gray Email, did Angela Gray insist that the Claimant's request was challenging to manage?
5. In the Gray Email, did Angela Gray challenge the opinion of Occupational Health and/or not accept their findings?
5
6. Did any of the alleged actions by the Respondent at 1(a) - (f) above, if proven, taken separately or cumulatively and in conjunction with the Gray Email, amount to a breach of any express or implied term of the Claimant's employment contract?
10
7. If yes to question 6, did this amount to a material breach?
8. What was the reason for the Claimant's resignation on 18th August 2021?
15
9. If the reason for the Claimant's resignation was a material breach by the Respondent, did the Claimant waive the breach through her conduct by returning to work in the interim and/or did she delay too long in resigning in response so as to affirm the contract?
20

Appendix 2**Joint List of Facts**

1. The Claimant was employed by the Respondent continuously from 14th April 2003 until 15th September 2021.
5
2. At the point her employment terminated, the Claimant was employed as a Senior Procurement Officer.
3. The Respondent underwent a restructure of its procurement department in
10 July 2020.
4. The Claimant worked under the supervision of Meriel Maddison from January 2020.
- 15 5. Tom Henderson's team covered the following aspects of procurement work: Education, Corporate Services, Planning and Economic Development and Social Policy.
6. The Claimant went off sick on 23rd October 2020 and remained off sick until
20 15th July 2021 when she signed back into work using up accrued leave as requested by Julie Whitelaw, until her return on a phased basis 22nd July AM.
7. In the period from 12th October 2020 until 2nd July 2021, the Claimant and
25 Angela Gray exchanged a number of emails in which the Claimant explained that she considered she was unable to undertake work on social policy contracts and Angela Gray responded to those emails. The relevant emails are at Joint Bundle pages:
 - a. 194-195;
 - 30 b. 290-294;
 - c. 298;

- d. 322-325;
- e. 329-338; and
- f. 339-344.

- 5 8. The Respondent consulted Occupational Health (OH) three times during the Claimant's absence. This included an assessment with Dr. Monika Dobrowolska.
- io 9. Angela Gray emailed the Claimant on 2nd July 2021 confirming, amongst other things, that she could not absolutely guarantee that the Claimant would never be asked a question in relation to social policy contracts.
10. The Claimant resigned with notice on 18th August 2021.
- 15 11. The Claimant partially worked her notice period with the Respondent's agreement and her employment terminated on 15th September 2021.