



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001190/2024

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Held in Edinburgh on 4-5 December 2024

Employment Judge Sangster

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Ms Y Dunbar

**Claimant
In Person**

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Driver & Vehicle Standards Agency

**Respondent
Represented by
Ms Thompson-Robertson
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

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- The claimant's complaint of unfair dismissal succeeds. The respondent is ordered to pay the claimant the sum of **£12,194.30** by way of compensation.
- The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to this award.

REASONS

Introduction

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1. The claimant presented a complaint of constructive unfair dismissal.
2. The respondent resisted the claim.
3. The parties lodged a joint bundle of productions in advance of the final hearing, extending to 268 pages.
4. The claimant gave evidence on her own behalf at the final hearing.

5. The respondent led evidence from the following individuals, each of which is employed by the respondent:
- a. Sadie Williams (**SW**), Talent Specialist;
 - b. Paula Pitcher (**PP**), Director of People; and
 - 5 c. Stephen Jordan (**SJ**), Head of the Office of the Traffic Commissioner.

Issues to be determined

6. The only issues before the Tribunal were whether the claimant was constructively and unfairly dismissed by the respondent and, if so, what remedy should be awarded.

10 Findings in fact

7. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues to be determined. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.
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8. The respondent is a government body, which has around 4,500 employees. It carries out driving tests, approves people to be driving and MOT testers, carries out tests to make sure lorries and buses are safe to drive, carries out roadside checks on drivers and vehicles and monitors vehicle recalls.
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9. The Office of the Traffic Commissioner (**OTC**) is an arm's length body and independent regulator for the Department for Transport (**DfT**), sitting under the Driver and Vehicle Standards Agency. The OTC are responsible for the licensing and regulation of those who operate heavy goods vehicles, buses and coaches, and the registration of local bus services.
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10. The claimant was employed by the respondent as Personal Secretary to the Traffic Commissioner, working within the OTC in Edinburgh. Her employment commenced on 26 February 2007. Her role was almost exclusively desk based and involved providing secretarial and administrative support to the Traffic Commissioner in Edinburgh. This included duties such as audio typing, greeting visitors, answering telephone calls, drafting emails, collating papers, filing and diary management. Her job title and duties did not change during her employment. Her role was an Administrative Officer (**AO**) grade. She worked 37 hours per week, over 5 days (Monday to Friday). Following an occupational health assessment in 2019, adjustments were made as a result of the claimant's medical conditions, and she thereafter worked from home three days per week. Her medical conditions restrict her ability to drive long distances, travel alone on public transport and lift/carry heavy objects. The claimant enjoyed her role and planned to remain working for the respondent until she turned 66, in June 2026.
11. Personal Secretaries who were subsequently employed by the respondent also undertook casework. Their formal job titles were Personal Secretary/Caseworker, and their job descriptions reflected the additional duties they undertook in relation to casework, such as clerking public enquiries, conducting research, drafting submissions and warning letters, compiling section 9 or section 43 statements, adhering to statutory guidance and directions of the Senior Traffic Commissioner and ensuring compliance with the relevant Operating Instructions. The claimant however remained as a Personal Secretary and she did not, at any stage, undertake additional duties as a Caseworker.
12. In 2021, the respondent commenced a restructuring exercise, impacting all staff employed within the OTC (approximately 135 employees). The claimant's role as Personal Secretary, and that of 7 Personal Secretary/Caseworkers, was to be removed from the structure. Instead, there would be 4 Personal Assistants, of a higher grade (Executive Officer/EO), who would each support two Traffic Commissioners, in two different locations, as well as a number of Casework Officers/Hearing Centre Support Officers.

13. The claimant was invited to apply for the Personal Assistant role. She attended an interview on 7 November 2023. She experienced some issues hearing the audio required for the practical exercise. While the scoring for the practical exercise was subsequently adjusted, as a result of the issues the claimant experienced, those issues caused her to become anxious, and she did not perform well in the remainder of the interview. She was not successful in her application for the Personal Assistant role and was informed of this on 13 November 2023.
14. The claimant understood that there would only be two other roles available at her grade in Edinburgh in the new structure, namely Hearing Centre Support Officer and Casework Officer. She had worked for the respondent, as a Personal Secretary, for 16½ years. She did not feel that she had the skills or ability to undertake those roles, or that she would be able to do so given her medical conditions: the Hearing Centre Support Officer role would require her to attend the office every working day, as hearings were held 3 days per week and preparations for hearings would require to be done, in the hearing centre, on the other days; and the Casework Officer role would require travel to hearing centres throughout Scotland, carrying recording equipment and large files.
15. On 16 November 2023, the claimant wrote to SJ expressing disappointment that she had been unsuccessful in her application for the Personal Assistant role and stating *'the alternative AO roles that will be available are not suitable alternative roles. They differ significantly from my current role and skills and I don't think it is reasonable or appropriate for me to enter into a retraining program. As a result, I believe my role has been made redundant and would like to consult with you about what this means in terms of a redundancy package.'* SJ responded stating that he was almost certain redundancy would not be offered. The claimant raised, on 22 November 2023, that she had adjustments in place due to her medical issues and, as a result, only attended the office two days per week. She highlighted that this may impact any future role assigned to her. She was informed by SJ, on 30 November 2023, that everyone would be briefed on the outcome of the job matching process shortly

and speculation on the impact on her role was premature, so would not be discussed at that stage.

- 5 16. On 12 December 2023, the claimant sent a letter to PP. She stated that she was doing so as she felt the concerns she had raised and not been addressed in full. She set out that she had concerns in relation to the interview process for the role of Personal Assistant. She also stated that she felt her role as Personal Secretary was redundant, as it no longer existed, and that none of the other roles in the new structure would be a match to her secretarial skill set, as they involved case work, were entirely different from her role and would require significant retraining.
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17. On 15 December 2023, the claimant received formal notification that she had been matched to the roles of Compliance Casework Officer and Hearing Centre Support Officer (the **Matched Roles**). She was informed that she required to indicate which role she would prefer to undertake by 10 January 2024. There was no suggestion that adjustments would be made to the roles, as a result of the claimant's medical conditions, or that this had been considered.
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- 20 18. The matching process had been undertaken by SW. She had considered whether the role of Personal Secretary/Caseworker was a match for the roles of Compliance Casework Officer and Hearing Centre Support Officer in the new structure, based on the job descriptions she had been provided for the roles. Where the roles had a 'strong resemblance' - determined by assessing whether they were two thirds or more the same, they were considered a match. The job description for the Personal Secretary/Caseworker did not however reflect the role that the claimant undertook, as she was a Personal Secretary, not a Personal Secretary/Caseworker. It included duties related to the role of a Caseworker, such as clerking public enquiries, conducting research, drafting submissions and warning letters, compiling section 9 or section 43 statements, and adhering to statutory guidance and directions of the Senior Traffic Commissioner and ensuring compliance with Operating Instructions. The claimant did not undertake those duties, and had never done
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so. No matching exercise was undertaken to consider whether the claimant's role, of Personal Secretary, was a match for the Compliance Casework Officer and Hearing Centre Support Officer roles. Had that been done, it would have been determined that the claimant's role was not a match with the role of Compliance Casework Officer or the role of Hearing Centre Support Officer. The Matched Roles did not have a 'strong resemblance' to the claimant's role. They were not two thirds or more the same as the claimant's role.

19. PP responded to the claimant's letter of 12 December 2023, by email dated 18 December 2023. She stated that she was confident the correct approach had been followed, and that the claimant had been supported by her managers through the process. She indicated that, if the claimant was not redeployed into an AO role in the OTC, she would be placed on the DfT redeployment register, to consider whether she could be matched to suitable alternative job roles across DfT. PP stated that there were no plans to make anyone redundant.

20. On 21 December 2023, the claimant sent a further letter to PP. She quoted section 139 of the Employment Rights Act 1996, stating that she believed there was a redundancy situation as the respondent's requirement for employees to carry out work of a particular kind (i.e. Personal Secretary) in the place where the claimant was employed (Edinburgh) had ceased or diminished, or would do so. She stated:

As previously advised I was not employed as a personal secretary/caseworker, but a stand alone personal secretary thus making my circumstances different from anyone else within the Office of the Traffic Commissioner. I do not think they would have considered my unique position when working towards achieving the TOM. Mr Jordan advised me that he was unaware that there was still a Personal Secretary within the OTC. Redeployment is not a suitable alternative. Having looked over the AO job descriptions that have been circulated, they do not match my skill set and therefore should not be considered applicable to myself. I have a number of ongoing health issues which would not allow me to carry out that type of work

to its full potential. I had a DVSA health assessment completed a few years ago which suggested that I would benefit from working a few days at home. This was put in place pre COVID and DVSA/my HEO allowed me to work three days at home.'

- 5 21. PP responded on 2 January 2024. She stated the claimant could not be made redundant where suitable alternative posts existed, and that the respondent would work with the claimant to seek to match her to roles across DfT (including in OTC and DVSA), which were of the same grade, could be carried out from her current location and would make use of her skills. She suggested
- 10 that the claimant's manager should consider obtaining an updated occupational health report. She did not investigate or respond to the particular issues posed in the claimant's email, for example re the suitability of the posts she had been matched to, or the claimant's assertion that she was a Personal Secretary, not a Personal Secretary/Caseworker.
- 15 22. On 8 January 2024, the claimant confirmed that she would not be selecting either of the Matched Roles, as she did not consider them to be matches to her role, and would be unable to undertake them given the adjustments she required to accommodate her medical conditions.
- 20 23. The implications of her indicating, on 8 January 2024, that she would not be selecting either of the Matched Roles were not discussed with her at any stage and claimant was not placed on a redeployment register, as PP had stated in her emails of 18 December 2023 and 2 January 2024. The claimant understood that her role would cease to exist when the incumbent Traffic Commissioner in Edinburgh left her role in March 2024. She did not feel she
- 25 would be able to undertake either of the Matched Roles, even with extensive training (she had been informed by SJ that this would take at least a year), given her medical conditions. In those circumstances, the claimant felt that she had no alternative but to look for an alternative role.
- 30 24. On/around 30 January 2024, the claimant indicated to her line managers that she had received a conditional offer of part time employment in the NHS. She stated that she understood the standard checks would take some time to

complete and, if the role was confirmed, she anticipated that she would resign at the start of March 2024, with 4 weeks' notice. The claimant still hoped the respondent would take some action to redeem the situation, as continuing to work full time for the respondent for a further two years, until her intended retirement, was preferable to taking up part time employment with the NHS.

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25. The claimant attended for a further occupational health assessment on 5 February 2024, and a report was provided to the respondent that day. She hoped the respondent would take some action on receipt of that. The respondent however took no steps to discuss that report with the claimant, to consider whether, given her medical conditions, the claimant could undertake the Matched Roles, or to discuss that with her. The respondent did not place the claimant on the redeployment register. The respondent did not consider what would happen if the claimant's conditional offer of employment was not confirmed. They wanted her to resign, having concluded, without discussion with the claimant, that her leaving at the end of March 2024, at the same time as the incumbent Traffic Commissioner, was a *'suitable end'* to the claimant's employment with the respondent and a *'nice way to finish'* for the claimant.

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26. On 4 March 2024, the claimant resigned, giving 4 weeks' notice. She felt she had no alternative but to do so, as the Matched Roles were not suitable alternative employment for her, and no adjustments or alternatives had been proposed or discussed with her. On the day she resigned, the claimant also sought an actuarially reduced early retirement pension. She did so as she had only been able to secure a part time role with the NHS and needed to make up her wages, to meet her financial commitments.

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27. The claimant's employment terminated on 29 March 2024. Her salary at the time her employment terminated was £23,844. She had 17 years' service at that point, and was 63 years old. She commenced her new role in the NHS on 2 April 2024, working 17.5 hours per week. Her pro-rated salary in her new role is £11,469.02.

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Observations on evidence

28. The respondent's position was that the claimant's role changed from 'Personal Secretary' to 'Personal Secretary/Caseworker' in 2018. The Tribunal did not accept that this was the case. In reaching that conclusion, the Tribunal relied upon the following:
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- a. The fact that no evidence was presented which showed that the claimant was ever informed by the respondent of any change to her job title or duties, or provided with an updated job description. For the avoidance of doubt, the Tribunal did not accept that a change made, in 2018, on one line at the bottom of the claimant's payslips, from '*AO Traffic Commissioner P*' to '*AO Personal Secretary/Cas*' demonstrated that there had been a formal change to claimant's job title or duties: it simply demonstrated a change in the way the respondent chose to categorise the claimant's role, as did similar changes on the respondent's internal HR system.
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- b. The claimant's unchallenged evidence that her duties did not change. Her duties were those of a personal secretary from the commencement of her employment onwards, and she did not, at any stage, undertake case work.
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- c. The terms of the Occupational Health Reports dated July and August 2019, both of which refer to the claimant as a 'Personal Secretary', a job title which was presumably supplied by the respondent in their referral forms, and which there was no evidence of the respondent disputing.
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29. JS accepted that he became responsible for line management of the claimant, and discussions regarding the matching process, occupational health and redeployment, from 16 January 2024 onwards, when her line manager commenced a period of long-term sickness absence. He accepted that he took no action whatsoever to discuss these matters with the claimant, despite assuming that role. Rather than viewing her statement that she may resign as an opportunity to resolve matters and retain a long serving employee, he
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appeared to seize upon the claimant's potential resignation as a neat solution to a problematic issue, concluding that the claimant leaving at the end of March 2024, at the same time as the incumbent Traffic Commissioner, would be a *'suitable end'* to the claimant's employment with the respondent and a *'nice way to finish'* for the claimant. He did not consider what would happen if the claimant's conditional offer of employment was not confirmed, if any steps could be taken to retain the claimant who was a long-serving employee, or why the claimant was considering leaving the respondent's employment – did she wish to do so or did she simply feel she had no other option.

10 Submissions

30. The claimant, in summary, submitted that:

- a. The interview process for the Personal Assistant role was flawed, but she accepted the outcome and sought to move on.
- b. The matching exercise did not take into account that she was a Personal Secretary, not a Personal Secretary/Caseworker, and she did not undertake any casework.
- c. The respondent took no steps to place her on the redeployment register.
- d. She was left with no alternative but to look for alternative employment, given that the Matched Roles were not suitable alternative employment for her and no other alternatives were considered or proposed.

31. Ms Thompson-Robertson, for the respondent, provided a summary of the evidence, relevant legislative provisions and case law and, in summary, submitted that:

- a. The respondent's witnesses were credible and reliable, and their evidence should be preferred to that of the claimant.
- b. No repudiatory breach of contract has been identified.
- c. The claimant resigned to take up a role in the NHS, not in response to any breach of contract on the part of the respondent.

- d. Alternatively, if there was a breach, and the claimant resigned in response to this, she delayed to long, prior to doing so.
- e. The claimant has not taken appropriate steps to mitigate any loss. There were alternative roles available which were offered to her.

5 Relevant Law

Constructive dismissal

32. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of section 94 of the Employment Rights Act 1996 (**ERA**). 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).
33. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd*** [1998] AC 20).
34. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).
35. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy

(although it will usually be so), but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

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36. In order for there to be a constructive dismissal, there must be a breach by the employer of an essential term, such as the trust and confidence obligation, and the employee must resign in response to that breach (although that need not be the sole reason - see **Nottinghamshire County Council v Meikle** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.
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37. The Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust** [2018] IRLR 833 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:
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- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - b. Has he or she affirmed the contract since that act?
 - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - d. If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence?
 - e. Did the employee resign in response (or partly in response) to that breach?
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38. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

Discussion & Decision

39. In considering the claimant's claim of constructive dismissal, the Tribunal considered the tests set out in *Kaur v Leeds Teaching Hospital NHS Trust*. The Tribunal's conclusions in relation to each element are set out below.
40. **What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?** The Tribunal noted that the most recent act on the part of the respondent, which the claimant relied upon as causing or triggering her resignation, was the respondent's failure to take any action, following receipt of the occupational health report on 5 February 2024, such as considering adjustments to the roles or placing her on the redeployment register.
41. **Has he or she affirmed the contract since that act?** The Tribunal noted that the claimant resigned on 4 March 2024. The Tribunal found that the claimant had not affirmed the contract since the most recent act on the part of the respondent, which the claimant stated caused, or triggered, her resignation. Her conduct did not demonstrate an intention to continue in employment, rather than resign. She had clearly expressed her view that the Matched Roles were not suitable for her. She had raised concerns with the respondent and asked them

to look at alternatives. She was waiting to see if the respondent's position would change, following the occupational health assessment on 5 February 2024. When it became clear that the respondent did not intend to take any action, or offer any alternatives, she took the decision to resign.

5 42. **If not, was that act (or omission) by itself a repudiatory breach of contract?**

The Tribunal concluded that that act, by itself, did not constitute a repudiatory breach of contract.

10 43. **If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?**

The Tribunal noted that the Court of Appeal in *Omilaju* stated that the act or omission relied upon need not be unreasonable or blameworthy, but it must, in some way, contribute to the breach of the implied obligation of trust and confidence. An entirely innocuous act on the part of the employer cannot
15 be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence. The test of whether the employee's trust and confidence has been undermined is objective.

20 44. The Tribunal concluded that the last act relied upon was not an innocuous act and could, in principle, amount to a final straw. That act did not 'land in an empty scale', it had to be considered in light of the other, previous, conduct relied upon. The Tribunal concluded that, when considered with the respondent's other actions, namely:

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- a. Failing to carry out a matching process in relation to the claimant's role;
 - b. Erroneously informing her that the 'Matched Roles' were a match for her position;
 - c. Failing to appropriately address her concerns in relation to the matching process and Matched Roles; and
 - d. Failing to offer any alternatives, or place the claimant on the redeployment register,

the respondent's actions were part of a course of conduct comprising several acts and omissions which, viewed cumulatively, did amount to a breach of the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties. A breach of the implied term of trust and confidence, is generally, by its nature, a repudiatory breach (5 *Morrow v Safeway Stores plc* 2002 IRLR 9, EAT). In this case, the Tribunal also concluded that the respondent had, through SJ's actions, demonstrated an intention not to be bound by the contract, in a manner that meant that it no longer wished to continue with the employment relationship. The Tribunal (10 accordingly concluded that the respondent's conduct in this case amounted to a repudiatory breach of contract.

45. **Did the employee resign in response (or partly in response) to that breach?** The Tribunal concluded that the claimant did resign in response to the breach. Whilst the respondent asserted that the claimant had resigned because (15 she had been offered another role, the Tribunal concluded that the claimant would not have looked for alternative employment had it not been for the respondent's actions and would not have resigned (even with the offer of alternative employment being confirmed) had the respondent taken action (20 following receipt of the occupational health report. The breach of contract was accordingly the effective cause of her resignation

46. Given these findings the Tribunal concluded that the claimant was constructively dismissed by the respondent. The Tribunal found that this was an unfair dismissal. The Tribunal did not accept that the claimant was fairly dismissed by (25 reason of redundancy, or as a result of 'some other substantial reason', as asserted by the respondent. For the reasons set out above, the Tribunal did not accept that a fair process had been followed regarding matching, proper consideration of the claimant's concerns, or consideration of alternatives through redeployment.

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Remedy*Basic Award*

47. Given the claimant's age at the date her employment terminated (63 years old), length of service (17 years) and gross weekly salary (£458.60) the claimant's
5 basic award is **£11,694.30**.

Compensatory Award

48. The claimant commenced alternative employment, in the NHS, on 2 March 2024, immediately following the termination of her employment with the respondent. This is a part time role, and her earnings are less in this role
10 than those with the respondent. She is now also in receipt of pension benefits. Since securing the NHS role, the claimant has not taken any further steps to secure full time employment, or to secure an additional role/hours to cover the ongoing difference between her previous and current salary. In
15 these circumstances the Tribunal concluded that it was not just and equitable to make any award in relation to loss of earnings and to make a compensatory award of **£500** for loss of statutory rights only.

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Employment Judge: M Sangster
Date of Judgment: 17 December 2024

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Date sent to parties**Date**17/12/2024