THE INDUSTRIAL TRIBUNALS

CASE REF: 22980/19IT

CLAIMANT: **Maeve Hendry**

RESPONDENT: **1. Board of Governors, Thornfield House School**
2. Education Authority

JUDGMENT

The unanimous judgment of the tribunal is as follows:-

1. The claimant was not constructively dismissed by the respondent and the claimant's claim of constructive unfair dismissal is therefore dismissed in its entirety.

2. The respondent did not breach the claimant's contract of employment as alleged and the claimant's claim for breach of contract is therefore dismissed.

3. The respondent did not provide the claimant with a written statement of particulars of employment as required by article 33 of the Employment Rights (Northern Ireland) Order 1996 and the claimant's complaint in this respect is therefore well founded. The Tribunal is unable to make any monetary award in respect of this complaint.

Constitution of Tribunal:

Employment Judge: **Employment Judge Turkington**

Members: **Mr I Rosbotham**
Ms G Clarke

Appearances:

The claimant appeared and represented herself.

The respondent appeared and was represented by Mr M Corkey, Barrister-at-Law, instructed by Ms S O'Boyle of the Education Authority Solicitors.

The Claims

1. The claimant's claims were:-

    a) A claim of constructive unfair dismissal.

b) A claim of breach of contract.

c) A claim of failure to provide a written statement of employment particulars pursuant to article 33 of the Employment Rights (Northern Ireland) Order 1996 ("ERO")

The Issues

2. Having clarified the remaining claims and outstanding issues at the outset of the hearing, it was clear that the issues for the tribunal to determine were as follows:-

Legal Issues

(a) Was the Claimant constructively unfairly dismissed contrary to article 126 of the ERO? Was the Claimant, in the circumstances, entitled to terminate her employment without notice by reason of the employer's conduct (article 127 of the ERO)? (In the course of the hearing, it became clear that the claimant was relying on the same alleged breaches of contract as set out under b) below).

(b) Was the Claimant's contract of employment breached in respect of the following alleged repudiatory breaches (The Tribunal has re-ordered these alleged breaches into chronological order):-

A. Claimant decided not to apply for a post in September 2018 when she perceived that it would be given to a friend of the Principal's daughter.

B. Claimant was required in January 2019 to provide reports for a class she had only covered for a short time.

C. Unpaid hours for work done over and above what was expected of a NISTR substitute teacher.

D. Alleged failure to implement promised changes to the Claimant's workload.

E. Creating an unsafe working environment for the Claimant through poor risk management and supervision.

F. Being asked to complete a "care plan" for a pupil.

G. Unable to locate the Principal during school hours

H. Alleged unfair recruitment for the one day per week permanent post

I. Alleged failure to honour an oral agreement that the Claimant would secure the one day per week permanent post

J. Failure to appoint the Claimant's teaching assistant following a selection process in June 2019

(c) Was the Claimant provided with a written statement of employment particulars pursuant to article 33 of the ERO?

Factual Issues

The following factual issues were ventilated during the hearing and required determination by the Tribunal. (Not all of the factual issues outlined in the Agreed Statement of Legal and Factual Issues arose on the evidence presented at the hearing).

(a) Did the Claimant resign from her employment? If so, on what date?

(b) Did the Claimant resign in response to the Respondent's alleged breach(es) of the Claimant's contract of employment as outlined above?

(c) Did the Claimant work outside of timetabled hours to meet the requirements of the job?

(d) Did Mr Burns ask the Claimant to write a "care plan" for a pupil? Did the Claimant advise Mr Burns that she was uncomfortable completing a "care plan"? Did Mr Burns insist on the "care plan" being completed in any event?

(e) Did Mr Burns promise the Claimant a permanent one day per week post in exchange for her agreeing to undertake a 5 day per week maternity cover role? If so, on what date did this occur? Did any such alleged promise constitute a contractual term of the Claimant's employment?

(f) Was the recruitment process for the one day per week post carried out fairly?

The contentions of the parties

3. In his closing submissions, the respondent's counsel contended that, to succeed in a claim of constructive dismissal, the Claimant must show that the employer has committed a repudiatory breach of contract. He referred the Tribunal to a number of legal authorities and argued that the relevant breach must be a significant breach going to the root of the contract. Counsel also outlined the various elements which must be satisfied, namely that there must have been a breach of contract by the employer, the breach must be of sufficient importance to justify the employee resigning or must be the last in a series of such breaches, the employee must leave in response to the breach(es) and the employee must not delay too long.

4. In summing up the evidence in the case, counsel suggested that the claimant's principal issue was with the recruitment process for the one day per week post. The claimant had repeatedly conceded that there was no evidence that the recruitment process was manipulated and, in fact, the claimant had done well in the interview process, being marked equal to the successful candidate by two out of three members of the panel. In relation to the allegation that the claimant had been promised this job, counsel argued

that the claimant had clearly been aware that the post would have to be advertised and that, in the event of there being a stronger candidate, she would not be appointed. In relation to the claimant's other alleged breaches of contract, counsel contended that these matters fell squarely within the scope of the claimant's contractual duties as set out in the Jordanstown Agreement. As regards the claim for failure to provide written particulars of employment, counsel submitted that this claim should fail as the Jordanstown Agreement itself constituted the written particulars.

5. In her submissions to the Tribunal, the claimant referred to her complaint in respect of failure to provide written particulars of contract, contending that she had not been provided with any such particulars. She contended that she had been constructively dismissed due to an unfair recruitment process which was the "last straw" in a series of breaches of contract with the accumulation of all these breaches being the reason why she had pursued her claims to the Tribunal. The claimant contended that she was unable to return to the school after June 2019 because she had been treated in an unfair manner, she was ill and this was documented in her medical records. The claimant submitted that she was fully justified in leaving her employment. She outlined various ways in which she considered the Principal had been involved in the recruitment process and contended that she had been promised the job.

6. In relation to the various pupil reports she had prepared, the claimant accepted that writing of reports was required under the Jordanstown Agreement, but her contention was that what was required of her was in excess of what was expected of any teacher, let alone a NISTR teacher. In relation to the writing of the 'care plan' for a female child, the claimant contended that it was the understanding that teachers did not write care plans. As regards the Looked After Child in class 3, the claimant contended that the circumstances were exceptional and additional support was required over and above that which she had received. This led to what the claimant regarded as a lack of support and an unsafe work environment. She had lost all trust and confidence in the School Principal.

Sources of Evidence

7. Witness statements were submitted by the claimant on her own behalf and by Mr Colm Burns, Mr Tom Stewart, Mrs Maureen Morrow and Mrs Laura Finnegan on behalf of the respondent. All these witnesses attended at the hearing and were cross examined by the opposite party, save for Mr Stewart.

8. At the outset of the hearing, the respondent's counsel indicated that Mr Tom Stewart was ill and would be unable to attend the hearing. Counsel made an application for Mr Stewart's witness statement to be admitted in evidence without the need for formal proof. The claimant objected to this application. The Tribunal carefully considered the contentions of both parties on this point. Since another member of the recruitment panel, namely Mrs Morrow, was available for cross examination, the Tribunal permitted the witness statement of Mr Stewart to be admitted, provided that the written statement was signed by him. The Tribunal was duly furnished with a signed copy of this statement during the course of the hearing. However, since Mr Stewart was not available to be cross examined by the claimant, the Tribunal attached less weight to the evidence contained in his witness statement than was attached

to the evidence given by those witnesses who were cross examined at the hearing.

Findings of Fact

9. Having considered the evidence of the witnesses and the content of relevant documents referred to along with the submissions of both parties, the tribunal found the following relevant facts:-

(1) The Claimant is a qualified teacher and at all relevant times was registered on the Northern Ireland Substitute Teachers Register ("NISTR"). Thornfield House School ("the School") is a controlled school with a partially delegated budget which provides education for children of both primary and secondary school age who have speech and language difficulties including Developmental Language Disorder. Pupils receive speech therapy from Speech and Language therapists based at the School. It is the only such specialist school in Northern Ireland and has a regional catchment area. Teachers in special schools, including Thornfield, receive a higher rate of pay to reflect the more challenging nature of the work in these schools.

(2) The Claimant began working at the School in October 2015 and continued in various roles at the School until 28 June 2019. During this period, the Claimant had no absence due to illness. The Claimant was initially engaged by Mr Colm Burns, the School Principal. Temporary or emergency cover in the School is normally arranged by Mr Burns, whereas permanent appointments are made by the Board of Governors. The Claimant was not provided with a formal induction pack, although all teachers in the School are provided with an information pack in relation to child protection.

(3) The Terms and Conditions of Employment of all teachers in Northern Ireland are found in the Teachers Pay and Conditions of Service issued by Department of Education Circular 1987/26 (known as the Jordanstown Agreement). The Jordanstown Agreement contains a number of provisions which are relevant to the issues in this case. These provisions appear under the headings of "*Pay and Conditions of Service for Teachers in Northern Ireland"* and then "*A. Permanent and Temporary Teachers ……."*

Para 13

(i) (c) Assessing, recording and reporting on the development, progress and attainment of pupils.

(ii) (c) Making records or and reports on the personal and social needs of pupils except in instances where to do so might be regarded as compromising a teacher's own position.

(d) Communicating and consulting with the parents of pupils

(e) Communicating and co-operating with persons or bodies outside the school as may be approved by the school authorities

(f) Participating in meeting arranged for any of the purposes described above

(iii) Providing or contributing to oral and written assessments, reports and references relating to individual pupils and groups of pupils subject to the provisions of paragraph 13 (ii) (c)

(4) Through NISTR, the Claimant also worked from time to time in other schools such as Longstone Special School in Dundonald and Rathcoole Primary School. The Claimant was asked to return to work in each school that she worked in.

(5) From 21 October 2015, the Claimant worked in the School on a total of sixty days either as one off days or on consecutive days to cover for illness or teacher absence for other reasons.

(6) From 7 April 2016 to 30 June 2016, the Claimant covered an absence due to long term illness five days per week.

(7) From 5 September 2016 to February 2019 the Claimant worked one day per week on a Monday in the post primary part of the School, a continuous period of two and a half years. The requirement for cover one day per week resulted from the class teacher reducing her working days to four days per week.

(8) From 1 March 2017 to January 2018, the Claimant worked two days per week as an Advisory Teacher with the Outreach Team and then continued in this role one and a half days per week until June 2018, a continuous period of one year and four months.

(9) From November 2018 to December 2018, the Claimant worked three days per week teaching class 3-4 until a permanent teacher was recruited.

(10) The Claimant also covered three maternity leaves as follows:-

a) August 2016 to February 2017 two and a half days per week in class 1-2.

b) January to June 2018 two and a half days per week in class 1-2.

c) February 2019 to 28 June 2019 five days per week in class 3.

(11) The Claimant was engaged for each of the roles outlined above by Mr Burns. On each occasion, the role was offered by Mr Burns and accepted by the Claimant verbally. No one else was present during any of these discussions and (with one exception) none of these engagements were confirmed in writing. The only exception was one period from March to June 2017 in respect of the Outreach role when Mr Burns asked the Claimant to complete a Notification of Appointment of Teacher Form (TR23). The Claimant was never given written details of any Grievance Policy available to her.

(12) On 2 June 2016, Mr Burns asked the Claimant to organise the parent/teacher/speech therapist reviews for the class the Claimant was covering. He also asked the Claimant to review the Individual Education Plans for the children and to write the end of year reports which were due on 20 June. It is a statutory requirement for a school to provide end of year reports to parents. Over the next few weeks, the Claimant worked during lunch and break times and after school to complete 11 reports. The Claimant had been covering this class since 7th April 2016 and the Claimant accepted under cross examination that she was best placed to prepare these reports. The Claimant did not raise any complaint, whether formal or informal, at the time in relation to the preparation of these reports.

(13) At the end of June 2018, one of the teachers at the School resigned. In September 2018, the Claimant considered applying for this permanent post, but decided not to as she reached the view that the post was "earmarked" for someone else whom the Claimant understood to be a friend of the Principal's daughter.

(14) During November and December 2018, the Claimant had worked for 19 days in Class 3-4. She was asked by Mr Burns to write reports for 3 pupils for the Education Authority ("EA") so they could assess if these pupils were correctly placed at the School. The Claimant prepared these reports outside of school hours during December 2018 and January 2019. The Claimant did not raise any complaint at the time, whether formal or informal, regarding these reports.

(15) Prior to the School being inspected in February 2019, Mr Burns told the Claimant to become the School's World Around Us ("WAU") co-ordinator meaning that she had to write the School's documentation for WAU prior to the inspection. The Claimant was working 5 days per week in the School at that time. The Claimant duly wrote the required documentation and it was delivered by 11 February 2019 in time for the inspection. The Claimant did not raise any complaint at the time, whether formal or informal, regarding this work.

(16) The Claimant began her role in providing maternity cover for the Class 3 teacher in February 2019. There was a male child in this class who was a Looked After Child ("LAC"). He had very challenging behavioural difficulties which caused particular challenges for the Claimant as the class teacher. This child took up a lot of the Claimant's time and his behaviour led to disruption for the rest of the pupils in the class.

(17) After only a few working in Class 3, the Claimant was asked by Mr Burns to attend a meeting with an Education Psychologist from the EA Dr Hill. Advice was provided during this meeting in respect of strategies to manage this boy's behaviour which the Claimant and the teaching assistant were able to implement following the meeting.

(18) The following day 6 February 2019, there were incidents involving this child and a safeguarding meeting was held. Mr Burns invited the Claimant to join this meeting after it was commenced. The possibility of

one to one support for this child was discussed during the meeting. However, one to one support was not implemented before the end of the summer term. Such support is not a matter for the School alone, but has to be approved by the EA following detailed assessment.

(19) On 15 March 2019, this child's Speech and Language Therapist decided to withdraw from working with him due to his behaviour. The Claimant wrote to the School's Child Protection lead on 3 May 2019 and a further safeguarding meeting was held in School on 10 May.

(20) On 21 May 2019, a LAC review meeting was held at the Moyle Hospital. The Claimant attended this meeting along with a Speech Therapist and Child Protection lead. Mr Burns did not attend this meeting. The Claimant prepared a note for the purpose of this meeting which she wanted Mr Burns to approve. Whilst the Claimant could not initially locate Mr Burns, he did review and approve the document just in time for the Claimant and the other staff to leave for the meeting.

(21) The Claimant was taking Kalms over the counter medication at this time, although Mr Burns was not aware of this at the time.

(22) On 5 June 2019, the child had a crisis and the Claimant wished to have assistance from Mr Burns, but had difficulty in locating him.

(23) During the Claimant's time teaching class 3, Mr Burns attended the classroom from time to time to assist the Claimant in relation to the Looked After Child. It had also been arranged that the Looked After Child was removed from the class for half an hour each day to relieve the pressure on the Claimant as class teacher.

(24) In Class 3, there was a female child who had a physical disability which made her vulnerable to injury within the School environment. The girl's mother had been seeking for some time to have a "Care Plan" developed for her child. The Tribunal considers it unfortunate that this document was labelled as a "care plan". Essentially, it was a safety plan or risk assessment to ensure that the child was kept as safe as possible in school. Mr Burns asked the Claimant to prepare the Plan which was to be reviewed by the child's orthopaedic consultant. The Claimant was not happy to write this Plan as she considered the preparation of a Care Plan to be the role of health professionals, but she reluctantly agreed to do so. The substantive Plan prepared by the Claimant was eventually approved and signed off by the child's consultant with only one minor correction from a medical perspective.

<u>The one day per week permanent post</u>

(25) The one day per week (Monday) post in post primary which the Claimant covered from September 2016 to February 2019 was first advertised in the summer term of 2016. Sixteen candidates were interviewed but no one was appointed to the role. Mr Burns then asked the Claimant if she would cover this one day per week role for the following academic year which the Claimant agreed to do.

(26) In December 2018, Mr Burns asked the Claimant to cover the maternity leave of the class 3 teacher on a full time basis starting in February 2019. The Claimant declined this offer giving a number of reasons, including her wish to continue with the one day per week role.

(27) On 9 January 2019, a requisition in respect of the one day per week post was sent by the School to the Education Authority. This was essentially a request for the post to be advertised and the School asked for this to be done as soon as possible. It appears that this request was not processed promptly by the EA.

(28) Shortly afterwards, Mr Burns once again asked the Claimant to cover class 3 full time during the teacher's maternity leave. There was a dispute between the parties on the evidence as to what exactly Mr Burns said about the one day per week job, which the Claimant was reluctant to leave. The Claimant's evidence was that Mr Burns said words to the effect of "that is your job, you will get that job", in other words, it was a promise. Mr Burns evidence was that he simply told the Claimant he expected very few applicants for the job and she would have a strong chance of getting it. The Tribunal considers it inherently unlikely that Mr Burns, understanding that the permanent one day per week post would have to be publicly advertised, would have promised the Claimant or indeed anyone that such a job would was theirs. Further, Mr Burns' evidence on this point has been consistent, including the Claimant's account of his reply to her challenge on this point when Mr Burns was informing the Claimant of the outcome of the interviews. On balance, therefore, the Tribunal prefers Mr Burns version of events. The Tribunal therefore finds as a fact that Mr Burns said to the Claimant words to the effect that she was a strong candidate and had a good chance of getting the job.

(29) The Claimant accepted under cross examination that she was aware that, since this was a permanent post, it would have to be publicly advertised. She also accepted that, if a stronger candidate came along, she would not be appointed to the post.

(30) In February 2019, the Claimant left the one day per week post and began teaching Class 3 on a full time basis. There was another conversation between Mr Burns and the Claimant about the one day per week job around this time. Mr Burns told the Claimant that the job would be advertised in March and she should "*Keep a look out for it*", which she did. However, the job was not advertised at that time.

(31) On 15 February 2019, the School Secretary sent an email to the EA enquiring about the requisition for the one day per week post.

(32) The one day per week post was initially covered by Ms Murphy who was also working in another role at the School. In April 2019, Ms Murphy left to take up a role at another school.

(33) From 13 May 2019, Mrs Laura Finnegan began to cover the one day per week role. Mrs Laura Finnegan is a niece by marriage of Mr Burns and also a first cousin of Mr Burns' daughter who was a member of the

Senior Management Team at the School. At the beginning of her evidence to the Tribunal, Mrs Finnegan indicated that she wished to clarify one matter relating to the evidence in her witness statement. The Tribunal permitted Mrs Finnegan to provide this supplemental evidence. Mrs Finnegan clarified that there had in fact been a conversation between herself and Mr Burns around the end of April 2019 in relation to this post. The Tribunal accepted the veracity of Mrs Finnegan's account of this conversation. Mr Burns asked Mrs Finnegan to cover the one day per week post for May and June. Mrs Finnegan agreed because it suited her at the time. During the conversation, Mrs Finnegan asked Mr Burns what was happening with this job, would it be advertised? Mr Burns replied that it would and Mrs Finnegan had said that she would think about applying for it. Mr Burns had then said that Mrs Finnegan was fully entitled to apply for the job. The Tribunal generally found Mrs Finnegan to be a straightforward witness and it accepts her evidence that this was the extent of the conversation between her and Mr Burns about the one day per week post.

(34) On 14 May 2019, there was a meeting of the Board of Governors of the School. The one day per week post was among the items discussed by the Governors. The minutes which were approved and signed by the Chairman on 22 May noted that before the Governors drew up the requisition for this post, Mr Burns withdrew from the meeting having declared that there was the possibility of a relative applying for this post. The minutes then record that after Mr Burns left the room, the Governors agreed the criteria for the post and completed the requisition for the recruitment.

(35) The one day per week job was not advertised by the EA during March, April or May. The requisition was re-submitted by the School on two further occasions before the post was finally advertised on or about 11th June 2019. On that day, the Claimant received text messages from colleagues alerting her to the fact that a one day per week post had been advertised. The Claimant felt it was not clear whether this was the same one day per week post that she had previously been covering. However, the Claimant submitted her application for the post which was indeed the one day per week post.

(36) The Governors met again on 18 June 2019 and it was agreed that they would reconvene on 24 June to complete the shortlisting for the one day per week post. On 24 June 2019, Mr Burns drove to the EA offices in Ballymena to collect the applications for this post. The interviews were planned for 27 June.

(37) At the Governors meeting on 24 June, Mr Burns again left the meeting before the Governors discussed the applications for this post.

(38) Mrs Finnegan also applied for the post. Both the Claimant and Mrs Finnegan were shortlisted by the recruitment panel which was made up of three Governors of the School, namely Mr Tom Stewart, Mr Alastair Henderson and Mrs Maureen Morrow. Mr Stewart and Mr Henderson are both very experience former Principals. All members of the selection

panel had undergone recruitment and selection training on 12th March 2019.

(39) The Claimant received a letter dated 24 June 2019 signed by Mr Burns inviting her to an interview on 27 June.

(40) On 27 June, the panel were conducting interviews for a number of different posts in the School and they were running late. The Claimant was sitting waiting to be called in to her interview when Mrs Finnegan also arrived for her interview. It was unfortunate that steps had not been taken to ensure that the two candidates for this post did not come into contact in this way. There was a conversation between Mrs Finnegan and the Claimant. Whilst there was some dispute on the evidence between the Claimant and Mrs Finnegan about what exactly was said, there was also a considerable degree of overlap. The Claimant said that Mrs Finnegan had sat beside her and said "*I hope there will be no hard feelings".* Mrs Finnegan agreed that she had said those words, but on her account, they were preceded by "*whatever the outcome"* and followed by *"between us".* As noted above, the Tribunal generally found Mrs Finnegan to be a straightforward and truthful witness and it accepts that Mrs Finnegan said "*Whatever the outcome, I hope there will be no hard feelings between us".* The Tribunal has no doubt that this was an awkward situation that these two candidates found themselves in and that this conversation was very uncomfortable for both of them. The Claimant was visibly annoyed by the conversation and Mrs Finnegan moved away.

(41) The Claimant and Mrs Finnegan were both interviewed by the panel. Both candidates were asked the same questions and their answers were scored using the same scoring system. Two of the panel members gave exactly the same score to the Claimant and Mrs Finnegan whilst the third panel member Mr Stewart gave Mrs Finnegan three more marks than the Claimant.

(42) After the interviews were concluded and the outcome decided, Mr Burns returned to their meeting to be informed of the decision. The report of the selection panel confirmed that Mrs Finnegan was the candidate recommended for appointment with the Claimant as the reserve candidate. Mr Burns then notified the EA of the outcome of the interviews. In a letter to the Claimant dated 28 June 2019 and signed by Mr Burns, the Claimant was informed that she was unsuccessful. This letter did not indicate that the Claimant was the reserve candidate for the post, but the correspondence from the EA to the Claimant dated 22 July 2019 confirmed that she was the reserve candidate and that this would remain valid for 12 months so that, in the event that any similar vacancy arose, the Claimant might be offered such opportunity without the need for a further interview.

(43) Also on 28 June 2019, Mr Burns provided verbal feedback to the Claimant. In informing the Claimant of the outcome of the interviews, Mr Burns sought to distance himself from the recruitment process. The Claimant said to Mr Burns' words to the effect of *"you told me that job was mine".* Mr Burns responded by saying in effect that he had only told

the Claimant that she would be a strong candidate for the job. The Claimant was very annoyed during this discussion and this was clear to Mr Burns. No one else was present during this conversation between the Claimant and Mr Burns. Mr Burns also provided verbal feedback to the successful candidate Mrs Finnegan.

(44) Friday 28 June 2019 was the last date of the summer term at the School. The tribunal has no doubt that the Claimant was very annoyed about the outcome of the interviews for the one day per week post. She never returned to work at the School.

(45) The Claimant attended her asthma nurse on 23 July 2019. The nurse suggested that the Claimant's mood might be the reason for the Claimant's physical symptoms. The Claimant attended her GP on 29th July. The GP noted low mood and generalised anxiety, ongoing for many months now and the GP also made reference in this note to the recruitment process. The Claimant's GP referred her to the Community Mental Health Team. Prior to her attendance with her GP at the end of July 2019, there is no record in the Claimant's GP notes and records of her having made any complaint regarding difficulties at work.

(46) On 24 July 2019, Mr Burns wrote to the Claimant. He referred to his conversation with the Claimant at the end of the previous term around her willingness to continue with the offer of the 5 day per week post. He noted that, at the end of term, the Claimant had stated that she was reconsidering her options and would think about it. Mr Burns asked the Claimant to clarify at this stage if she wished to take up the offer of this substitute post, that is continuing with Class 3. Mr Burns also indicated that he would give the Claimant an additional 2 weeks from the date of this letter to confirm her position on this offer. If he had not heard from the Claimant by then, he would begin the process of seeking an alternative substitute for the role. Mr Burns thanked the Claimant for her work to date in Class 3 and passed on his best wishes for the rest of the summer. Finally, he indicated that the Claimant could clarify her position by letter or by phone or text.

(47) On 13 August 2019, Mr Burns wrote to the Claimant again. He stated that he was writing to clarify the substitute cover arrangements for Class 3 from September 2019. He referred to his previous letter dated 24 July. He noted that he had subsequently followed up on this on 6 August when he left a voicemail for the Claimant asking if she was interested in the position on offer, that is to continue teaching Class 3 five days per week. (The Claimant had not responded to this voicemail message). Mr Burns confirmed that he had now managed to obtain alternative cover for Class 3. He went on to put on record his thanks for teaching the Class 3 pupils since February 2019 and for the other temporary work she had done in the main school and with the Outreach team. He wished the Claimant well for her career and teaching during the next academic year, thanking her on behalf of the Board of Governors and staff for her previous work in school. The Claimant did not respond to this correspondence.

(48) Whilst the Claimant has never returned to work in the School, neither has she sent a letter of resignation or any other correspondence explaining why she was not returning to the School.

(49) At the beginning of the new term in September 2019, the Claimant was ill and unfit for work. She submitted sick lines to the EA/DENI and received statutory sick pay in relation to NISTR. SSP continued to be paid until March 2020.

(50) The Claimant's Claim Form was lodged with the Office of the Industrial Tribunals and the Fair Employment Tribunal on 25 September 2019.

(51) The Tribunal was required to determine the date of termination of the Claimant's contract of employment with Thornfield School. When the Tribunal sought to clarify the claimant's position on this point, she was adamant that her employment was terminated on the last day of the summer term in 2019, that is Friday 29 June 2019. However, if the claimant had decided at that stage that she would not return to the School, she took no steps to communicate that decision to the School. Rather, it only became clear to Mr Burns that the claimant was not planning to return to Class 3 in September 2019 when the claimant failed to respond to his letter dated 24 July 2019 and particularly when she did not reply to Mr Burns' subsequent voicemail on 6 August. Accordingly, on the basis of the facts found, the Tribunal has determined that the claimant's contract of employment with the School for the fixed term maternity cover post in Class 3 was terminated by the claimant around 7 August 2019 when the claimant made it clear via her conduct that she had decided not to return to the School in September. Although this specific contract of employment with the School had been terminated, the claimant remained on the NISTR register of substitute teachers.

Statement of Law

Constructive dismissal

10. By Article 127 (1) (c) of the ERO, a resignation by an employee can, in defined circumstances, constitute a dismissal by the employer. This is generally known as constructive dismissal. Article 127 (1) (c) of the Order states as follows:-

> *"(1) For the purposes of this Part an employee is dismissed by his employer if …….*
>
> *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

11. Harvey on Industrial Relations and Employment Law ("Harvey") at Div DI 3 para 403 states as follows:-

> *"In order for the employee to be able to claim constructive dismissal, four conditions must be met:*

(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

(2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

(3) He must leave in response to the breach and not for some other, unconnected reason.

(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."

12. It is an implied term of every contract of employment that the employer must not without reasonable and proper cause conduct themselves in a manner calculated to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee – see ***Woods v WM Car Services (Peterborough) Ltd 1983 IRLR 413 & Malik v BCCI HL 1997 IRLR 462.*** This is generally known as the implied duty of trust and confidence.

13. A breach of the implied duty of trust and confidence always amounts to a fundamental breach of contract which will entitle the employee to resign in response to that breach – ***Morrow v Safeway Stores plc 2002 IRLR 9.***

14. In the case of ***Brown v Merchant Ferries [1998] IRLR 682,*** the Northern Ireland Court of Appeal set out the relevant test in the following terms:-

"*Thus in this case the question becomes did the [employer's] conduct so impact on the [employee] that viewed objectively the [employee] could properly conclude that …….his employer, was repudiating the contract?"*

15. The Employment Appeal Tribunal in the case of ***Claridge v Daler Rowney Limited [2008] IRLR 672 at 676*** sought to reconcile a number of previous decisions and stated as follows:-

"It is necessary that the conduct must be calculated to destroy or seriously damage the employment relationship. The employee must be entitled to say 'You have behaved so badly that I should not be expected to have to stay in your employment'. It seems to us that there is no artificiality in saying that an employee should not be able to satisfy that test unless the behaviour is outwith the band of reasonable responses."

16. In determining whether there has been a breach of the implied term of trust and confidence which would justify the employee in resigning without notice, the principle known as the "last straw doctrine" may be relevant. The principle is summarised in Harvey Div DI 3 para 481 as follows:-

"*Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. A number of cases illustrate this, eg* ***Garner v Grange Furnishing Ltd 1977 IRLR 206; Woods v WM Car Services (Peterborough) Ltd1981 IRLR 347, [1981] ICR 666; and Lewis v Motorworld Garages Ltd1985 IRLR 465, [1986] ICR 157, CA,*** *where Glidewell LJ expressly commented that:*

'... the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?' However in ***Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA*** *the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history".*

17. The "last straw doctrine" has also been considered more recently in the case of ***GAB Robins (UK) Limited v Triggs (EAT) (UKEAT/0111/07/RN)***. In this case, the claimant had for some time complained of an excessive workload. She also complained of bullying by a manager who had shouted down the phone at her. By the end of September 2004, the claimant had had enough and she was signed off sick by her doctor. The claimant never returned to work. The claimant lodged a written grievance raising the issues of overwork and the alleged bullying by the manager. The employer entirely failed to address the issue of overwork and, in respect of the allegation of bullying, the employer suggested an informal meeting between the claimant and the manager in order to try to resolve their differences. On 15th February 2005, the claimant wrote to the employer confirming that she would find it very difficult to attend such a meeting and to return to work when the alleged bully had re-organised the management structure so as to bring the claimant directly under his control. The claimant confirmed that she was resigning and bringing a claim of constructive dismissal.

18. The Employment Tribunal which heard Ms Triggs' claim concluded that trust and confidence finally broke down when the employer failed to carry out an adequate and proper investigation into the claimant's grievances. The Employment Tribunal decided that Ms Triggs had therefore been unfairly constructively dismissed.

19. The decision of the Employment Tribunal was upheld by the Employment Appeal Tribunal (EAT). The EAT reviewed the caselaw relating to the "last

straw doctrine", including the case of ***Omilaju*** referred to above. The EAT analysed the situation in Ms Triggs' case as follows:-

> "*(1) the acts relied upon by the Claimant of overwork and bullying by (the manager) amounted cumulatively to a breach of the implied term as at 30 September 2004.*
>
> *(2) Thereafter, by continuing in the employment whilst off sick the Claimant affirmed the contract.*
>
> *(3) However, the Respondent's failure 'to carry out an adequate and proper investigation into her grievances' ([Employment Tribunal's] Reasons paragraph 53) contributed materially to the earlier acts relied on so as cumulatively to amount to a breach of the implied term."*

20. In the Scottish EAT case of ***Sweetin v Coral Racing [2006] IRLR 252***, the Tribunal had made a finding of fact that the employer was not aware of the employee's grievance until she resigned. In this context, the EAT stated:-

> "*What is, though, fundamental is that an employee cannot complain that an employer has failed to deal properly and appropriately with their grievance if it has not been effectively communicated to him. An employer cannot reasonably be expected to take steps where an employee is nursing an unexplained grievance or has made assumptions of which the employer is ignorant."*

21. If a tribunal is satisfied that an employee was constructively dismissed by the employer, it must then go on to consider the reason for the dismissal and whether the dismissal was, in all the circumstances, fair or unfair in accordance with article 130 of the Order – see ***Stephenson & Co (Oxford) Ltd v Austin*** **[1990] ICR 609, EAT.**

22. By Article 130(1) of the Order, it is for the employer to show the reason for the dismissal and that it is a reason falling within para (2), that is a potentially fair reason for dismissal. Where the employer fails to show a potentially fair reason for dismissal, the dismissal will be unfair.

Breach of contract

23. Under the Industrial Tribunals Extension of Jurisdiction Order (Northern Ireland) 1994 ("the 1994 Order"), proceedings may be brought before a tribunal in respect of a claim by an employee for the recovery of damages (other than for personal injury) or any sum due under the employee's contract provided that the claim is outstanding on the termination of the employee's employment. Such a claim can be brought within three months of the effective date of termination of the employee's employment.

Failure to provide written statement of employment particulars

24. Pursuant to Article 33 of the Order, an employer shall give to the employee a written statement of particulars of employment within 2 months after the beginning of the employment. Where the employer does not give the employee a statement as required by Article 33, the employee may require a

reference to be made to an industrial tribunal to determine what particulars ought to have been included in a statement so as to comply with the requirements of Article 33.

25. By article 27 of the Employment (Northern Ireland) Order 2003 ("the 2003 Order"), where an employer has failed to provide an employee with a written statement pursuant to article 33 of the Order, and the Tribunal has found in the employee's favour in a relevant claim, the Tribunal can make an additional award in favour of the employee. The relevant claims include claims of unfair dismissal and breach of contract. The additional award will be an amount between a minimum of two weeks' pay and a maximum of four weeks' pay.

Conclusions

Constructive Dismissal

26. As set out at para 12 *& seq* above, to succeed in a claim of constructive dismissal, the claimant must firstly establish that the employer has committed a breach of her contract of employment. The Tribunal therefore considered in turn each of the alleged breaches of contract relied upon by the claimant.

A. Claimant decided not to apply for a post in September 2018 when she perceived that it would be given to a friend of the Principal's daughter

The Tribunal accepted the claimant's evidence that she had considered applying for a vacant post in September 2018, but had decided against it. Other than the fact that the claimant had formed the view that the post was earmarked for someone who she believed to have a connection to the Principal, the Tribunal had no evidence of anything that would constitute a breach of the contract of employment with which the claimant held with the School at that time. The claimant raised no issue or complaint at the time.

The Tribunal therefore concluded that it was not satisfied that, on the basis of the facts found, this constituted a breach of the claimant's contract.

B. Claimant was required in January 2019 to provide reports for a class she had only covered for a short time

The Tribunal found as a fact that the claimant was asked to prepare reports for 3 pupils. She had worked in this class for 19 days at this stage covering the vacancy until a permanent teacher was recruited for the class. The Claimant acknowledged under cross examination that these reports were required and she was best placed at that time to prepare them. The Tribunal took into account that, under the Jordanstown Agreement, which the Tribunal noted is equally applicable to permanent and temporary teachers, it is part of the role of any teacher to prepare pupil reports. As such, the Tribunal does not believe that it was a breach of the claimant's contract for her to be asked to prepare a small number of reports in the circumstances which pertained at this time.

C. Unpaid hours for work done over and above what was expected of a NISTR substitute teacher

The Tribunal had no doubt that the claimant was a dedicated and hard working teacher who, whilst she was working in the School, diligently worked the hours required to ensure that the pupils in whatever class she was working with received the support they required. As noted above, it is clear from its heading that the Jordanstown Agreement applies equally to both temporary and permanent teachers. No distinction is drawn between these different categories of teacher. The Tribunal also noted that the claimant on a number of occasions accepted under cross examination that she was best placed to carry out the tasks asked of her. In addition, the claimant acknowledged that teachers in Special Schools were paid a higher rate of pay, presumably in recognition of the particular challenges and additional demands placed on them. The claimant also accepted that she did not complain at the time about the extra hours worked, nor did she request time off in lieu.

Taking account of all these relevant facts, the Tribunal has concluded that there was no breach of the claimant's contract of employment as regards additional hours worked.

D. Alleged failure to implement promised changes to the Claimant's workload

The Tribunal understands that this alleged breach of contract relates in the main to the challenges the claimant experienced in teaching the Looked After Child in Class 3. Whilst a number of additional supports had already been put in place, there was discussion about further adjustments and supports to assist the claimant as class teacher for this child. The Tribunal accepted that decisions in respect of additional supports such as a one to one classroom assistant had significant cost implications and hence did not fall to the School alone. Such matters had to be referred to the EA. The Tribunal decided that there was no breach of the claimant's contract of employment in relation to failure to implement changes to the claimant's workload.

E. Creating an unsafe working environment for the Claimant through poor risk management and supervision

On the basis of the facts as outlined above, the Tribunal does not consider that an unsafe environment was created for the claimant. It was recognised generally by the claimant and Mr Burns in their evidence that teaching in a Special School can be challenging. The Tribunal also noted that a number of adjustments were put in place for the claimant and support was also available from Mr Burns, who did attend her classroom to assist on occasion as required, as well as from the School's SENCO and other members of the senior management team. Mr Burns had asked for the claimant to attend the meeting regarding the Looked After Child so that her perspective could be heard directly. The claimant did not raise any concern or issue with the School at the time and there was no record in the claimant's GP notes and records of any such concern being raised with her GP before the end of the summer term 2019.

The Tribunal therefore concluded that there was no breach of contract through the creation of an unsafe working environment for the claimant.

F. Being asked to complete a 'care plan' for a pupil

As set out above, the Tribunal believes it is unfortunate that this document was referred to as a 'care plan' as this does not properly reflect its content or objectives. The document appears to have been in the nature of a safety plan/risk assessment designed to ensure the safety of the relevant child at school and mitigate any risks to her safety. The Tribunal considered that it was not inappropriate for the claimant as the class teacher to be asked to draft this document. Ultimately, it was always intended that the plan should be reviewed by an appropriate health professional, namely the child's Consultant, and indeed the plan prepared by the claimant was reviewed and signed off by the Consultant with only one limited amendment.

In light of all the relevant circumstances, the Tribunal determined that when the claimant was asked to prepare this document, as properly understood and leaving to one side the unfortunate label attached to it, this was within the scope of the claimant's contractual duties and did not constitute a breach of the claimant's contract of employment.

G. Unable to locate the Principal during school hours

On a number of occasions during the hearing, the claimant sought to suggest that she was unable to find the Principal in the School during School hours. For instance, the Tribunal accepted the claimant's evidence that on 5 June 2019, when there was a crisis involving the Looked After Child in Class 3, the claimant had difficulty in locating Mr Burns.

However, the logic of the claimant's position in relation to this alleged breach is essentially that the Principal was required to be in School at all times during school hours and available to respond immediately should she require his assistance and if he was not, then this was a breach of her contract of employment (and presumably that of every other teacher in the School). The claimant's argument focused only on the Principal and failed to acknowledge that other senior staff and members of the School's senior management team may have been present in the School at the relevant times and available to respond to assist the claimant or indeed any other teacher.

The Tribunal has concluded that inability to locate the Principal in the School building on occasion did not amount to a breach of the claimant's contract of employment.

H. Failure to appoint the Claimant's teaching assistant following a selection process in June 2019

The claimant did not call the teaching assistant in question to give evidence and the Tribunal was unable to make findings of fact in respect of this allegation.

In any event, the Tribunal found it difficult to see how the alleged failure to appoint someone else to a post could constitute a breach of the claimant's contract of employment. Accordingly, the Tribunal has concluded that there was no breach of the claimant's contract of employment in this regard.

I. Alleged failure to honour an oral agreement that the Claimant would secure the one day per week permanent post

The Tribunal found as a fact that there was no oral agreement that the claimant would secure the one day per week permanent post. Rather, as set out at para 10 (28) above, Mr Burns said to the claimant words to the effect that she was a strong candidate and had a good chance of getting the job. In view of this finding of fact, the basis for this alleged breach of contract falls away.

J. Alleged unfair recruitment for the one day per week permanent post

It was very clear from the claimant's evidence and from the attention she gave to this matter in her submissions that the one day per week post was the main focus for the claimant. Indeed, she made it clear that her failure to be appointed to the post was very much "the last straw" for her and this is also apparent from the account recorded by the claimant's GP in her medical notes. The Tribunal was left in no doubt that the claimant had a very real and acute sense of grievance in relation her non appointment to this job.

During the hearing, the claimant sought to criticise a number of aspects of the recruitment process. However, even when invited to clarify her position, she fell short of suggesting that the process was manipulated in some way. The claimant was critical of the fact that, having stepped aside from the core elements of the recruitment process due to the identified conflict of interest, nevertheless Mr Burns continued to be involved in some aspects of the process. The Tribunal believes that the elements of the procedure in which Mr Burns was involved were largely administrative and peripheral. However, the Tribunal would also suggest that it may have been better if Mr Burns had not taken any part in the process whatsoever, perhaps asking the Vice Principal to carry out the necessary tasks.

On the basis of the facts found by it, the Tribunal has been unable to identify any specific aspect of the recruitment process which was unfair to the claimant nor does the Tribunal consider that the overall recruitment procedure was unfair to the claimant. Unfortunately for the claimant, this was simply a situation where, whilst the claimant performed well at the interview, and indeed was scored identically to the successful candidate by two of the panel members, the other candidate performed marginally better on the day in the view of the Chair of the panel.

That being the case, the Tribunal has determined that there was no unfairness in the recruitment process for the one day per week post and therefore there was no breach of the claimant's contract of employment in this regard.

Summary – constructive dismissal

Having considered each of the alleged breaches of contract in turn, the Tribunal has concluded on the facts found by it that there was no breach of contract in any of these areas. The Tribunal also took a step back to consider whether overall there was a course of conduct on the part of the employer or series of acts which together amounted to a breach of the implied term of trust and confidence. It concluded that the employer had not acted in a manner calculated to destroy or seriously damage the relationship of mutual trust and confidence between the employer and employee.

The Tribunal therefore concluded that the claimant was not constructively dismissed by her employer.

Breach of contract

27. In respect of the alleged breaches of contract A through to J as set out above, the Tribunal has concluded that these did not either individually or taken together amount to a breach of contract. Accordingly, the claimant's claim for breach of contract is dismissed in full.

Written Statement of Employment Particulars

28. The Tribunal found as a fact that the claimant did not receive any written confirmation of any of her successive engagements with the School. Indeed, this was not disputed by the School Principal Mr Burns. Counsel for the respondents sought to argue that the Jordanstown Agreement effectively constituted a written statement of particulars of employment. The Tribunal certainly concurs that the Jordanstown Agreement is the Collective Agreement which details many of the terms and conditions of employment applicable to all teachers. The Tribunal would agree that written particulars provided to teachers would no doubt include reference to the Jordanstown Agreement as the source of many of their terms and conditions.

29. However, there are many matters which are required to be included in the statutory written statement which cannot possibly be regarded as covered by the Jordanstown Agreement. These include matters such as:-

(b) the date when the employment began;

(c) the date when the period of continuous employment began;

(g) where the employment is not intended to be permanent, the period for which it is to continue or , if it is for a fixed term, the date when it is to end.

Such matters are obviously unique to the employee and the particular circumstances and clearly will not be found in the Jordanstown Agreement. The argument put forward by the claimant's counsel must therefore be rejected.

30. The Tribunal therefore concludes that the claimant was not provided with the statutory written statement of employment particulars as required.

31. Whilst the claimant brought this complaint to the Tribunal, she did not specifically ask the Tribunal to make any determination of the matters which should have been included in such statement and the Tribunal has not therefore sought to determine these matters.

32. The Tribunal has considered article 27 of the 2003 Order. If the Tribunal held in favour of the claimant in respect of her other claims, the Tribunal could have made an additional award under this provision. However, since the claimant has not succeeded in her claims of constructive dismissal or breach of contract, the Tribunal is unable to make any such award.

Employment Judge: *J. Turkington*

Date and place of hearing: 13, 14, 15, 16 & 17 September 2021, Belfast

Date decision recorded in register and issued to parties: