



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case no: 4102672/2020 (V)

Held remotely on 1, 2, 3, 4, 5, 17, 18, 19, 23, 24 and 25 February 2021

Employment Judge W A Meiklejohn

10

Mrs L Malpass

**Claimant
Represented by:
Mr J Malpass –
Claimant's husband**

15

BASICS Scotland

**Respondent
Represented by:
Mrs N McClelland –
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is as follows –

- (a) The claimant's claim of constructive unfair dismissal fails and is dismissed; and
- (b) The claimant's claim of unlawful deduction of wages is continued to a further hearing to determine both liability and remedy.

30

REASONS

1. This case came before me for a final hearing, conducted remotely by means of the Cloud Video Platform. Mr Malpass represented the claimant and Mrs McClelland represented the respondent.

35

E.T. Z4 (WR)

Nature of claims

2. The claimant brought complaints of constructive unfair dismissal and unlawful deduction of wages. These complaints were resisted by the respondent.

5 **Procedural history**

3. The claimant's ET1 claim form was presented on 19 May 2020. The respondent's ET3 response form was submitted on 29 June 2020. There were no preliminary hearings and the case proceeded directly to a final hearing.
- 10 4. At the start of the final hearing on 1 February 2021 Mr Malpass lodged a written application for strike out of the response under Rule 37(1) of the Tribunal Rules of Procedure 2013. I indicated that I proposed to deal with this at the conclusion of the claimant's case and invited Mrs McClelland to provide a written response. She did so on 3 February 2021. In the event,
15 Mr Malpass withdrew the application for strike out at the start of proceedings on 4 February 2021.
5. The case was originally set down for a 5 day hearing commencing 1 February 2021. There was insufficient time to complete the evidence in that time and so the hearing continued over the additional days listed
20 above.

Evidence

6. I heard evidence from the claimant and, on her behalf, from –
- Mrs W Falconer - formerly employed by the respondent as Course Co-ordinator.
 - 25 • Mr Malpass.
 - Mr C Young - employed by the respondent as Storeman/Driver/Equipment Technician.
 - Mr C Stewart - employed by the respondent as IT Lead/Senior Administrator.
- 30 7. For the respondent I heard evidence from –

- Mrs L MacInnes – the respondent’s Director of Education.
 - Dr R Price – the respondent’s Clinical Director.
 - Mr D Tripp – the respondent’s Vice-Chair (now Chair).
 - Mr J Pritchard – the respondent’s Treasurer.
 - 5 • Mr D Bywater – the respondent’s Chair (at the relevant time).
 - Ms L Duff – now the respondent’s General Manager.
8. There was a joint bundle of documents extending to 594 pages to which I refer by page number. This was supplemented during the hearing by (a) a number of text messages between the claimant and Mr Pritchard, and (b) records of the respondent’s BT conference call facility for January 10 2020.
9. It is not the function of the Tribunal to record every piece of evidence presented to it and I have not attempted to do so. I have focussed on those parts of the evidence which I considered to have the closest bearing on the issues I had to decide. Before recording my findings in fact I will 15 set out the applicable statutory provisions and refer to two cases which are relevant.

Applicable law

Unfair dismissal

- 20 10. Section 94(1) of the Employment Rights Act 1996 (“ERA”) provides as follows –

“An employee has the right not to be unfairly dismissed by his employer.”

Constructive dismissal

- 25 11. Section 95(1) ERA provides as follows –

“For the purposes of this Part an employee is dismissed by his employer if....

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he

is entitled to terminate it without notice by reason of the employer's conduct."

Fairness

12. Section 98 ERA provides, so far as relevant, as follows –

5 “(1) *In determining for the purpose of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

 (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*

 (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

 (2) *A reason falls within this subsection if it –*

 (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

 (b) *relates to the conduct of the employee,*

 (c) *is that the employee was redundant, or*

 (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment....*

 (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

 (a) *depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

 (b) *shall be determined in accordance with equity and the substantial merits of the case.”*

Meaning of constructive dismissal

13. Historically there was some tension as to whether the “*employer’s conduct*” under what is now section 95(1)(c) ERA had to amount to a breach of contract or whether unreasonable conduct was sufficient. In ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** the matter was settled in favour of the contract test. Lord Denning explained matters in these terms –

“*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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.*”

Trust and confidence

14. The employee may not be able to point to an express term of the contract said to have been breached but will often argue that there has been a breach of an implied term. In ***Malik and another v British Bank of Credit and Commerce S.A. (in compulsory liquidation) [1997] UKHL 23*** Lord Steyn expressed the implied obligation of trust and confidence (upon which the claimant relies in the present case) in terms that the employer shall not –

“*...without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between and employer and employee.*”

Unlawful deduction of wages

15. Section 13 ERA provides, so far as relevant, as follows –

“(1) An employer shall not make a deduction from wages of a worker employed by him unless –

5 *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction....

10 *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the*
15 *worker’s wages on that occasion.”*

Findings in fact

16. The respondent is a company limited by guarantee (SC226924) and is a Scottish charity registered with the Office of the Scottish Charity Regulator (SC030189). It specialises in the provision of intensive training
20 programmes to health professionals throughout Scotland, including remote/rural areas, in the field of pre-hospital immediate care. BASICS is an acronym for British Association for Immediate Care, Scotland.

17. The respondent runs courses under licence from other organisations including the Advanced Life Support Group (“ALSG”) and the Royal
25 College of Surgeons (“RCS”). These include the PHECC course – PHECC being the Pre-Hospital Emergency Care Council – which was described in evidence as the respondent’s “flagship” course. The respondent also runs its own courses which are referred to as “portfolio” courses. The delivery model typically involves courses being directed by
30 a Clinical Educator supported by volunteer instructors.

18. The respondent has a board of directors who are unpaid volunteers and are employed elsewhere within healthcare services. Some are volunteer

instructors. The respondent receives funding from National Health Service Education Scotland (“NES”).

19. The claimant commenced employment with the respondent in September 2007, initially as a part-time Administrative Assistant. By 2018, and prior to the events described below, she was Office Manager working four days per week.

Dr Colville Laird

20. The respondent was set up by Dr Laird in 1999. Prior to that BASICS UK, an English registered charity established in 1977, operated across the UK. Dr Laird was until his retiral on 31 December 2018 the respondent’s Medical Director. As Office Manager, the claimant reported to Dr Laird.

21. In anticipation of Dr Laird’s retiral the respondent appointed two Clinical Directors, Dr Richard Price and Dr Ben Price. There were some interpersonal difficulties between Dr Laird and Dr Ben Price and the latter left the respondent in February 2019.

Dr Richard Price

22. Dr Richard Price became Assistant Clinical Director in October 2016. The draft job description for this post was produced (155-160). This described the post as “*accountable to*” the Medical Director. Initially Dr Price remained an employee of Greater Glasgow & Clyde Health Board and provided two clinical sessions per week (ie one day per week) to the respondent for which the respondent reimbursed his employer.

23. Dr Price became Clinical Director in January 2019 following Dr Laird’s retiral. From 1 July 2019 Dr Price became a part-time employee of the respondent. His change of status was driven by pension tax considerations. He was issued with a contract of employment (142-154). This identified his “*Designated Line Manager*” as the respondent’s Board of Directors. However, in some matters such as hours of work and annual leave, Dr Price had to obtain the agreement of the respondent’s Chief Executive.

24. Dr Price's contract of employment referred to a job description which I understood to be the same as (or at least in all material respects similar to) the one relating to his role as Assistant Clinical Director. Under "*People Management*" this provided as follows –

5 "*The post holder will be expected to play an active part in managing the clinical staff and supporting the volunteer instructors who work with BASICS Scotland. This may include undertaking staff appraisals on an annual basis.*"

Sandpiper Trust

- 10 25. Sandpiper Trust ("SPT") (Scottish charity 031165) provides Sandpiper Bags which contain emergency life-saving medical equipment to rural clinicians to enable pre-hospital emergency care to be given in situations where ambulance response time is long, or where the skills of a doctor are required alongside those of ambulance paramedics. SPT works in
15 collaboration with the respondent and Scottish Ambulance Service.

26. Since 2004 the respondent and SPT have operated from the same premises in Aberuthven. The claimant and SPT's manager, Ms L Duff, shared an office.

Changes to claimant's role

- 20 27. On 14 November 2018 the claimant was issued with an updated contract of employment (52-55). This recorded her revised job title of Office Manager/Assistant to the Board of Directors. Although not referred to in the contract, there was also a job description (51) which included the following –

25 "*The post holder will be responsible for management of the organisations business processes including all administration, finance and line management of administrative support for BASICS Scotland....*

- *Manage day to day activities of the organisation including line
30 management of administrative staff.*

- *Maintain all personnel records, recruitment and selection of staff and issuing employment contracts, liaising with employment lawyers as necessary....”*

28. The claimant’s contract referred to the respondent’s Disciplinary and
5 Grievance Procedure (48-50) which was stated not to form part of her terms and conditions of employment. The Grievance Procedure was expressed as follows –

10 *“Problems and misunderstandings are bound to arise when people work together. It is usually found that when a problem is discussed openly it can be dealt with quickly and efficiently. Equally, if a problem is left unresolved it may develop into a major difficulty.*

15 *Openness and honesty with one another is essential and every Head of Department has a responsibility to listen and respond to problems that are causing concern to members of their department. Any problem on work related matters should in the first instance be raised with the Medical Director of BASICS Scotland Limited.*

If a problem is not resolved at this stage or if the grievance involves the Medical Director of BASICS Scotland Limited, it should then be taken to the Chairman of BASICS Scotland Limited.”

20 29. At this time (14 November 2018) the claimant’s hours of work were reduced so that she would work three days per week instead of four. Her salary remained the same. The claimant would routinely take work home.

30. Notwithstanding the addition of “Assistant to the Board of Directors” to her
25 job title, the claimant already attended board meetings and acted as minute taker. The normal process involved the claimant taking handwritten notes at the board meeting, typing these up and circulating them in advance of the next board meeting at which the minutes would be approved. This was in compliance with article 127 of the respondent’s Articles of Association which provided –

30 *“The directors shall ensure that minutes are made of all proceedings at general meetings, directors’ meetings and meetings of committees; a minute of any meeting shall include the names of those present, and (as far as possible) shall be signed by the chairperson of the meeting.”*

Appointment of Chief Executive

31. Prior to Dr Laird's retiral and recognising that the organisation was about to enter a period of change and transition, the respondent engaged with Cranfield Trust. This is an organisation which provides management support to charities. The purpose of this engagement was to advise on the appropriate structure for the respondent going forward, including the option of appointing a Chief Executive.

32. This led to the recruitment of Ms Lucy Aitchison as Chief Executive Officer ("CEO") with effect from 1 January 2019. She was issued with a contract of employment dated 19 February 2019 (83-95) which referred to a job description (96-100). The job description described the job purpose of the CEO post in these terms –

"The post holder will be responsible for all paid employees and for managing the activities and administrative support for BASICS Scotland.

- *To take responsibility for maintaining the running of the charity.*
- *To ensure the effective day to day management of the charity in accordance with the BASICS Scotland governing documents and the Board's directives.*
- *To maintain high standards of practice in supporting the work of the charity within the ethos of BASICS Scotland.*
- *To ensure inclusion and diversity in all aspects of the charity's work.*
- *To take responsibility for providing leadership and management to the staff and volunteers."*

33. Prior to the CEO'S recruitment the claimant was asked to consider the position of CEO but preferred to continue as Office Manager.

Clinical Educators

34. Delivery of the education and training provided by the respondent was undertaken by the Clinical Educators. They ran the courses and events which made up the respondent's annual programme. At the time of the

CEO's appointment, the Clinical Educators were Mr G Ramage and Mr A McLean.

35. The Clinical Educators worked with Mrs Falconer as Course Coordinator, Mr Stewart as IT Lead/Senior Administrator and Mr Young as Storeman/Driver/Equipment Technician. Apart from some evidence about a falling out between Mrs Falconer and Mr McLean, it appeared that the working relationships amongst this group were reasonably harmonious.

36. Both Clinical Educators left the respondent in 2019. Mr Ramage retired in May 2019 and Mr McLean moved on in June 2019. There was a recruitment process with a view to finding replacements. This led to the appointment of Ms H Sinclair with effect from 5 June 2019. A second new Clinical Educator, Ms E Edwards was also appointed. She required to relocate from Australia and was expected to take up her post in September/October 2019.

37. Ms Sinclair was issued with a contract of employment dated 19 June 2019 (120-132) which identified her "*Designated Line Manager*" as the Director of Education. The contract provided that hours of work and annual leave required to be agreed with/approved by the Director of Education. Notice of intention to take holidays and notification of sickness absence had to be given to the Office Manager.

38. Ms Sinclair's contract referred to a job description (133-138). This described her "*Organisational Position*" in these terms –

"The postholder reports operationally to the CEO BASICS Scotland and will maintain a close liaison with the Clinical Director and Director of Education. The postholder is one of a team of two Clinical Educators that will share the course delivery workload for BASICS Scotland, with the support of the IT/Admin team. The postholder will be required to manage and prioritise their work portfolio in consultation with the Advisory Team, receiving direction as required to meet the needs of the team and the business areas they are responsible for; together with any multi-agency/CS MEN project/research work required from time to time."

39. The “*Advisory Team*” comprised the CEO, Clinical Director and Director of Education.

Ms Lisa MacInnes

5 40. Following Dr Ben Price’s departure, the respondent decided that his role of Clinical Director should be changed to Director of Education. Ms MacInnes was appointed to this position with effect from 6 June 2019. She was issued with a contract of employment dated 19 June 2019 (101-113) which referred to a job description (114-119). Like Dr Price, she was employed for one day per week.

10 41. Ms MacInnes’ contract identified her “*Designated Line Manager*” as the CEO. As with Dr Richard Price, matters such as hours of work and annual leave had to be agreed with the CEO. Within the “*Main Duties/Responsibilities*” section of the job description (at paragraph 6.7) Ms MacInnes’ line management responsibilities were described as follows –

“*Although this post has no direct line management responsibility, the post holder would be expected to manage, supervise and develop staff where appropriate, in line with BASICS Scotland policies and procedures.*”

20 ***Problems with CEO***

42. The CEO introduced a number of changes. She prepared a detailed action plan (183-194). At her suggestion, the board set up a number of sub-groups/committees. These included a staff sub-committee comprising the Chair, Vice-Chair, Treasurer, CEO and the claimant.

25 43. Unfortunately, relationships between the CEO and members of the respondent’s staff deteriorated. The claimant sent an email to Mr Bywater on 1 August 2019 (207) attaching a list of 14 bullet points (209) expressing areas of staff concern. These included micro managing, insensitivity and lack of judgment. These concerns were echoed in a lengthy email from
30 Mr Stewart to Mr Bywater and the claimant dated 6 August 2019 (210-214). Around this time, three members of the respondent’s staff

(Mr Stewart, Mrs Falconer and the claimant) were absent due to work related stress.

44. The CEO's contract of employment made provision for a probationary period of 6 months followed by a review of performance. The respondent initiated a 360 review by staff. This highlighted areas of concern. Mr Bywater, Mr Tripp and Mr Pritchard met with the CEO on 13 August 2019. Following discussions amongst the respondent's directors, the decision was made to terminate the CEO's appointment. She was placed on garden leave from 27 August 2019 until her employment ended on 26 November 2019. Mr Tripp told the respondent's staff about the CEO's departure on 27 August 2019.

Claimant becomes Interim General Manager

45. Mr Bywater, Mr Tripp and Mr Pritchard held discussions with the claimant, the outcome of which was a proposal that the claimant should be appointed as General Manager on an interim basis. This was approved by the respondent's board at their meeting on 19 September 2019.

46. Mr Bywater told the claimant that she would be "*appropriately remunerated*" as General Manager but no salary figure was discussed or agreed. The claimant accepted appointment as interim General Manager without there being any agreement in place for an adjustment to her salary. Mr Pritchard acknowledged that his expectation had been that the claimant's salary would increase but not to the level the CEO had received; there was never any agreement on the amount. Mr Bywater accepted that it would have been appropriate for the claimant to be remunerated while acting as interim General Manager as the same level as the CEO, given that she was taking on most of the CEO's role while still performing the duties of Office Manager.

47. The claimant made two stipulations in agreeing to become interim General Manager. The first was that she should not be the "*face*" of the organisation. The second was that she should not have line management responsibility for the Clinical Educators (and in so finding I preferred the evidence of the claimant to that of Mr Bywater, Mr Tripp and Mr Pritchard who did not recall this). This was reflected in the staff sub-group item in

the minutes of the board meeting of 19 September 2019 (238) – “*LMac will take on appraisals of Clinical Educators in the absence of a CEO*” – and in the terms in which the claimant told staff about her appointment.

5 48. The respondent’s board of directors took no steps to announce the claimant’s appointment. They should have done so. It was left to the claimant to tell her colleagues which she did by an email dated 24 September 2019 (242) in these terms –

10 *“Just a quick update for those of you who weren’t at the board meeting last week, the board of directors have asked me to take on role of interim general manager until they’ve had time to review staffing situation which I’ve agreed to do for now. Richard and Lisa will continue to lead/oversee all clinical and educational decisions.”*

Issues with Ms Sinclair

15 49. Ms Sinclair took up her post as Clinical Educator on 5 June 2019. She had only a short period of handover with Mr McLean who left on 25 June 2019. She was then the respondent’s only Clinical Educator. She was busy with attendance at/delivery of courses. Tensions arose between her and members of the respondent’s administration team.

20 50. Mr Stewart had some issues with Ms Sinclair. These included her ability to connect up and pack away the equipment used during training and non-provision of clinical input required for training videos. Mr Stewart raised the clinical input issue with the claimant and also with Ms MacInnes.

25 51. Mr Young clearly took some pride in how the respondent’s van was packed when transporting equipment. He showed Ms Sinclair how to load the van. He found that when the van was returned after use by Ms Sinclair, it was not loaded in what he regarded as the correct way. He referred to finding sharp items on the van floor, food detritus and litter, the manikin case not secured and items lying against the side door so that it could not be opened. Mr Pritchard referred to Mr Young being annoyed when 30 Ms Sinclair did not park the van in the right place after using it.

52. There was friction between Ms Sinclair and Mrs Falconer. Mrs Falconer needed input from Ms Sinclair to enable her to arrange the respondent’s

courses. She found that this was not forthcoming. She felt that Ms Sinclair was concentrating on future projects rather than what was time critical for Mrs Falconer. She was not getting replies from Ms Sinclair to emails.

53. Ms MacInnes became involved in this. There were meetings involving Mrs Falconer, Ms Sinclair, Ms MacInnes and the claimant in November 2019 based around a work planner/agreed actions template. These were an attempt by Ms MacInnes to resolve the issue of co-operation between Ms Sinclair and Mrs Falconer. Mrs Falconer said in evidence that these meetings *“had helped to highlight issues but did not solve the problem”*.
54. The claimant had an issue with Ms Sinclair about her involvement with Mountain Rescue, suggesting, according to Dr Price, that the time Ms Sinclair spent on this left her tired at work and that some of the respondent’s materials might have been misappropriated. Dr Price said that there had been no evidence to substantiate these matters. My view of this was that the claimant would not have raised these matters without having a genuine concern.
55. The claimant also had difficulty with Ms Sinclair regarding pension contributions. It had been clearly stated to Ms Sinclair in her letter of appointment of 2 May 2019 (195) that the respondent paid an employer’s pension contribution of 5% and that if she wished to pay a higher pension contribution this would be reflected in a salary reduction. Ms Sinclair was unwilling to accept this. The claimant considered that Ms Sinclair was untruthful to her over this matter.
56. Ms Sinclair escalated this issue to Ms MacInnes. Mr Tripp became involved in an effort to find some resolution (566-567). The matter came before the board on 5 December 2019 and was referred to the staff sub-committee. The claimant emailed the members of that committee on 6 December 2019 with a summary of what had happened. There was no doubt that the claimant was correct in her understanding of the position, ie that Ms Sinclair had accepted appointment on the basis set out in the preceding paragraph as regards pension contributions. The notes of the board meeting subsequently held on 28 January 2020 recorded *“HS – aware pension is put to bed”* (386).

Claimant's health issues

57. In November 2019 the claimant consulted her GP. According to a report from her GP dated 31 December 2020 (593-594), the claimant "*presented with palpitations and raised blood pressure*". She was given a blood pressure monitor to wear for a 24 hour period. This would have been
5 apparent to those working with the claimant at the time.

58. Ms Duff was well placed to observe the claimant's state of health as they shared an office. She described the claimant in the period before Christmas 2019 as "*very unhappy*" and said that she seemed "*very tense*".
10 The claimant had told her that she "*felt quite unwell*".

Issues with Ms Edwards

59. Ms Edwards made her application for the position of Clinical Educator while living and working in Australia. She had relevant experience and held an Australian qualification (PHTLS) which was broadly equivalent to that required to perform the Clinical Educator role in the UK (and was
15 known to Dr Price). She was interviewed and appointed. It was anticipated that she would commence employment in September/October 2019 but she did not in fact do so until 2 December 2019.

60. The job description for the Clinical Educator position (133-139) had been prepared by the CEO. It contained "*Essential*" and "*Desirable*" criteria. Mr Bywater asked that certain of the "*desirable*" criteria be changed to "*essential*". These related to "*Full Instructor/Course Director experience on PHEC/PHPLS/Life Support Courses or equivalent*" and "*Experience of ALSG course provision, governance and GIC certification*". This was not
20 done. If it had been done, neither Ms Edwards nor Ms Sinclair would have met the essential criteria and, in all probability, would not have been shortlisted for interview. On the other hand, the prospective candidate pool would have been restricted.
25

61. When the claimant met with Ms Edwards regarding her contract of employment on 7 December 2019, she asked Ms Edwards to produce her
30 Australian qualifications. When they spoke again on 15 December 2019, Ms Edwards told the claimant that her qualifications had been mislaid in

the course of her move from Australia. The claimant told Ms Edwards that she would have to go through the respondent's usual qualification process. This involved (a) attending a PHECC course as a candidate, (b) being identified as having instructor potential, (c) attending courses as an instructor candidate, (d) being approved as an instructor, and (e) being registered as an instructor with the ALSG.

5

10

62. Ms Edwards took this to Dr Price and Ms MacInnes. Dr Price was of the view that Ms Edwards' qualification was equivalent and that should suffice. He was concerned that to require Ms Edwards to take steps to gain the UK qualification was "*post hoc*", ie being imposed after her appointment. It was not referenced in Ms Edwards' contract of employment which had been prepared by the claimant.

15

63. After the claimant raised the matter with Mr Bywater and Mr Tripp, the respondent made enquiries in January 2020. The result was confirmation that ALSG did not recognise Ms Edwards' PHTLS qualification. It took around 20 minutes to obtain that confirmation.

20

64. In the meantime, it was known that there was a PHECC course scheduled to take place in Arran in January 2020 and there was discussion about whether Ms Edwards would attend this. There was however an issue over availability of accommodation. The claimant emailed Ms MacInnes, copying in Ms Edwards, about this on 19 December 2019 (283-284).

30

65. Ms Edwards then emailed the claimant and Ms MacInnes later on 19 December 2019 (283) in these terms –

"I understand Arran is tricky due to accommodation issues so as much as I would like to attend I understand the decision has been made to take someone else. I think me going through the whole IC etc process is extremely frustrating as I have these qualifications from Australia. I think this makes me quite a bit different from the volunteer instructors. It also was not something that was communicated to me that I would need to do during my hiring process. I really just need to go on a course or 2 as an observer and I think it will be fine. I also have gained quite a bit of knowledge of PHECC since being here so I feel it's all a bit redundant to go through the whole process. If it's an issue then

just leave me on the portfolio and other non PHECC teaching. I'm happy to discuss further. Obviously I won't see either of you until the new year so we can chat then...."

Communication with directors

5 66. Between September and December 2019 (and prior to the events of
18/19 December 2019 referred to below) the claimant had regular contact
with Mr Bywater, Mr Tripp and Mr Pritchard. She told them about the
problems described above. Mr Bywater and Mr Tripp did not understand
the claimant to be raising a grievance. Mr Pritchard said there was "*not a*
10 *formal grievance by letter*". They felt they were being supportive of the
claimant. They did not at the time recognise the extent to which the
claimant was being affected by an accumulation of issues.

Events of 18 December 2019

15 67. The respondent held a PHECC instructors meeting at Sandpiper House.
Dr Price, Ms MacInnes, Ms Sinclair and Ms Edwards were present. The
claimant asked Dr Price to speak to Ms Sinclair following complaints
brought to the claimant by Mrs Falconer. Mrs Falconer was alleging that
Ms Sinclair was not engaging with her and so preventing her from booking
courses. Dr Price did so. Ms MacInnes was present. Ms Sinclair became
20 upset, was unable to continue to participate in the PHECC meeting and
required to go home. Dr Price acknowledged that this was "*not my finest*
hour". He had been angry and frustrated when he spoke to Ms Sinclair.

25 68. Dr Price said that speaking to Ms Sinclair had "*opened a floodgate of*
issues". Ms Sinclair described the system operated by Mrs Falconer as
inefficient and cumbersome and based on a time when the Clinical
Educators spent more time in the office. She said she found Mrs Falconer
resistant to change and obstructive. She felt under stress due to the
amount of time she spent on the road. Dr Price said that "*the penny*
started to drop that it was a complex multifaceted problem".

30 69. After the PHECC meeting Ms MacInnes and Mr Tripp (who had been
attending as an instructor) had a conversation with the claimant. They
discussed ongoing staff issues. Mr Tripp said that they were "*struggling*

to get things sorted out". He said that the claimant "*seemed fine*". The subject of mediation came up and Ms MacInnes indicated that she would look into this. He described the claimant's attitude to mediation as not "*overly enthusiastic*" but that "*she was beginning to see it as an option*".

5 70. During the evening of 18 December 2019 Ms Sinclair copied the claimant into an email saying that she was unwell and would not be at work the following day. Shortly after this Ms Edwards emailed the claimant to say that she would not be at work the following day because she had a container arriving from Australia. Due to the non-availability of the Clinical
10 Educators, a meeting scheduled with the respondent's funders on 19 December 2019 had to be cancelled.

Events of 19 December 2019

71. A conversation took place during the afternoon of 19 December 2019 amongst Mr Tripp, Mr D Currie (another member of the respondent's
15 board) and the claimant. The catalyst for this was Ms Edwards' email of 19 December 2019 (283). The claimant was upset and stressed. She described herself as having a "*meltdown*". She said that she could not take any more. There were complaints every day. There was hostility in the office. She indicated to Mr Tripp and Mr Currie that she was
20 contemplating resignation.

72. Mr Tripp urged the claimant to step back and to wait until after the Christmas/New Year holiday period. He regarded the claimant as a friend and said that it was "*upsetting to listen to a friend in that state*". He said that the claimant was upset at the context and content of Ms Edwards' email. He regarded the email as "*borderline insubordinate*". He described
25 Ms Edwards as having a "*forceful personality*" and being "*quite blunt*".

73. There was an exchange of text messages between Mr Tripp and the claimant on 20 December 2019 (288-289) in which Mr Tripp told the claimant that he –

30 *"Had a long chat with Lorna D last night. She is very keen to help and support us in anyway she can. I think we need to exploit this as much as we can. It will show the staff that we are genuinely trying but also*

might show some that it can be done with a bit of initiative!! Lynne, use and abuse Lorna as much as you need to she is a very positive asset. But also knows what's going on!"

5 74. There was a conflict in the evidence of Mr Tripp and Ms Duff as to how their conversation came about. Mr Tripp said that Ms Duff had called him "out of the blue". Ms Duff said that Mr Tripp had approached her to ask for her perception from the SPT side. I was unable to resolve this, but did not regard it as material.

10 75. The claimant said in evidence that Mr Tripp speaking to Ms Duff "added to my underlying suspicion" and that she did not feel it was "appropriate for him to speak to an external person". However, that was not how the claimant reacted at the time. She responded to Mr Tripp's text (289) "Yeah – she's a wee gem". As there was a close relationship between the respondent and SPT and Ms Duff worked alongside the claimant in Sandpiper House, shared an office with her and attended the respondent's board meetings on behalf of SPT, she was not entirely "external". When 15 the claimant sent her email on 24 September 2019 (242) to advise her colleagues of her becoming interim General Manager, she included Ms Duff as a recipient. The claimant referred to "things going on behind my back" but that was not consistent with Mr Tripp having told the claimant 20 about his conversation with Ms Duff very shortly after that conversation had taken place.

Claimant resigns

25 76. The claimant's first day back at work after the Christmas/New Year holiday period was Tuesday 7 January 2020. She said that when Ms Sinclair arrived at the office, she did not say "good morning". The claimant said that the "hostility was horrible" and that she felt she "could not cope any more". At 11.13am she sent an email (293) attaching a letter (295) to the respondent's directors, copied to Dr Price and Ms MacInnes, in these 30 terms –

"Letter of Resignation

After careful and considered thought, it is with much sadness, I am writing to give notice and tender my resignation from my post at BASICS Scotland.

5 *I have thoroughly enjoyed my time in the 12 years I have worked for BASICS and have huge admiration for the time and effort from our dedicated volunteers in delivering the highest quality of training in pre-hospital care for practitioners in remote and rural Scotland.*

10 *However, given some of the recent changes, I now feel it is time for me to step back and allow new members of staff to take the organisation forward. I feel I can no longer sustain the level of professional and personal commitment which I have previously given to the organisation and recent stress at work has now taken its toll and is affecting my health.*

15 *I will of course work my three months' notice period and will work with the Board to ensure minimum disruption to the organisation.*

I wish BASICS Scotland staff, volunteers and Board Members all the best for the future."

77. Mr Bywater and Mr Tripp were both out of the country at this point. Mr Currie emailed them on 7 January 2020 (296), copied to the rest of the board and Dr Price/Ms MacInnes, suggesting a board meeting. 20 Mr Bywater replied on 8 January 2020 (301) supporting that suggestion, stating "*Happy to meet and discuss with everyone next week*". That reflected the fact that Mr Bywater would not be back in the UK until the following week.

25 78. There was some conflict in the evidence regarding when that board meeting, which took place by conference call on 14 January 2020, was arranged but it was clear that it was no later than 8 January 2020. This was confirmed by an email from Ms MacInnes on that date (298-299) in which she said that she wanted to "*offer my thoughts as I will be unable to* 30 *join the call next Tuesday*".

79. Ms MacInnes spoke with the claimant after becoming aware of her resignation. She formed the view that the claimant did not want to leave. She sent an email to the board (and Dr Price) on 8 January 2020 (298-299, also 307-308) expressing that view, stating "*I don't believe Lynne*

really wants to leave, it's simply that the work environment just now is unhealthy to the extent it is affecting her physical and mental well being that there is simply no other option". She suggested a possible external mediator. She also had a video call with staff in which the claimant did not participate as she was not in the office. I did not agree with the claimant's assertion that she had been marginalised by Ms MacInnes and Dr Price.

5
80. Following her resignation the claimant received supportive messages from a number of the respondent's directors. These included –

10 (a) From Dr McLeod (317) – *"Sorry to hear your decision but more sorry to hear your health may have been affected. Lots of complimentary and encouraging words flying around but obviously not enough actions. Hopefully the Directors can step up a gear and make amends where necessary".*

15 (b) From Mr Tripp (310) – *"Devastated, totally understand and to be frank not a surprise. Your well-being is paramount. I am sorry and think we may not have help[ed] by piling on more and more stuff!"*

Lucy Pearce resigns

20 81. On 9 January 2020 Ms C Hewitt, another of the respondent's board members, emailed Mr Bywater, copied to the other directors and Dr Price/Ms MacInnes, (301-302) to advise that she had received a resignation letter from Ms Pearce. Ms Pearce had only recently joined the respondent and worked in the office with Mrs Falconer. Ms Hewitt told her colleagues that Ms Pearce's reason for leaving was *"work related stress"*.

25 82. Ms MacInnes followed up on this with an email to Ms Hewitt and Mr Bywater, copied to the rest of the board and Dr Price, on 9 January 2020 (310-311) in which she reported on her video call with seven of the respondent's staff that afternoon. Later the same evening Ms MacInnes forwarded to Ms Hewitt an exchange of emails between herself and Ms Pearce (313-316). Ms Pearce referred to *"non communication/rudeness and criticism/unhelpfulness"* within the admin office. She spoke of Mrs Falconer *"withholding vital information"* and said that she felt *"undermined and threatened/borderline bullied"*.

30

83. Mrs Falconer was also finding the office environment stressful. In her evidence she spoke of lack of communication from Ms Sinclair and Ms MacInnes. She had taken her complaints about that to the claimant. She described the office environment towards the end of 2019 as “very
5 *toxic and stressful*”. She said that her coping mechanism was to go “*into myself*” and keep her head down.

Ms Duff offers her thoughts

84. During the evening of Sunday 12 January 2020 Ms Duff emailed Dr Price and Ms MacInnes (334) attaching a document headed “*Observations & Ideas*” (336-337). This was a follow up to a conversation Ms Duff had with
10 Dr Price and Ms MacInnes a few days earlier, after the claimant had submitted her resignation. They had discussed how to move things forward and whether that might involve more support for the claimant.

85. A little later the same evening Ms Duff forwarded her email and attachment
15 to Mr Bywater (334). Her email included –

*“I know this is entirely unsolicited, but I would be cautious about parachuting a new team member in too quickly – RP, Lisa and I batted around ideas for an interim plan, to ensure maximum knowledge transfer, while steadying things temporarily. If they feel any of it is worth
20 mentioning to the board they will.”*

86. The claimant’s view was that Ms Duff’s intervention was confirmation of her suspicion that the Board had been working with Ms Duff behind her back. I did not believe that suspicion was well founded. I was satisfied that the true position was that Ms Duff (a) knew what was going on within
25 the respondent’s organisation, (b) was concerned in view of the close relationship between SPT and the respondent, and (c) was willing to help if she could.

Mr Bywater meets with claimant

87. Mr Bywater spent time at Sandpiper House on 14 January 2020 including
30 a fairly lengthy meeting with the claimant. There was a conflict in their accounts as to whether the claimant had withdrawn her resignation during this meeting.

88. The claimant's evidence was that Mr Bywater had asked her to withdraw her resignation and she had agreed to do so. Under cross-examination, the claimant said that Mr Bywater had asked if she would withdraw her resignation and, if not, would she extend her resignation to give the board
5 time to resolve the issues, to which she said yes. The claimant denied that she had said that she would only withdraw her resignation if everything was resolved to her complete satisfaction. She had referred to working towards a "*workable solution*", that is being able to come to work without needing medication and not going home crying every night. The
10 claimant said that she had raised with Mr Bywater that she felt she was being pushed out so as to bring Ms Duff in, and Mr Bywater had assured her that this was not the case.

89. Mr Bywater's evidence was that he had asked the claimant if there was anything the respondent could do to prevent her resigning, referring to her
15 as a "*valued and respected, long standing member of the team*". The claimant's response had been that she did not want to resign. She had indicated that she was potentially open to further negotiation but there was no clear plan. The claimant did not withdraw her resignation.

90. The meeting with Mr Bywater and the claimant took place not long before
20 the board meeting on the same date. Within the handwritten notes of that meeting Mr Bywater is recorded as making the following statements –

"Biggest challenge is Lynne has resigned" (349)

"LM does not want to leave but feels she has no other alternative.

Unsure if we can make changes to allow her to stay." (352)

25 91. Within the same notes, following a reference by Mr Bywater to "*how to progress the situation*", Mr Tripp is recorded as saying –

"formal announcement to say this is happening and also announce resignation" (355)

92. I considered that these statements by Mr Bywater and Mr Tripp were
30 consistent with the claimant's resignation still being effective, and not consistent with it having been withdrawn. Accordingly, I preferred the evidence of Mr Bywater to that of the claimant as to what was said at their

meeting on 14 January 2020. The claimant was open to further discussion but did not withdraw her resignation.

Board meeting on 14 January 2020

5 93. The respondent's directors met by means of telephone conference on 14 January 2020. Dr Price also participated. Ms MacInnes was invited but did not participate as she has out of the country. There was evidence that it had not been intended to invite Dr Price and Ms MacInnes and to restrict participation to the directors only but in the event no issue was taken regarding Dr Price's participation.

10 94. The respondent's Articles of Association (59-82) contain detailed provisions (at Articles 101 – 115) for "*Procedure at directors' meetings*". These include –

15 *"110 The individual holding the office of Senior Staff shall not be entitled to be a director but (subject to article 111) must be allowed to attend and speak (but not vote) at all board meetings.*

111 The directors shall have the right to require the individual referred to in article 110 to leave the room and refrain from participating in any discussions or decisions relating to his/her remuneration or other terms and conditions of employment, or otherwise connected with his position as an employee of the company."

20

25 95. "Senior Staff" is not defined in the Articles but it was clear from the evidence that this was understood to be a reference to the most senior employee within the organisation. During her period of employment (or at least until going on garden leave) this was the CEO. Thereafter, following her appointment as interim General Manager, it was the claimant.

30 96. In terms of Article 110, the claimant should have been invited to the board meeting on 14 January 2020 but she was not (although she was advised of the meeting by Mr Bywater when they spoke on 14 January 2020). However, in terms of Article 111, if the claimant had participated, she could have been excluded from the meeting while her position as an employee was discussed. As the board meeting on 14 January 2020 related to the

claimant's resignation and matters connected with it, that meant in effect that the claimant could properly have been excluded from the meeting.

5 97. The Articles of Association so far as relating to directors' meetings contained no reference to "*formal*" meetings and provided (at Article 127) that minutes were to be made "*of all proceedings at general meetings, directors' meetings and meetings of committees*". The respondent's directors who gave evidence all accepted that this meant the meeting on 14 January 2020 (and those that followed) were board meetings and required to be minuted, and accordingly the handwritten notes comprised the minutes.

10 98. There was discussion amongst the directors and Dr Price as to how best to take things forward. The agreed outcomes were that –

(a) Mr Bywater and Ms Moggach, another of the directors, would hold individual and group meetings with the staff on 22/23 January 2020.

15 (b) The board would meet again on 22 January 2020 (with Mr Pritchard taking the minutes).

99. It was noted in the minutes on the meeting on 14 January 2020 that Mrs Falconer had handed in her notice, or was planning to do so the following day. Mrs Falconer gave notice of her resignation on 15 January 2020.

20 ***Staff meetings***

100. Mr Bywater and Ms Moggach held a group meeting with the respondent's staff (with the exceptions of Dr Price and Mr Young) on 22 January 2020. Mr Bywater's description of this was that "*the staff did not engage greatly*". There was "*a lot of silence*" despite prompting by Mr Bywater and Ms Moggach. There was a suggestion by Ms Edwards that the Board was "*untrustworthy*" and she "*walked out in a rude and unprofessional manner*" (according to Mr Bywater's subsequent report to the board). Mr Bywater said that he felt "*exhausted, frustrated and exasperated*" after the meeting.

25 101. Mr Bywater and Ms Moggach conducted individual meetings on 30 23 January 2020. These were restricted due to staff work commitments. Mr Bywater's evidence was that "*very little came out of that day*".

102. The work commitments were RCS examinations in Edinburgh and the PHECC course in Arran. There was evidence about (a) the Clinical Educators' unwillingness to participate at the RCS examinations, (b) Ms Edwards having an issue about travelling to those examinations with Mr Young, evidently as a result of issues which Ms Sinclair had with Mr Young relating to the previous RCS examination diet, (c) whether and, if so, in what capacity Ms Edwards should attend the Arran course and (d) the travel arrangements for those travelling to Arran. I do not believe it is necessary to go into the detail of these matters beyond recording that they provided further insight into the state of dysfunction within the respondent's organisation, and contributed to the stress felt by the claimant.

Board meeting on 22 January 2020

103. There was a board meeting conducted by telephone conference on 22 January 2020. The purpose was for Mr Bywater and Ms Moggach to provide a report on their meeting with the staff. Mr Pritchard who had been tasked with taking the minutes was unable to attend due to work commitments. No notes of this meeting were taken. Mr Bywater accepted that there should have been minutes prepared. As "*Senior Staff*" the claimant should have been invited but was not.

104. Ms MacInnes said that Mr Bywater had cancelled the board meeting scheduled for 22 January 2020 following the meeting with staff on that date. If that was her recollection, she was incorrect.

SBAR

105. Following their meetings with the staff on 22/23 January 2020 Mr Bywater and Ms Moggach prepared an SBAR (Situation, Background, Assessment, Recommendation) report. The purpose was to inform the board of the outcome of the staff meetings. The assessment section concluded as follows –

"Currently and objectively it is apparent that the sandpiper house staff are non-functioning as a team, hostile and broken."

106. The recommendation section included a proposal for the board to review all currently planned activity with a view to facilitating *“a realistic service delivery plan, given the resources available”*. There was a recommendation that *“Clear definition of the organisational management structure requires to be understood and adhered to by all”*. Also recommended were *“Frank communication with all members of the team”*, *“employing external support”* and *“bringing in external mediation”*.

107. The SBAR report was sent to the board members (but not Dr Price and Ms MacInnes) in advance of the board meeting on 28 January 2020.

Board meeting on 28 January 2020

108. There was a further board meeting held by telephone conference on 28 January 2020. Again there was evidence that it was not intended to invite Dr Price and Ms MacInnes, but they did join the call and no issue was taken with that. The claimant should have been invited, but was not.

109. Handwritten notes were taken (379-395). Mr Bywater reported on the discussions which he and Ms Moggach had with staff on 22/23 January 2020. He was recorded as describing the *“current position”* in these terms -

“need to decide what to do about 3 resignations which as far as we are concerned still stands – need to discuss advertisements”.

110. There was some discussion about contract issues which Mr Tripp described as an accumulation of small aspects. This reflected inconsistencies between job descriptions and contracts of employment and in respect of line management responsibilities. There was also discussion about how communication with the respondent’s funders and stakeholders should be handled.

111. The notes recorded (at 394) a number of agreed actions. These comprised –

(1) Drafting a letter to NES.

(2) Informing staff of the plan for external mediation.

(3) Asking the claimant, Mrs Falconer and Ms Pearce if they would be willing to extend their periods of notice pending mediation.

(4) Offering Ms Duff one day per week – this task was assigned to Dr Price with the stipulation that he should discuss it with the claimant before making an offer to Ms Duff.

5

Dr Price speaks to claimant

112. As Dr Price was to be in the office the following day, he was tasked with (a) speaking with those who had resigned about extending their notice periods, (b) telling the staff about the plan for external mediation, and (c) speaking with the claimant and then Ms Duff about the latter working one day per week.

10

113. Dr Price duly spoke with the staff on 29 January 2020, including the claimant. There was some conflict between the evidence of Dr Price and that of the claimant about their meeting. Dr Price said that the claimant rejected the concept of external mediation (and was the only employee to do so). She said more than once “*You need to fix the problem*”. She did not specify what she expected the respondent to do but nodded in the direction of the Clinical Educators’ office.

15

114. According to Dr Price the claimant seemed supportive of Ms Duff coming in, but for what he described as the wrong reason. He said that the claimant’s general approach was that Ms Duff would provide continuity for when she left. He denied that the claimant had suggested that Mr Stewart and/or Mrs Falconer could be utilised as they understood her role.

20

115. The claimant’s evidence about her meeting with Dr Price was that he told her it had been agreed by the board that Ms Duff would be brought in on a consultancy basis to do the claimant’s job one day per week. The claimant told Dr Price that Ms Duff did not know her (the claimant’s) job. She suggested it should be Mr Stewart who assisted, and said that Mrs Falconer knew more about the finance side. The claimant said that Dr Price had told her that it was a board decision and that it was final. She denied that she had agreed to the proposal to bring Ms Duff in.

25

30

116. Ms Duff then joined the meeting. Dr Price's evidence was that salary had been discussed at the board meeting on 28 January 2020 and the conclusion was that Ms Duff should be employed (rather than seconded or subcontracted from SPT) with parity to the claimant's salary. That was not borne out by the notes of the board meeting. According to Dr Price, the claimant said that Ms Duff should not be on the same incremental point of Band 8A as herself, and he left that for the claimant and Ms Duff to negotiate.

117. Dr Price agreed that the claimant had been upset at their meeting but described it as "*cordial and professional*". Ms Duff described the claimant as "*very upset*". She had been unhappy about Ms Duff having "*Deputy*" in her job title. Ms Duff's view was that the claimant had made up her mind that resignation was the right thing for her to do. She recalled that the claimant had said "*People need to understand that I'm leaving*".

118. It was not surprising that the claimant and Dr Price had different recollections and perceptions of a meeting which took place more than a year ago and at which no notes were taken. However, Dr Price sent an email to the board during the evening of 29 January 2020 (399) reporting on the day's events in which he stated –

"Lorna and Lynne are both in agreement about Lorna taking on a day per week with a view to providing resilience and offloading Lynne and potentially allowing some continuity should Lynne leave at the end of her current notice. As this work equates to that of Lynne's it will be at entry point 8A (thus no seniority increment) for one day per week. With employers contributions this is £10725/year. I have suggested that we set this up as a 6 month temporary contract. I have subsequently discussed this with JP as treasurer and he is in agreement. Lynne will further the contract issues from here."

119. I was satisfied that Dr Price's email was an accurate summary of what had been discussed at his meeting with the claimant, and then with the claimant and Ms Duff, on 29 January 2020. I did not believe that Dr Price had told the claimant that the board's decision to bring in Ms Duff was "*final*" but it was credible that the claimant should have that impression. I

considered that Dr Price had probably underestimated the extent to which the claimant was upset at their meeting, but not incorrect when telling the board that she had agreed to Ms Duff being brought in.

Claimant consults her GP

5 120. On or around 3 February 2020 the claimant consulted her GP and commenced a period of medically certified absence which continued until her notice expired. This was described in her GP's letter of 31 December 2020 (at 594) as "*significant work-related stress which was causing anxiety, chest pain and disturbed sleep. She was distraught at the*
10 *prospect of returning to work, feeling guilty about being off, but also having fast, regular palpitations, constant anxiety and was tremulous*".

121. Mr Malpass emailed the respondent's directors on 3 February 2020 (406) requesting that future contact be through himself. He attached the claimant's letter to the board of the same date (407-408) which was in
15 these terms –

"Following on from events of last week, I feel I have to reiterate the complaints previously raised which have not been resolved and has led to further complaints on how this matter has been handled.

After months of difficulties which were raised with both senior members of staff and the board, I discussed that it was affecting my health and I would be left with no choice but to tender my resignation. I was assured that the board would act on my complaints.

On returning after Christmas break, there was no update on the situation and as the working environment was causing severe stress, I was left with no alternative but to reluctantly tender my resignation.

I was contacted by various board members and asked if I would consider withdrawing my resignation if they could resolve the underlying issues that are affecting my health. I verbally agreed to this as the board advised that they planned to hold a telephone meeting with board members and would get back to me with the outcome of issues raised.

On returning to work the following week, I was informed that it had been agreed that two members of the board would hold a staff meeting

with everyone present and thereafter conduct one to one meetings with individuals. Once all these meetings had taken place, they would hold a further telephone meeting with the board of directors and reach agreement on recommendations.

5 *Whilst in the office last week, Richard Price approached me and requested to meet with me. During this meeting he informed me that he had been tasked to update me with actions from a board meeting which had taken place the previous night. There are several points of this meeting that have caused me further stress resulting in me being*
10 *signed off unfit for work by my Doctor. I would like to raise the following at this time:-*

1. *I was informed this would be a meeting of board of directors, however, Richard informed me that himself and Lisa McInnes have been present at all these meetings. Why were they present*
15 *and other members of staff were not?*
2. *Were these meetings minuted with a clear record of how these decisions were reached?*
3. *I was advised that the decision had been made to employ Lorna Duff, Sandpiper Trust on a temporary 6 month contract on the*
20 *same salary scale as me in role as Deputy General Manager. I have previously expressed that my backlog of work was due to taking over the CEO's work streams, as well as continuing with my own workload and that as a result of spending most of my week in meetings to resolve issues with the admin and clinical team, I was*
25 *finding it difficult to get time to complete my workload. Both the admin and clinical educators expressed that they had too much work to cope with. Why was the decision made to bring in help for my role without consulting me, yet the members of staff who have clearly stated they have too much work have not been offered the*
30 *critical support needed by bringing additional admin/clinical staff to help them?*

I feel I have been marginalised by the actions, and inaction, of the board and clinical members of staff.

35 *The failure to address these problems has made my position untenable as lack of support has led to ill health, there has been failure to address the hostile conduct within the work environment and as I*

cannot see how the situation will change, it is the “last straw” in my ability to cope.

5 *Board members are fully aware that I have been left with no other option but to resign and leave a job and organisation which I did not want to walk away from and have been fully committed to as a loyal employee for over 12 years.*

I would appreciate if the above points could be answered, however, given my current ill health, all emails and contact should be directed through my husband, John.”

10 122. On 14 February 2020 Mr Malpass emailed Mr Bywater (410-411) with an extensive list of matters requiring the respondent’s attention. This could only have been provided by the claimant and was reflective of her commitment to the respondent.

Mr Bywater responds

15 123. On 15 February 2020 Mr Bywater replied to the claimant’s letter of 3 February 2020 (413-414). He answered her three numbered paragraphs as follows –

20 1. *The intention of the evening meeting was for the board of directors to discuss the contents of an SBAR report which had been drafted following the 2 days of discussion with staff members regarding the ongoing challenges within Sandpiper House. An administration error lead to the Clinical Director – Richard Price and Director of Education - Lisa MacInnes being invited. That was not intentional, nor was it intended that the meeting be one at which staff would be invited. As I*

25 *am sure you will understand the SBAR report required consideration by the Board to determine what further action would be required to address the current situation in the organisation.*

2. *No formal minutes were recorded. However, individuals took notes and action points.*

30 3. *The offer of support which we had received from Lorna Duff was deemed sensible to accept given current workloads. Richard Price, as clinical director was asked to discuss this with her as he would be in the office the next day. I can advise that no discussion or decision*

5 was made regarding remuneration (sic) or job title. It was agreed to ask Lorna Duff to assist with the general work of BASICS Scotland wherever it was required or needed across the organisation. We felt that your workload distribution was the priority to relieve the workload pressure on you given your assumption of some of the work streams of the former Chief Executive. During the discussion with Lorna Duff and yourself, it was suggested that if she filled any General Manager level duties, as opposed to general admin, then she could potentially be remunerated at the appropriate level. However, this would require further discussion regarding the affordability & costs involved to BASICS Scotland.

10 124. Mr Bywater concluded his reply in these terms –

15 “I am conscious that your letter does raise concerns, which I have tried to address, but which could amount to a grievance. To ensure that we follow the correct procedure I would be grateful if you could advise whether by your letter you are intending to raise a formal grievance. At this stage I haven’t treated it as such as you have not mentioned raising a grievance, but it would be remiss of me not to check if that was your intention. If so then we will need to consider who it would be appropriate to deal with it.”

20 125. The claimant did not respond to Mr Bywater’s letter.

25 126. Following expiry of the claimant’s period of notice, Mr Tripp wrote to her on behalf of the board (418) expressing in fulsome terms the respondent’s appreciation. Mr Tripp referred to the claimant’s “*professional, tenacious, enthusiastic attitude and support for BASICS Scotland*” and thanked her for her “*commitment and dedication*”. I was in no doubt that those sentiments were genuine and well deserved.

Comments on evidence

30 127. All of the witnesses were credible in the sense that they gave their evidence to the best of their recollection. There were differences in recollection and perception but these did not render any of the witnesses unreliable. Where I have preferred the evidence of one witness over

another, it was because the documents pointed in a particular direction or because the version I favoured seemed the more probable.

128. It will be apparent to the parties that I have not made reference to some of the evidence presented, nor covered some aspects in as much detail as was provided by the witnesses. I have done that on the basis of proportionality – the overriding objective in Rule 2 of the Tribunal Rules to deal with cases “*fairly and justly*” includes “*dealing with cases in ways which are proportionate to the complexity and importance of the issues*”.

Submissions by Mr Malpass

129. Mr Malpass submitted that the respondent’s directors had supervised circumstances in which a serious breakdown in trust and confidence had occurred such as to allow the claimant to treat herself as constructively dismissed. The directors knew that the claimant’s working environment had become toxic but failed to act on that knowledge. They allowed what they saw as minor issues to build up and become more serious. This was, Mr Malpass argued, a repetition of their failure to step in and address the staff complaints about the CEO.

130. Issues within the contracts of employment of the Clinical Educators and the Director of Education regarding line management responsibilities were not the claimant’s fault. She prepared the contracts based on instructions from those on the interview panel.

131. The respondent failed to provide the claimant with support and guidance. They failed to inform the staff about the claimant’s role as interim General Manager. That left the claimant, Dr Price and Ms MacInnes, and the staff unclear about her role. The staff sub-group (including Mr Bywater, Mr Tripp and Mr Pritchard) had decision making powers on staffing matters and had a duty to act on the information brought to them by the claimant, but failed to do so.

132. Adding to the pressure on the claimant was the fact that neither of the Clinical Educators was, when recruited, suitably qualified to undertake teaching on the PHECC courses. It was a simple task to check whether Ms Edwards’ Australian qualification was acceptable to ALSG and, if it had

been done at the time of recruitment, might have prevented her leaving Australia to take up a job for which she was not qualified.

- 5 133. Mr Malpass submitted that the difficulty over Ms Sinclair's pension contributions led to uncooperative and obstructive behaviour on her part and hostility towards the claimant. She lied to the claimant. The claimant reported this to Ms MacInnes. This was in line with the respondent's disciplinary procedure. The Board should have ensured this was dealt with as the claimant could not sit in judgment on a complaint which she herself had made. Mr Malpass was critical of Mr Tripp's statements in evidence that the problems were the claimant's to solve as General Manager and that he expected the claimant to come to him with solutions.
- 10 134. Mr Malpass argued that Ms MacInnes had demonstrated bias against the respondent's more established staff. This was evident from the handling of Ms Pearce's complaint about Mrs Falconer. Board members had formed a view about Mrs Falconer's alleged behaviour without giving her an opportunity to respond. There was a theme – complaints were made, not dealt with and the people complained about were not notified.
- 15 135. Mr Malpass submitted that Ms Edwards' email of 19 December 2019 had been the last straw for the claimant. Mr Tripp had described this as "*borderline insubordinate*". Mr Malpass said it was not credible that Mr Tripp would not have told Mr Bywater and Mr Pritchard about his meeting with the claimant on 19 December 2019. Mr Malpass argued that, having resigned on her first day back at work on 7 January 2020, the claimant had not waited too long before doing so.
- 20 136. Mr Malpass argued that the claimant had withdrawn her resignation, or at least put it "*on hold*", during her conversation with Mr Bywater on 14 January 2020. This was confirmed by Mr Bywater's text message to the claimant on 21 January 2020 (328) where he stated (in the context of the travel arrangements to Arran) "*Lynne you are still the BOSS, so let them know that*". If however I found that the claimant had not withdrawn her resignation, Mr Malpass argued that there was enough in the respondent's conduct prior to that date to amount to a complete breakdown of trust and confidence.
- 25 30

137. If I found that the claimant had withdrawn her resignation, Mr Malpass argued that the continuing conduct of the respondent after 14 January 2020 demonstrated a further total breakdown in trust and confidence. Mr Malpass referred to the claimant not being invited to board meetings and Dr Price and Ms MacInnes being allowed to participate as evidence of the claimant being marginalised by the respondent. By the time she submitted her letter of 3 February 2020, the claimant was showing severe signs of stress and anxiety such as to render her unfit for work.
138. Mr Malpass argued that Mr Bywater's reply to the claimant of 15 February 2020 was a clear misrepresentation of the facts. It was apparent from the minutes that Dr Price had not relayed the board's position correctly when he spoke to the claimant on 29 January 2020. The claimant could have no confidence that any grievance would be properly addressed.
139. Mr Malpass invited me to find that the respondent had, by their actions and inactions, failed to support the claimant between September and December 2019. They failed to give clear written guidance to the claimant and the staff following her appointment as interim General Manager. They failed to deal with the claimant's complaints. There had been an accumulation of issues leading to the last straw moment on 19 December 2019.
140. Mr Malpass referred to the case of ***Fletcher v Countrywide Estate Agents 3400899/2016*** where there was a finding of constructive unfair dismissal in circumstances not dissimilar to the present case.

Submissions by Mrs McClelland

141. Mrs McClelland reminded me that for a claim of constructive unfair dismissal to succeed there must be a repudiatory breach of contract by the employer. Unreasonable conduct was not enough.
142. Mrs McClelland referred to ***London Borough of Waltham Forest v Omilaju [2005] ICR 481*** and ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** in the context of there being a final straw in response to which an employee resigns. The final straw cannot be trivial

or entirely innocuous. The approach the Tribunal should take in a final straw case was set out in **Kaur** (per Underhill LJ at paragraph 55) –

- (i) 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?
- 5 (ii) Has he or she affirmed the contract since that act?
- (iii) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (iv) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and
10 omissions which, viewed cumulatively, amounted to a repudiatory breach of the **Malik** term?
- (v) Did the employee resign in response (or partly in response) to that breach?

143. Mrs McClelland said that the respondent did not dispute that 2019 had
15 been a difficult year. Dr Laird had retired. The decision was made to appoint a CEO. Dr Ben Price departed. Both of the then Clinical Educators left. The CEO appointment did not go as hoped. Staff felt micro-managed. The claimant submitted a list of concerns (which showed, Mrs McClelland argued, that the claimant was not afraid to put
20 her concerns in writing).

144. There were issues following the appointment of Ms Sinclair and Ms Edwards. The former took over the workload of the previous two Clinical Educators. None of the volunteer instructors applied for the position which meant that none of the candidates had qualified instructor
25 status. It was however not uncommon that a new start should need training. The fact that both of the new Clinical Educators lacked experience and qualifications when first appointed was not a failing on the part of the respondent.

145. Mrs McClelland acknowledged that the CEO's probationary review was
30 delayed but argued that this was not material, and not uncommon. The claimant, Mrs Falconer and Mr Stewart went off sick, leading the board to believe that the position was not recoverable. The board then took

decisive action, showing their willingness to do so when circumstances required it.

146. It had not been unreasonable that the respondent decided not to parachute someone else in. That risked doing more harm than good. It had been reasonable for the respondent to hold discussions with the claimant. She was a passionate and committed employee. She had not been pressurised into accepting the position of interim General Manager.

147. Mrs McClelland accepted that the claimant had not been provided with an updated job description. However, the claimant was well versed in job descriptions and contracts of employment. She had been involved in the preparation of her own job description in 2018. She bore some responsibility for not updating that job description when she became interim General Manager.

148. Mrs McClelland accepted that it would have been helpful if the board had said something to the staff when the claimant became interim General Manager. That could have clarified the understanding (both of the claimant and the staff) of line management responsibilities. Mrs McClelland also accepted that there were contradictions in the job descriptions and contracts of employment documentation but suggested that the claimant might have understated her involvement in that process.

149. On the issue of whether the respondent should have understood the complaints brought to directors by the claimant as grievances, Mrs McClelland argued that there had been a blurring of the lines. Had the claimant been speaking to them as directors or as friends? The claimant had not said "*Enough is enough and I want you to do something about it*". The directors had tried to offer support and advice but there was no indication of what practical support the claimant was looking for.

150. The difficulty which Mrs Falconer was having in terms of getting information from Ms Sinclair was addressed. Ms MacInnes recognised that there was a communication problem and tried to assist by introducing the action tracker and holding meetings in November 2019. Dr Price spoke to Ms Sinclair on 18 December 2019 when the claimant asked him to do so.

151. Mrs McClelland disagreed with Mr Malpass' assertion that the respondent should have investigated all of the matters which arose. The problem was dysfunction within the team and would not necessarily have been addressed by investigation of individual complaints.
- 5 152. Mrs McClelland submitted that Ms Edwards' email of 19 December 2019 should not be regarded as a final straw. Ms Edwards was not refusing to go through the training. She was making the reasonable point that the need to do so was not raised at the time of her appointment, stating that she could be left on non-PHECC work and indicating a willingness to discuss matters.
- 10 153. When Ms Pearce described herself as "*borderline bullied*" by Mrs Falconer, it was not unreasonable for the respondent to treat this as one more matter that would need to be looked at in the context of what was going on in the office.
- 15 154. Mrs McClelland argued that there was no evidence of discussions going on behind the claimant's back to have Ms Duff come in. Ms Duff was in a position to observe events and offered to help. The question of who initiated her conversation with Mr Tripp on 19 December 2019 was not material.
- 20 155. Mrs McClelland acknowledged that the respondent had not considered the "*Senior Staff*" point when arranging the board meetings in January 2020. However, the claimant had been aware that a board meeting was taking place on 14 January 2020. If she felt she had a right to attend, she could have said so. In any event, in terms of Article 111, she could have been asked to leave while matters connected with her own employment were discussed. There was no fundamental breach of contract.
- 25 156. In respect of the difference between what was discussed at the board meeting on 28 January 2020 and what Dr Price told the claimant when they met on 29 January 2020, Mrs McClelland observed that Dr Price's recollection was that there had been discussion of the salary to be offered to Ms Duff at the board meeting and, while Mr Bywater, Mr Tripp and Mr Pritchard did not recall this, it had been a lengthy meeting and some of the detail might have been lost. Mrs McClelland argued that I should
- 30

accept Dr Price's evidence that he had not presented the offer to Ms Duff as a *fait accompli* when speaking to the claimant.

157. Mrs McClelland said that the board minutes of 14 January 2020 and 28 January 2020 reflected the board's understanding that the claimant had not withdrawn her resignation. It followed that 7 January 2020 was the date of her resignation and nothing occurring thereafter could amount to a final straw. If I found that the claimant had withdrawn her resignation, I should not regard the meeting between Dr Price and the claimant on 29 January 2020 as a final straw event.
158. Mrs McClelland invited me to find that the respondent's board and Dr Price/Ms MacInnes had given the claimant extensive support between September and December 2019. The fact that the claimant remained unhappy was indicative of the complexity of the situation. The directors had attempted internal mediation and were looking at external mediation.
159. In relation to the unlawful deduction of wages claim, Mrs McClelland argued that no salary figure for the claimant's role of interim General Manager had been agreed. It followed that there could be no unlawful deduction. Mrs McClelland did not accept that there could be an implied term in the claimant's contract of employment that her salary should be increased to not less than £40,000 per year in line with what the CEO had been paid. In any event, much of what was allocated to the CEO had previously been done by the claimant herself.

Discussion

160. I reminded myself of what the Court of Appeal said in ***Omilaju*** (per Dyson LJ at paragraph 14) –

"1) The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating....

2) It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between

employer and employee: see, for example, Malik....I shall refer to this as “the implied term of trust and confidence”.

5 3) *Any breach of the implied term of trust and confidence will amount to a repudiation of the contract – see, for example, per Browne-Wilkinson J in Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated to **destroy or seriously damage** the relationship (emphasis added).*

10 4) *The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must “impinge on the relationship in the sense that, looked at **objectively**, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer” (emphasis added)*

15 5) *A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law –*

20 *[480] 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*

25 *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.”*

30 161. I also reminded myself of what Underhill LJ said in **Kaur** – see paragraph 142 above.

162. In a constructive dismissal case it is the conduct of the employer which comes under scrutiny. It must be conduct in response to which the employee is entitled to terminate the contract without notice, irrespective

of whether the employee actually does so when he/she leaves (ie whether the employee leaves immediately or after a period of notice). That was what Lord Denning said in ***Western Excavating*** –

5 “...the conduct must in either case be sufficiently serious to entitle him to leave at once.”

Employer’s conduct

163. That the claimant felt increasingly upset about what she perceived to be a lack of support from the respondent’s board as matters unfolded was clear. However, it was not the degree of upset upon which I had to focus but rather the nature of the respondent’s conduct. The question was whether that conduct, viewed objectively, was of a character – “sufficiently serious” – to entitle the claimant to leave without notice.

164. As recorded above (see paragraphs 87-92), I found that the claimant resigned on 7 January 2020 and did not withdraw that resignation. That meant that I had to look at the respondent’s conduct in the period before, rather than after, the claimant’s resignation.

165. I considered that the starting point for this enquiry was the claimant’s appointment as interim General Manager on 19 September 2019. There were issues arising before this, relating to the relationship between the CEO and the staff, but these were dealt with by the respondent. They acted on the areas of staff concern collated by the claimant in the list of bullet points (209) she emailed to Mr Bywater on 1 August 2019. They conducted the 360 review and brought the CEO’s tenure to an end.

166. While some of the issues with which the claimant was subsequently confronted were already festering prior to her appointment as interim General Manager, the issue of board “support and guidance” for the claimant (to quote Mr Malpass) did not arise until after that appointment. I therefore concentrated on the sequence of events between 19 September 2019 and 7 January 2020. I looked at the acts or omissions of the respondent with a view to determining whether, individually or cumulatively, they amounted to a repudiatory breach of the claimant’s contract of employment.

167. Matters got off to an inauspicious start. The board should have announced the claimant's appointment rather than leaving the claimant to do this herself. That would have been an opportunity to make clear the extent to which the claimant was taking over the CEO's duties, and that she was now "*Senior Staff*" to use the language of the Articles. It might have avoided issues relating to line management responsibility for the Clinical Educators.
168. The position might have been clarified if the claimant had been provided with an updated job description and an amendment to her contract of employment. There was a statutory obligation on the respondent (in terms of section 4(1) ERA) to give the claimant a written statement containing particulars of any change to those matters, particulars of which required to be included or referred to in the statement of initial employment particulars given under sections 1-3 ERA. Those particulars included job title and, where the employment was not intended to be permanent, the period for which it was expected to continue.
169. However, it was not in my view a repudiatory breach of contract by the respondent for the board to fail to announce the claimant's appointment, nor to fail to give the claimant a written statement complying with section 4(1) ERA. If the CEO had still been in post, the board might reasonably have expected her to announce to staff a change in the claimant's position within the organisation. Given that the claimant had taken over most of the CEO's duties, it was not wholly unreasonable to leave her to make the announcement. Similarly, the board might reasonably have expected the claimant to update her own contract and job description.
170. Thereafter a series of issues landed on the claimant's desk. There were tensions between Ms Sinclair and some of her colleagues – Mrs Falconer, Mr Stewart and Mr Young. Ms Sinclair became the only Clinical Educator following a brief period of handover from Mr McLean. She was busy with delivery of courses. Mrs Falconer and Mr Stewart perceived that she was not cooperating in areas that were important to their work. She did not adhere to Mr Young's standards of van management.

171. The issue regarding Ms Sinclair's involvement with Mountain Rescue arose. This was the claimant "*looking out*" for the respondent's interests when she observed Ms Sinclair appearing to be tired at work and suspected misappropriation of some of the respondent's materials.
- 5 172. There was also the issue around the level of pension contributions for Ms Sinclair. The claimant was troubled by Ms Sinclair's behaviour over this. She (the claimant) was aware that Ms Sinclair had accepted her appointment on the basis of there being a 5% employer pension contribution. She believed that Ms Sinclair was untruthful when the matter
10 was discussed between them.
173. The involvement of Ms MacInnes and Mr Tripp in this issue was well intentioned. There was a genuine concern that for the respondent to be able to attract staff from the NHS (particularly to fill the Clinical Educator role where an NHS background was likely to be relevant) it would be a
15 disadvantage if the respondent's pension terms were significantly inferior to those offered by the NHS. However, this contributed to the issue dragging on. Matters were not helped by Ms Sinclair's delay in signing her contract.
174. The claimant involved herself in the effort, initiated by Ms MacInnes with
20 the action tracker, to address the difficulty between Mrs Falconer and Ms Sinclair. Mrs Falconer said in her evidence that this "*had helped to highlight issues but did not solve the problem*". Ms Sinclair's negative views of Mrs Falconer and her system were laid bare when she spoke to Dr Price and Ms MacInnes on 18 December 2019.
- 25 175. When Ms Edwards took up her Clinical Educator appointment at the beginning of December 2019, it might reasonably have been anticipated that things would get better. The team of Clinical Educators was back to full strength. The workload of course delivery would be shared and there should be more time to provide the information Mrs Falconer required to
30 book courses. Unfortunately, instead of getting better, things got worse.
176. The issue arose of Ms Edwards' Australian qualification and whether she needed to go through the respondent's usual qualification process. The seed of this problem was sewn when the CEO did not implement

Mr Bywater's request to change certain criteria from "*desirable*" to "*essential*" (see paragraph 60 above). Ms Edwards was offered employment without any check being carried out (a short and simple process as it transpired) to establish whether her Australian qualification would suffice.

5

177. The matter was not addressed in Ms Edwards' contract of employment which was prepared by the claimant. This was not the claimant's fault. The CEO was in post at the time of Ms Edwards' appointment and it would have been for her to instruct the claimant to incorporate a reference to the qualification point into the contract, if thought necessary. The claimant was entitled to assume that Ms Edwards would need to go through the respondent's usual qualification process and that was what she told Ms Edwards on 15 December 2019.

10

178. When Ms Edwards took the matter to Dr Price, he recognised the problem the respondent had created for itself (reflected in his use of the phrase "*post hoc*"). He had some personal knowledge of the Australian qualification and thought it should suffice. While I did not doubt that he was acting in good faith, I believed that the claimant saw this as Dr Price taking Ms Edwards' side against her. This was in my view a factor behind the claimant's negative reaction to Ms Edwards' email of 19 December 2019.

15

20

179. As the claimant was contending with these issues, she was in regular contact with Mr Bywater, Mr Tripp and Mr Pritchard. In the context of her constructive dismissal claim she sought to characterise that contact as her bringing complaints to the directors and the directors failing to act on those complaints. She regarded this as a lack of "*support and guidance*" which, Mr Malpass argued, amounted to a breach of the implied term of trust and confidence.

25

180. I had considerable sympathy for the claimant. She was a loyal and committed employee. She believed in the work which the respondent does. When asked to step up after the CEO was placed on garden leave, she agreed to do so. Her first thought was not to negotiate an enhanced

30

remuneration package but to help the respondent at a time of difficulty when the appointment of the CEO had not worked out.

181. The claimant's task was not helped by staff behaviour which might fairly be described as sub-optimal. The organisation became increasingly dysfunctional. The extent of that dysfunction did not become clear to the directors until the efforts of Mr Bywater and Ms Moggach to resolve matters internally on 22/23 January 2020.
182. The question I had to decide was whether the respondent, by its acts or omissions, was in breach of the implied term of trust and confidence. In effect that meant I had to consider what Mr Bywater, Mr Tripp and Mr Pritchard (as they were the ones having contact with the claimant) had done or failed to do.
183. I considered that the claimant took work related concerns to Mr Bywater, Mr Tripp and Mr Pritchard because she wanted them to be aware of what was happening within the organisation and because she wanted to use them as a sounding board. I agreed with Mrs McClelland that there was a "*blurring of the lines*" as to whether the claimant was speaking to them as directors or as friends.
184. I did not consider that, at the time the claimant took work related concerns to Mr Bywater, Mr Tripp and Mr Pritchard between September and December 2019, she was escalating those concerns to the directors with an expectation that they would become involved. She was reporting complaints amongst the respondent's staff and complaints of her own about the Clinical Educators. She was not raising grievances.
185. The respondent's grievance procedure (see paragraph 28 above) was unhelpful as it had not been updated since Dr Laird retired as Medical Director. The process of taking matters to the Medical Director in the first instance and, if not resolved at that stage, to the Chairman was no longer apposite. Notwithstanding that, I believed that if the claimant had intended her concerns to be treated as grievances, she would have said so. I did not understand the claimant, when speaking to the directors, to have differentiated between matters which were the concerns of others and those which were her own concerns.

186. Accordingly, when viewed individually, I did not find that there had been any act or omission of the respondent prior to 19 December 2019 which amounted to a repudiatory breach of contract. The respondent did nothing
5 “*calculated to destroy or seriously damage*” the relationship of trust and confidence between them and the claimant.

Last straw

187. That brought me to the question of whether there had been a “*last straw*” event which, when viewed either in isolation or cumulatively with what had gone before, had entitled the claimant to resign and treat herself as
10 constructively dismissed. The relevant event in this case was Ms Edwards’ email of 19 December 2019. The respondent as employer was vicariously liable for the actions of Ms Edwards and so her email had the potential to be a “*last straw*” event.

188. As viewed subjectively by the claimant I could accept that this was the
15 final straw. The burden of the various issues described above was weighing heavily on her. Her health was suffering. She described having a “*meltdown*” when she spoke with Mr Bywater and Mr Currie on 19 December 2019.

189. However, per **Malik**, the issue was whether the conduct relied on, looked
20 at objectively, was likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his/her employer. On this point, I agreed with Mrs McClelland. Ms Edwards was not refusing to go through the training. She was questioning the need for it. It had not been raised at interview nor at the time of her appointment.
25 It was being imposed on her, as Dr Price put it, “*post hoc*”.

190. It seemed to me that, while the claimant was correct about the need for
Ms Edwards to go through the usual qualification process, it was not
unreasonable for Ms Edwards to challenge this. Her last words on the
subject, in terms of her email of 19 December 2019, were “*I’m happy to*
30 *discuss further*”. Viewed objectively, this could not be said to destroy or seriously damage the claimant’s trust and confidence in the respondent.

191. As Underhill LJ said in *Kaur* (at paragraph 45) a final straw event can either revive earlier breaches by the employer (in response to which the employee had affirmed the contract by soldiering on) or push matters over the *Malik* threshold. In the present case (a) there were no earlier repudiatory breaches to be revived, and (b) the email of 19 December 2019 did not, when looked at objectively, add anything to the burden on the camel's back (to quote the idiom). I do appreciate this is not how it was perceived by the claimant but that serves to illustrate the difference between the subjective and the objective view.

10 ***Decision to resign***

192. The claimant made comment in her evidence about nothing having happened over the Christmas and New Year period, following the events of 19 December 2019, before she returned to work on 7 January 2020. However, it was in my view unrealistic for her to expect that anything much would happen during the holiday period.

193. The one thing that did happen was Mr Tripp telling the claimant about his conversation with Ms Duff. The claimant came to view this as a negative, as evidence of a plot to have Ms Duff replace her. However I was satisfied that this was incorrect. Although Ms Duff did in fact become the respondent's General Manager, that was not in contemplation as at 20 December 2019 when Mr Tripp spoke with the claimant. The claimant's reaction at the time – “*Yeah - she's a wee gem*” – was positive. Accordingly I found there was no act or omission of the respondent between 19 December 2019 and the claimant returning to work on 7 January 2020 which changed the background against which the claimant decided to resign.

194. The claimant made reference to Ms Sinclair not saying “*good morning*” and to an atmosphere of “*hostility*” when she returned to work. I did not believe that these matters contributed in any material way to her decision to resign. Her letter of resignation was expressed in measured terms. She referred to “*careful and considered thought*”. It was effectively against the background of where matters stood on 19 December 2019 that the claimant decided to resign.

Events post-resignation

195. The consequence of my finding that the claimant had not withdrawn her resignation was that conduct of the respondent after she resigned on 7 January 2020 was not relevant to her decision to resign. For that reason I comment on that conduct only briefly.
196. I could understand that the claimant was annoyed to find that Dr Price and Ms MacInnes had participated in some or all of the board meetings held on 14, 22 and 28 January 2020. The claimant should have been invited so as to comply with the respondent's Articles of Association. However there was no real prejudice to the claimant because, in view of article 111, she could have been required not to participate in any discussion concerning her own employment.
197. There was no particular significance in the minutes of the board meetings of 14 and 28 January 2020 being in the form of handwritten notes. Those notes comprised the minutes. There should have been minutes of the board meeting on 22 January 2020 but the failure to prepare these was not material.
198. The assertion that the respondent should have investigated each of the matters which involved allegations of misconduct was in my view answered by the board's decision to attempt internal mediation. I considered that the process of investigating each allegation, conducting a disciplinary procedure if found appropriate, and imposing a sanction if merited (a) would have been disproportionately time consuming, and (b) would in all probability not have solved the dysfunctionality within the respondent's organisation. The internal mediation did not work but it was reasonable to regard it as a preferable alternative to investigating issues individually.
199. It was apparent that the conversation which Dr Price had with the claimant on 29 January 2020 went further than the agreed outcome as recorded in the minutes of the board meeting on 28 January 2020 where, as confirmed by Mr Bywater's letter to the claimant of 15 February 2020, there was no discussion about Ms Duff's remuneration and job title. However, I did not find that Dr Price had told the claimant that the decision by the board to

bring Ms Duff in was “*final*”. I did find that he had, as instructed by the board, discussed the matter with the claimant first and obtained her agreement.

Unlawful deduction

5 200. I was satisfied that the respondent expected to pay the claimant more than her then current salary as Office Manager when she agreed to become interim General Manager on 19 September 2019. That was what they meant by “*appropriately remunerated*”. Mr Bywater accepted that remuneration in line with the former CEO’s salary would have been
10 “*appropriate*”. That view was not shared by Mr Pritchard.

201. There was reference during the evidence to the claimant working beyond her contracted hours while employed as interim General Manager. The claimant’s contract of employment as Office Manager (52-55) stated –

15 “*You may be required to work overtime if and when necessary to meet any urgent deadlines that are a regular feature of a service orientated business. All additional hours will be at your usual hourly rate of pay.*”

202. The CEO’s contract of employment (83-95) stated –

20 “*You may be required to work overtime as and when required. You are not entitled to any payment for overtime; however, time off in lieu can be taken for such work.*”

203. I came to the view that, on the information presently available to me, I was unable to resolve the question of whether the claimant had been paid less than the amount “*properly payable*” to her in terms of section 13(3) ERA.

Decision

25 204. I decided that the claimant’s employment ended pursuant to her resignation on 7 January 2020. When the claimant resigned, she was not entitled to do so by reason of the respondent’s conduct. There was therefore no dismissal in terms of section 95(1)(c) ERA. It followed that her claim of unfair dismissal had to fail.

205. As I was unable to resolve the unlawful deduction claim, that will be continued to a further hearing to determine both liability and remedy. I encourage the parties to engage with each other before any such hearing to explore whether they can resolve this matter amicably. I also remind parties that if the claimant succeeds on this point, section 38 of the Employment Act 2002 may be engaged.

10

	Employment Judge:	Alexander Meiklejohn
15	Date of Judgment:	16 March 2021
	Date sent to parties:	17 March 2021