



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103295/2019

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Held by Cloud Video Platform on 28 February & 1-3 March 2022

**Employment Judge Sangster
Tribunal Member McElwee
Tribunal Member Taylor**

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Mr R Mitchell

[Redacted]
[Redacted]
[Redacted]
[Redacted]

**Claimant
Represented by:
Mr S Smith
Solicitor**

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Care Visions Group Limited

[Redacted]
[Redacted]
[Redacted]
[Redacted]

**Respondent
Represented by:
Ms A Stobart
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints of unfair dismissal and direct discrimination on the grounds of sexual orientation do not succeed and are dismissed.

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The complaints of direct discrimination on the grounds of sex and indirect discrimination in relation to sex and sexual orientation are dismissed following withdrawal by the claimant.

REASONS

Introduction

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1. The claimant presented a complaint of constructive unfair dismissal and discrimination on the grounds of sex and sexual orientation (direct and indirect discrimination). The complaints of indirect discrimination were withdrawn in August 2020.

2. The respondent denied that the claimant was unfairly dismissed and that he had been discriminated against.
3. The claimant gave evidence on his own behalf and led evidence from his mother, Catherine Mitchell.
- 5 4. The respondent led evidence from:
 - a. Stephen Craig (SC), Residential Service Manager for the respondent; and
 - b. Moira Greentree (MG), Director of Innovation for the respondent.
- 10 5. Evidence in chief was by way of written witness statements, which were taken as read.
6. The parties agreed a joint bundle of documents extending to 435 numbered pages, in advance of the hearing. Two further documents were added, with consent, during the course of the hearing.

Issues to be Determined

- 15 7. It was agreed at the outset of the hearing that the issues to be determined were as noted below.

Direct discrimination because of sex and/or sexual orientation - s13 Equality Act 2010 (EqA)

- 20 8. Did the respondent subject the claimant to the following treatment?
 - a. Failing to fully and properly investigate the allegations against the claimant; and
 - b. Failing to investigate whether one of the witnesses in the investigation was motivated by homophobia.
- 25 9. If so, was that treatment '*less favourable treatment*', i.e. did the respondent treat the claimant less favourably than they treated, or would have treated others ("comparators") in not materially different circumstances?

10. If so, was this because of the claimant's sex or his sexual orientation?

Time Limits

5 11. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the EqA? If not, should time be extended on a 'just and equitable' basis?

Constructive Unfair Dismissal

10 12. Did the factual allegations made by the claimant amount to a breach of any express or implied terms of the claimant's contract of employment? In his ET1 claim form the claimant stated that the respondent breached the contract of employment in six ways, namely:

- 15 a. Failing to pay him from April to October 2018;
- b. GM informed him in May 2018 that he had breached his contract;
- c. During October 2018 they misrepresented to him that they were carrying out an investigation and were considering the points he had made in contesting the allegations against him, when in fact they were not doing so;
- 20 d. At no stage did they account of the likelihood that the allegations by were false and made maliciously and in attempt to avoid punishment;
- e. At no stage did they take any steps to investigate the claimant's version of events and the issues he had raised about the evidence of Colleague A being false, and that she may have been motivated by discrimination
- 25 against the claimant on the grounds of his sexual orientation; and
- f. At no stage did the respondent offer emotional, financial or practical support to the claimant while he was awaiting trial, or subsequently:

30 13. If so, were such alleged breaches (taken alone or cumulatively) sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement for the claimant to treat the contract as terminated?

14. Did the claimant, by his conduct, waive any such breaches with the result that he did not remain entitled to terminate the contract?
15. Was the claimant's resignation in response to any alleged repudiatory breach?
16. If the claimant was dismissed: what was the principal reason for dismissal; was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (**ERA**); and, if so, was the dismissal fair or unfair in accordance with s98(4) ERA?

Findings in Fact

17. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
18. The claimant was employed by the respondent as a Residential Childcare Worker. His employment commenced on 1 December 2014.
19. The claimant's role as Residential Childcare Worker was regulated by SSSC and, as such, both the claimant and the respondent required to comply with SSSC's Code of Practice.
20. The claimant's contract of employment with the respondent, which he signed on 29 June 2015, stated at paragraph 20 that:
- 'All Residential Childcare Workers in Care Visions must be registered with the SSSC within the first six months of employment. It is an offence for Care Visions to employ an unregistered RCCW, It is the responsibility of the employee to ensure that they maintain registration with the SSSC and to ensure timeframes for meeting qualification requirements are met. Failure to maintain your professional accreditation and registration with the SSSC, including lapses in registration for any reason, will result in the company having no alternative but to suspend you from your duties without pay until you are able to satisfy the requirements of SSSC. **

21. The claimant was employed in a facility which provides 24 hour care for young people in the care of local authorities. Only one young person would reside in the facility at any time and there would always be at least two members of the respondent's staff working in the facility.

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22. In December 2017, there was a 15 year old male (referred to in this Judgment as AA) residing in the facility where the claimant worked. He was in the care of the local authority due to parental neglect. He had come from foster care and there had been allegations of him being involved in sexual behaviour with other children, although there had not been a prosecution.

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23. Around 17 December 2017 the claimant found evidence that AA had attempted to access child pornography using YouTube app on the Now TV box. The claimant challenged AA in relation to this, which resulted in a situation where AA became physically aggressive and required to be restrained. The claimant and the other worker on shift completed a detailed incident report in relation to the incident, as per the respondent's procedures.

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24. On 21 December 2017, one of the claimant's colleagues (referred to in this Judgment as **Colleague A**) provided a written report to the respondent that AA's sister had raised with her that AA felt uncomfortable around the claimant and had concerns in relation to his behaviour towards him. The concerns raised included that the claimant made inappropriate comments to AA (sometimes using sexual language), referred to himself as AA's 'Gay Dad', hugged AA against his will, asked him to leave his door open at all times and followed him around the house. Colleague A reported to the respondent that she had then spoken to AA, on a one to one basis, about what his sister had said. Colleague A informed the respondent that AA had confirmed that he felt uncomfortable around the claimant and felt that the claimant did not give him any space. She reported that he stated that the claimant worked him up to the point of being hyper, then became grumpy and had a go at him and that another residential care worker had noticed and commented on this.

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25. SC was appointed as investigation officer, to investigate these allegations, on or around 23 December 2017.

5 26. On 24 December 2017, the claimant met with his line manager (LM) at the service station, at LM's request. The claimant was on holiday at the time. The claimant was informed that AA had made an allegation against him. He asked for details of this, but was informed that LM could not discuss this with him at that stage. He was informed that he would require to work in other services until the investigation was concluded.

10 27. SC commenced his investigation on or around 4 January 2018. On 9 January 2019 he held fact find meetings with one of the claimant's colleagues (**Colleague B**) and LM. On 11 January 2018 he conducted fact find meetings with Colleague A, another of the claimant's colleagues (**Colleague C**) and
15 AA. The information provided by each individual was as follows:

a. Colleague B stated that she previously had concerns regarding horseplay between the claimant and AA and this leading to consequences for AA when he didn't then calm down, but that this seemed to have stopped in
20 the past few months. She stated that she had never heard the claimant asking AA to call him "gay dad", but she could recall hearing the expressions "gay da" or "gay-dar". She stated that she had not heard the claimant using inappropriate language or of AA being told to keep his door open.

25 b. LM stated that during a team meeting on 10 October 2017, he had instructed his team that there should be no horseplay with AA, as this had a negative impact on his behaviour. He did so after several staff members raised concerns with him about the claimant's conduct towards AA. After the meeting with SC, LM sent SC extracts notes from supervision
30 meetings he had conducted with the claimant and other team members. The notes referred to complaints from Colleague B & Colleague C about the claimant's behaviour. They also referred to a conversation LM held with Colleague A on 2 October 2017, when she complained about the claimant's use of sexual innuendos and horseplay with the young person.

- 5 c. Colleague A explained the allegations made against the claimant by AA and his sister, as per her initial statement of 21 December 2017. She stated that she felt that the part about AA being asked to leave his door open was fabricated, stating that she had never seen that when she was on shift. She stated however that she had raised with LM concerns about the claimant making sexual comments/innuendo. This included the claimant mimicking masturbation, using an ice pole, in front of her and AA. She said that the claimant played songs in his car when AA was present, some of which contained inappropriate lyrics with sexual
- 10 connotations. She also expressed concerns regarding horseplay between the claimant and AA. She stated that she had heard the claimant saying to the AA 'come on, give a hug to your gay dad', but had never witnessed the claimant hugging AA against his will.
- 15 d. Colleague C raised concerns about horseplay she stated that she had witnessed between the claimant and AA, stating that AA would become worked up and 'hyper', sometimes to the point where he had to be disciplined. She stated that she had not heard the claimant use inappropriate language, make sexual innuendos or refer to himself as AA's 'Gay Dad'. She stated that AA shut his bedroom door whenever he
- 20 wanted.
- 25 e. AA confirmed that he agreed with the statement submitted by Colleague A, which was read to him during the meeting. AA was asked if he had ever witnessed the claimant making any rude gesture with an ice pole. He stated that he had and mimicked oral sex and masturbation. AA was asked if he had ever listened to inappropriate music with the claimant. He stated that he did and that they listened to a song about someone having sex 'doggy-style' which was on a play list on the claimant's phone.

- 30 28. After speaking to the witnesses and AA, SC became concerned that the allegations made against the claimant could amount to criminal conduct. He was particularly concerned about the allegations in relation to the ice pole and the 'othering' of the relationship the claimant had with AA, by the reference to him being AA's Dad, which was suggestive of a special relationship between

the two. He sent an email to the respondent's Senior Manager of Human Resources, on Thursday 11 January 2018 at 15:36, around an hour after his meeting with AA had concluded. In the email he described the allegations against the claimant. He stated in his email *I have reflected on this and I am aware that I am only halfway through a fact find and I do not seek to influence the conclusion of any process; however in my opinion, based on learning in relation to Child Protection. I would not feel comfortable at this point if I had not raised a concern that, taking all of the above into consideration as a whole, there was the potential of possible grooming behaviour ongoing in this case.*

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29. On the advice of the respondent's Senior Manager of Human Resources, SC contacted one of the coordinators at the local Child Protection Unit on Monday 15 January 2018. SC briefly described the concerns regarding the claimant and asked for their opinion in relation to a potential reference of the case to the authorities. In response he was advised to raise the matter with the Police. He did so, after consulting with the respondent's HR Department and MG, who was at that stage Director of Operations. The SSSC were also informed of the allegations against the claimant by the respondent's HR Department, in accordance with the respondent's obligation to do so under the SSSC's Code of Practice. On the same day, SC met with the claimant to inform him that he was suspended on full pay. The claimant was not provided with any information as to the nature of the allegations or who had been interviewed, given the pending police investigation. He was simply informed that there had been significant concerns raised about his practice and the respondent would be in touch in due course. His suspension was subsequently confirmed by letter dated 15 January 2018. He was provided with details of the respondent's Employee Assistance Programme and given the name and contact details of an individual the respondent had nominated as a support person for the claimant during the course of the investigation. He was informed he could contact the respondent's HR Coordinator also, if he had any questions or queries relating to the investigation process.

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30. On 29 January 2018, the claimant was arrested and charged. The charges were that, during his employment with the respondent, the claimant did:

5 1. *behave in a manner which contravened section 33 of the Sexual Offences (Scotland) Act 2009 in that [he] did intentionally cause a child, AA, who has attained the age of 13 but not 16 years to look at a sexual image of either you engaging in a sexual activity or of a third person or imaginary person so engaging or your genitals or the genitals of a third person or imaginary person for*

10 a. *obtaining sexual gratification*
b. *humiliating, distressing or alarming the child*

15 2. *behave in a manner which contravened section 42 of the Sexual Offences (Scotland) Act 2009 and did sexually abuse the trust of a child, AA, whom is under the age of 18 years, and to whom [he is] in a position of trust in that [he] did intentionally engage in a sexual activity with or directed towards AA.*

20 31. The claimant was remanded in custody overnight and appeared at Glasgow Sheriff Court the following day. He pled not guilty and was released on bail, with standard and special bail conditions, namely that he must not approach, contact communicate with AA, or any witnesses in the case, in any way (or attempt to do so) and that he must not have unsupervised contact of any kind
25 with any child under the age of 16, other than such as is inadvertent and is not reasonably avoidable in the course of lawful daily life. A trial date was initially set for 18 May 2018. The trial date was later postponed to 24 August 2018 and Then postponed again to 11 September 2018.

30 32. On 16 April 2018 the claimant was informed that the Fitness to Practise Department of the SSSC was seeking a Temporary Suspension Order for 9 months. Their recommendation was subsequently approved, meaning that the claimant's registration with SSSC was suspended and the claimant was

unable to undertake his role as a Residential Child Care Worker, or any other role involving childcare, for that period.

- 5 33. On 23 April 2018, the respondent wrote to the claimant inviting him to a capability hearing on 30 April 2018, to discuss his continued employment following his bail conditions and the Temporary Suspension Order. The letter also confirmed that *'Due to the fact that the SSSC have now suspended your registration for a 9-month period, which means you are unable to practice as a Residential Child Care Worker, I must advise you that on this basis you will*
- 10 *now be placed on unpaid suspension which will take effect from Monday 16 April 2018.'* This was in accordance with the respondent's normal practice when an individual is temporarily suspended from the register by SSSC.
34. At the claimant's request, he was paid his accrued holiday pay in April 2018.
- 15 35. The capability hearing was postponed to 21 May 2018, at the claimant's request. The claimant was accompanied at the hearing by his GMB Trade Union representative. MG chaired the meeting and was accompanied by a member of the respondent's HR department. At the meeting the possibility of alternative employment for the claimant was discussed and the claimant's
- 20 trade union representative requested that no decision be made in relation to the claimant's employment until the outcome of the criminal court proceedings. MG stated that the respondent could have already terminated the claimant's contract of employment, as he was in breach of his contract
- 25 (by not being in a position to undertake his contractual duties), but they were instead meeting with him to see if there were any other roles which he could undertake on a temporary basis (which did not contravene his bail conditions and which did not require him to be registered with SSSC). No concerns were raised during the meeting in relation to the claimant being placed on unpaid
- 30 suspension.
36. By letter dated 1 June 2018, the respondent confirmed that they had investigated the possibility of alternative employment for the claimant, but

there were no suitable vacancies. It was noted that the claimant could not continue in his current role given his bail conditions and the suspension of his SSSC registration. He was informed that he would remain on unpaid suspension. The letter confirmed that the police had indicated to the respondent they could now continue with their internal investigation and that the investigating officer would contact the claimant to continue the fact-finding process.

37. During June 2018 the respondent raised with the claimant the potential of continuing the fact find process by the claimant answering, in writing, written questions posed by the investigating officer. The questions which the respondent required to be answered were set out in correspondence dated 29 June 2018, so the claimant could consider these. They were as follows:

- a. *It is alleged that, during the period in question, you imitated a sexual act, using an ice pole, and that you did this in front of a vulnerable young person. How would you respond to this?*
- b. *If you believe this allegation to be false, please share any reasons that you believe that an allegation of this nature would be made against you?*
- c. *If you feel that this allegation may be warranted but believe that there is context that you can provide, please take this opportunity to share the context.*
- d. *Is there any other statement you would like to make, including sharing any information you feel is relevant for the fact find process?*

38. On the advice of his criminal lawyer, the claimant indicated on 11 July 2018 that he would be unable to answer any questions until the conclusion of his criminal trial.

39. The claimant's criminal trial commenced on 11 September 2018, but did not proceed. It was deserted *pro loco et tempore*, meaning that the particular proceedings were stopped, but the prosecution could raise the case again in the future.

40. By letter dated 27 September 2018, the claimant was invited to an investigation meeting to be conducted by SC.

5 41. The claimant attended a fact find meeting with SC on 2 October 2018. The four questions set out above were put to him during the meeting. No other questions were posed. The claimant denied the conduct alleged and stated that Colleague A had been 'out to get him' and was annoyed and jealous of him because he had experience in the role and knew what he was doing. He stated that AA had made a false allegation as a result of the incident on 17
10 December 2017. He also stated that his lawyers had asked if Colleague A had ever been homophobic and that he had informed his lawyers that he had '*never got that vibe from her*'. He stated that '*there are various reasons why [Colleague A] could be doing what she is doing, but I can't really comment.*'
15 He asked for everyone who works for the respondent to be interviewed and asked the following questions '*Do you think [Colleague A] might have anything against Ryan? Do you believe there is any reason that AA might have said anything?*' He also stated that there was a discrepancy in dates asserted by Colleague A in the criminal proceedings and that she should be
20 interviewed again in relation to this. SC stated that he would consider matters, but could not guarantee that he would do so.

42. Following the fact finding meeting with the claimant, SC considered whether any further action should be taken. He concluded as follows:

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a. That he did not require to speak to any further witnesses. The witnesses he had spoken to had provided corroboration of the central allegations and he had already interviewed a number of the individuals suggested by the claimant; and

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b. That he did not require to reinterview Colleague A. The claimant himself stated that he did not think she was homophobic and there was nothing in her existing statement to indicate this was the case. The initial

allegations were made by AA's sister and AA and Colleague A was obliged to report them to the respondent. The fact find report considered whether there was corroboration of the allegations made and did not rely solely on the evidence/testimony of Colleague A.

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43. On 4 October 2018, the claimant enquired about a temporary alternative employment with the respondent, as an administrator, as he had seen that they were advertising for that role. This was considered by the respondent but they concluded that the claimant did not have the appropriate skill set to undertake the role.

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44. The claimant was sent the minutes of the fact find meeting on 8 October 2018 and approved them later that day.

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45. SC concluded his fact find report on 10 October 2018 and sent this to the respondent's HR Department and the Senior Operations Manager. They suggested some minor changes to the report, which SC considered and agreed with.

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46. On 11 October 2018, the claimant received a conditional offer of alternative employment with First Bus as a Trainee Bus Driver.

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47. On 18 October 2018, the claimant spoke to a member of the respondent's HR department. She informed him that she hoped the investigation would be concluded within 48 hours.

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48. On 29 October 2018 the claimant contacted the respondent's HR Department by telephone requesting an update on the investigation. She was informed by email, sent at 16:05, that the fact find report had been concluded and that it had been passed to a senior manager. He was informed that she would require 'a couple of more days to fully consider the report and supporting information before we can get back in touch with you to provide you with a further update.' The senior manager was considering the terms of the

investigation report, whether there should be a disciplinary hearing and, if so, the allegations which should be considered in that context.

49. On 30 October 2018, the claimant contacted a colleague (Colleague D) who informed him that *'none of the staff had been spoken to again.'*
50. At this time, the claimant was experiencing significant financial pressure. He had not received any payment from the respondent since the end of April 2018, it was approaching Christmas and his only income was job seekers' allowance. His mother was supporting him financially and had been for 6 months. He decided that he would resign from his employment with the respondent, so he could take up the alternative employment he had been offered. If the respondent had continued to pay him during his suspension, he would not have resigned.
51. By email sent at 02:19 on 31 October 2018, the claimant resigned with immediate effect, but stated that he would continue to participate in the investigation process. He highlighted that he had been informed by someone in the HR department that the fact find would be concluded within 48 hours of her call on 18 October 2018 and stated that *'the company have been unable to interview ANY staff members who worked in the same service as I did when the sexualised allegations took place'*. He stated that *'Due to these allegations and the incompetence of carevisions conducting an appropriate fact finding investigation in a fair and timely manner I have decided to take legal action against carevisions and have consulted an employment lawyer.'*
52. At the time of his resignation, the claimant had not seen:
- a. The notes of any of the fact find meetings conducted by the respondent, so was unaware of precisely who had been interviewed, or what they had stated to the respondent; or
 - b. The investigation report, so was unaware of the conclusions reached in that, in particular whether there were found to be facts to support any allegations and, if so, the terms of those allegations and the basis for them.

53. By letter dated 6 November 2018, the respondent gave the claimant the opportunity to reconsider his resignation and proceed with the internal process, which they highlighted was still ongoing. They confirmed they would not proceed with the internal process if he confirmed his resignation.

54. On 13 November 2018 the claimant confirmed that his resignation was effective from 31 October 2018 and that he would be engaging in Tribunal proceedings for constructive dismissal.

55. The claimant commenced employment with First Bus on 18 December 2018.

56. The criminal proceedings against the claimant were re-raised by the Procurator Fiscal and a further trial took place in March 2020, but was abandoned. SSSC continued the claimant's suspension from the register until 14 April 2020, when they stated they would be taking no further action, revoked the Temporary Suspension Order and closed the case.

Claimant's submissions

57. Mr Smith, for the claimant, lodged a written skeleton submission, extending to 10 pages, which he spoke to and supplemented. In summary, the claimant submitted that:

a. In relation to the constructive dismissal claim, The respondent was in breach of the claimant's contract of employment by:

i. Suspending the claimant without pay in April 2018; and/or

ii: Their actions cumulatively amounting to a breach of the Implied term of trust and confidence.

b. The complaint of direct discrimination on the grounds of sex was withdrawn.

c. The claimant was treated less favourably than the respondent would treat a straight care worker, and that this was due, in part, to the claimant being openly gay. Inferences can/should be drawn from:

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- i. The repeated reference to the use of the phrase 'gay Dad';
 - ii. SC's response to the claimant's evidence and SC's conclusion that there was a possibility of grooming; and
 - iii. The response to the claimant's assertions as to the possible motive for SSB's actions.

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d. The claimant should be awarded loss of earnings from May 2018 and up to 12 months after his employment terminated. An award for injury to feelings, in the lower Vento band, should also be made.

Respondent's submissions

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58. Ms Stobart, for the respondent, also lodged a written submission, extending to 11 pages, which she spoke to and supplemented. In summary, the respondent submitted that:

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a. The claimant was not entitled to payment in the period May to October 2018, given the terms of his contract and the fact that he was suspended by SSSC and could not fulfil his contractual duties;

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b. The respondent did not breach the implied term of trust and confidence. The respondent had reasonable and proper cause for their actions. They did not misrepresent their position to the claimant and their actions did not cumulatively breach the implied duty of trust and confidence. The claimant is now relying on information which he was unaware of at the time he resigned. Any deficiencies in the investigation could have been remedied by the respondent at a later stage. The claimant was appropriately supported throughout.

c. The claimant did not resign in response to any asserted breach, but due to financial reasons. He stated that he would not have resigned if the respondent continued to pay him.

5 d. The less favourable treatment asserted has not been established. Failing which it was not done because of the claimant's sexual orientation.

Relevant Law

Direct Discrimination

59. Section 13(1) Eq A provides that:

10 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

60. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In **Amnesty International v Ahmed** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in **James v Eastleigh Borough Council** [1990] IRLR 288 and (ii) in **Nagaragan v London Regional Transport** 999] IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as **Nagaragan**, the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did.

61. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumption's) (**Nagarajan**). **the** Tribunal should draw appropriate inferences as to the reason for the treatment from the primary facts with the assistance, where necessary, of the burden of proof provisions, as explained in the Court of Appeal case of **Anya v University of Oxford** [2001] IRLR 377. "Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of

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a discriminatory explanation of those facts” (**Madarassy v Nomura International Pic** [2007] IRLR 246).

62. In **Shamoon v Chief Constable of the RUC** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer’s conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?
63. The **EHRC: Code of Practice on Employment (2011)** states, at paragraph 3.5 that *‘The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have been treated differently from the way the employer treated - or would have treated - another person.’*
64. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *‘but does not need to be the only or even the main cause’* (paragraph 3.11, **EHRC: Code of Practice on Employment (2011)**). The protected characteristic does however require to have a *‘significant influence on the outcome’* (**Nagarajan**).

Burden of proof

65. Section 136 EqA provides:
- ‘If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.’*
66. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of **Igen v**

Wong [2005] IRLR 258, and **Madarassy v Nomura International Pic** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

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10 67. In **Madarassy**, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination.
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Something more is required, but that need not be a great deal (**Deman v Commission for Equality and Human Rights and ors** 2010 EWCA Civ 1279, CA). The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have
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regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in **Laing v Manchester City Council** [2006] IRLR 748, an EAT authority approved by the Court of Appeal in **Madarassy**.

25 *Constructive Unfair Dismissal*

6H. Employees with more than two years* continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract
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under which he/she is employed (with or without notice) in circumstances in

which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).

69. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (**Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (**Malik v Bank of Credit and Commerce International Ltd** [1998] AC 20).
70. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (**Lewis v Motorworld Garages Ltd** [1986] ICR 157).
71. As to what can constitute the last straw, the Court of Appeal in **Omilaju v Waltham Forest London Borough Council** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.
72. In order for there to be a constructive dismissal, not only must there be a breach by the employer of an essential term such as the trust and confidence obligation; it is also necessary that the employee resigns in response to the employer's conduct (although that need not be the sole reason - see

Nottinghamshire County Council v Meikle [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

73. The Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

b. Has he or she affirmed the contract since that act?

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

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

e. Did the employee resign in response (or partly in response) to that breach?

74. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but

must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

Discussion & Decision

Constructive Unfair Dismissal - s94 ERA

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75. The claimant claimed that the respondent was in breach of his contract of employment by:

a. Failing to pay him from April to October 2018; and

b. Their actions which, cumulatively, breached the implied duty of trust and confidence. The claimant relied upon the following in relation to this:

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i. GM informed him in May 2018 that he had breached his contract;

ii. During October 2018 they misrepresented to him that they were carrying out an investigation and were considering the points he had made in contesting the allegations against him, when in fact they were not doing so;

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iii. At no stage did they account of the likelihood that the allegations by were false and made maliciously and in attempt to avoid punishment;

iv. At no stage did they take any steps to investigate the claimant's version of events and the issues he had raised about the evidence of Colleague A being false, and that she may have been motivated by discrimination against the claimant on the grounds of his sexual orientation;

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v. At no stage did the respondent offer emotional, financial or practical support to the claimant while he was awaiting trial, or subsequently.

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76. The claimant relied upon the respondent's failure to pay him during his suspension, from April to October 2018, as being a fundamental breach of contract, of itself. The Tribunal did not accept that this was the case. The

Tribunal determined that the claimant had no entitlement to payment in the period from 16 April to 31 October 2018, given that:

5 a. The respondent had an express contractual right to withhold payment in these circumstances, under the terms of paragraph 20 of the claimant's contract of employment with the respondent, which stated that *lapses in registration for any reason will result in the company having no alternative but to suspend you from your duties without pay until you are able to satisfy the requirements of SSSC.*' The claimant's suspension by SSSC amounted to a lapse in his registration. He was not registered with SSSC during the period of his suspension. The respondent was contractually entitled to withhold his pay until the claimant was able to satisfy the requirements of SSSC; and

15 b. The fact that, as a result of his suspension by SSSC, and his bail conditions, the claimant was unable to undertake his contractual duties with the respondent. The respondent had no obligation to pay the claimant in the circumstances, as the claimant himself was not ready, willing and able to undertake his contractual duties.

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77. In considering the claimant's claim of constructive dismissal based on actions which he asserts cumulatively breached the implied duty of trust and confidence, the Tribunal considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. The Tribunal's conclusions in relation to each element were as follows:

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a. **What was the most recent act (or omission) on the part of the employer**
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The Tribunal noted that the most recent act relied upon by the claimant was that the respondent did not take action to investigate his position, following the fact find meeting held with him on 2 October 2018. This is in effect an amalgam of the points set out at paragraph 75.b.ii. & iv above.

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- b. **Has he or she affirmed the contract since that act?** The Tribunal noted that the claimant resigned on 31 October 2018. The Tribunal found that the claimant had not affirmed the contract since the most recent act on the part of the respondent, which the claimant stated caused, or triggered, his resignation.
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- c. **If not, was that act (or omission) by itself a repudiatory breach of contract?** The Tribunal noted that the claimant did not assert this to be the case, so there was no requirement to consider this.
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- d. **If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?** The Tribunal noted that the Court of Appeal in *Omilaju* stated that the act or omission relied upon need not be unreasonable or blameworthy, but it must, in some way, contribute to the breach of the implied obligation of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence. The Tribunal did not accept that during October 2018, the respondent was *'misrepresenting to him that they were carrying out an investigation and were considering the points he had made in contesting the allegations against him, when in fact they were not doing so'*. The respondent was *'carrying out an investigation and considering the points [the claimant] had made in contesting the allegations'*
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- during October 2018: SC held a fact find meeting with the claimant on 2 October 2018, considered the points the claimant raised in that meeting and then proceeded to conclude his investigation report. The claimant was informed of each of these steps. Approximately 34 hours prior to his resignation, the claimant was informed that the fact find report had been concluded and that it had been passed to a senior manager to review. He was informed that the senior manager required *'a couple of more days to fully consider the report and supporting information'* and they would get back in touch with him once the senior manager had done so, to provide an

update. These timescales were reasonable in the circumstances. The claimant was aware, at the time of his resignation, that the respondent had concluded its investigation and he would receive confirmation of the outcome/next stage imminently. The respondent was acting reasonably and properly in bringing the investigation to a conclusion in October 2018

The claimant relied upon being informed by Colleague D that *'none of the staff had been spoken to again'* to support his position that the respondent took no steps to investigate his version of events and the issues he raised.

The Tribunal concluded that, whilst the claimant may have interpreted the fact that SC had not interviewed all staff following his meeting with the claimant as hurtful and destructive of his trust and confidence in the respondent, without knowing which staff members had been spoken to previously by the respondent, or what they said to the respondent when they had been interviewed, this was not capable of contributing to any breach of the implied obligation of trust and confidence. In fact, SC had considered the claimant's request that he re-interview all staff in light of all the information which he had already collated in the course of his investigation and had concluded it was not appropriate to do so. He had reasonable and proper cause not to do so, given that he had already interviewed a number of the staff suggested and, having considered the additional points which the claimant suggested required to be covered with the witnesses, and the reasons why the claimant suggested this, SC concluded that this was not in fact necessary.

- e. **Did the employee resign in response (or partly in response) to that breach?** The Tribunal concluded that the claimant did not resign in response to the asserted breach of the duty of trust and confidence. The claimant's evidence to the Tribunal was that he resigned to take up alternative employment, due to the financial pressures he was under. It was approaching Christmas and his only income was job seekers' allowance. His mother was supporting him financially and had been for 6 months. He expressly stated that, if the respondent had continued to pay him he would

not have resigned. In these circumstances, the Tribunal concluded that the asserted breach of the implied duty of contract relied upon by the claimant, did not play a part in the claimant's resignation. He would not have resigned if he was still being paid by the respondent. As indicated at paragraph 76 above, the Tribunal concluded that the respondent was not in breach of contract by failing to pay the claimant for the period from 16 April to 31 October 2018.

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78. Given these findings the Tribunal concluded that the claimant was not constructively dismissed by the respondent. His claim of unfair dismissal is accordingly not successful and is dismissed.

Direct Discrimination

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79. The Tribunal considered each allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less favourable treatment and if so, what the reason for that treatment: was it because of sexual orientation? The Tribunal reached the following findings in relation to each alleged act of direct discrimination.

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a. Failing to fully and properly investigate the allegations against the claimant. The Tribunal noted the claimant's position that there were deficiencies in SC's investigation, but also noted the respondent's position that the disciplinary process was not concluded and any deficiencies could have been highlighted and remedied at a later stage in the process. The claimant's complaint was however that SC failed to fully and properly investigate the allegations and that this amounted to less favourable treatment because of his sexual orientation. He relied upon a hypothetical comparator, but there was no evidence before the Tribunal in relation to the actions taken by the respondent in other investigations, nor was it put to SC that he would have acted differently in a similar case involving a hypothetical comparator. At best, the evidence demonstrated that the claimant had a protected characteristic and that there were deficiencies in the investigation at the point he resigned (albeit he was

not aware of these at the time). No difference in the way the respondent treated, or would treat, others in similar circumstances was established. The Tribunal considered all the evidence (other than the respondent's explanation for its conduct) and determined that there were not facts (or inferences which could be drawn from facts) from which the Tribunal could decide, in the absence of any other explanation, that the respondent treated the claimant less favourably than a hypothetical comparator, whether due to sexual orientation or otherwise, in the conduct of the investigation. In these circumstances, the claimant has not established a prima facie case of direct discrimination.

b. Failing to investigate whether one of the witnesses (Colleague A) in the investigation was motivated by homophobia.

The Tribunal accepted that SC did not actively investigate whether colleague A was motivated by homophobia. In considering this complaint, adopting the approach approved by Lord Nichols in *Shamoon*, the Tribunal, concentrated initially on why the claimant was treated the way he was, and whether sexual orientation was a cause. The Tribunal found that SC did not investigate this as the claimant did not assert that this was the case: he stated that his lawyers had asked if Colleague A had ever been homophobic and he stated that he had *'never got that vibe from her'*. He stated that *'there are various reasons why [Colleague A] could be doing what she is doing, but I can't really comment'*, having previously stated that Colleague A had been 'out to get him' and was annoyed and jealous of him because he had experience in the role and knew what he was doing. SC reviewed the notes of the investigation he had conducted and concluded that there were no other assertions or suggestions that Colleague A was motivated by homophobia, It was for these reasons that SC did not investigate this matter further. The claimant's sexual orientation did not influence SC's actions, consciously or otherwise.

80. In light of the above, the claimant's complaints of direct discrimination because of sexual orientation do not succeed and are dismissed.

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Employment Judge: M Sangster
Date of Judgment: 14 March 2022
Entered in register: 18 March 2022
and copied to parties

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