



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105470/2022

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Held in Glasgow on 25 – 27 January; 17 – 21 April 2023  
Deliberation on 25 and 26 April 2023

Employment Judge P O'Donnell

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**Mrs L Leishman**

**Claimant**  
**In Person (25-27**  
**January 2023);**  
**Mr Milne - Counsel**  
**[Instructed by BTO]**  
**(17-21 April 2023)**

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**Cassiltoun Housing Association**

**Respondent**  
**Represented by:**  
**Mr O'Carrol -**  
**Counsel [Instructed**  
**By rrdar]**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the Claimant has not been dismissed as defined in s95(1)(c) of the Employment Rights Act 1996. The claim of unfair dismissal is, therefore, not well founded and is hereby dismissed.

### REASONS

#### Introduction

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1. The Claimant has brought a complaint of unfair dismissal under s94 of the Employment Rights Act 1996 alleging that she was dismissed as defined in s95(1)(c) of the 1996 Act (commonly referred to as a “constructive dismissal”). The claim was resisted by the Respondent, primarily on the basis that there was no constructive dismissal and the Claimant had resigned of her own accord.

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2. The Claimant represented herself at the hearing dates in January and was represented by counsel at the April dates.

**Preliminary issues**

3. At the outset of the hearing, a number of preliminary issues arose. Most of these were uncontroversial involving the correcting of typos in the ET3 and agreeing a list of issues.
- 5 4. There was, however, one matter which the Tribunal required to resolve. The “client” sitting with counsel for the Respondent was the chief executive and was to be called as a witness. The Claimant objected to the witness being present during other evidence, particularly the Claimant’s evidence; it was said that the case related to decisions of the chief executive and a board member could be present to give instructions.
- 10 5. In response, Mr O’Carroll made the following points:
- a. There was nothing already in the bundle about which the witness did not know about.
  - b. There may be a need for instructions during live evidence.
  - 15 c. An officer of the company and not a board member was required to give instructions and the chief executive was the appropriate officer. The Tribunal questioned this and Mr O’Carroll explained that the other senior members of management were also to be called as witnesses (although, in the event, not all of them were actually required but this did not become apparent until close to the end of the hearing).
- 20 6. The Tribunal asked whether there were any particular issues in dispute where the witness could step out whilst the Claimant gave her evidence and/or whether contemporaneous documents could be used to resolve any factual dispute (assuming the accuracy of these was not an issue in itself).
- 25 7. It was common ground between the parties that there was only a dispute about one particular meeting in February 2022 where the Respondent’s note of what was discussed was not agreed. The dispute is identified in the Claimant’s further particulars at p54. The accuracy of other contemporaneous documents were not in dispute.

8. The Tribunal allowed the witness to be present during the Claimant's evidence except where she was speaking to the meeting in question. The Tribunal gave the following reasons:

- 5 a. Ultimately this is about the credibility and reliability of the witness's evidence.
- b. The Tribunal is used to dealing with such matters where parties are aware of each other's evidence in advance (that is, where witness statements are used).
- 10 c. The Claimant can put her case to the witness in cross-examination and the Tribunal can take steps to ensure that any contested evidence is tested.
- d. Contemporaneous documents can be used to test the credibility and reliability of the evidence given by all the witnesses.
- 15 e. The same issue would arise if other senior officers were to act as the "client" given that, at the time, it was anticipated that they would also give evidence.
- f. The Overriding Objective to do justice can be achieved by allowing the witness to be present with this being borne in mind when assessing the credibility and reliability of all of the evidence.

20 **Evidence**

9. The Tribunal heard evidence from the following witnesses:

- a. The Claimant.
- b. Gamal Haddou (GH) – the Respondent's former director of finance who managed the Claimant.
- 25 c. Clair Malpas (CM) – the chief executive of the Respondent.
- d. Paula Brownlie (PB) – the Respondent's head of corporate services , HR and finance.

10. The Respondent had initially intended to call evidence from two other senior managers who had dealt with the Claimant's grievance and grievance appeal. However, after hearing the evidence of the Claimant, GH and CM, the Tribunal informed parties that it did not consider that evidence about how the grievance process was handled and the outcome of it was relevant to the issues to be determined. The whole grievance process took place after the Claimant had resigned and so could not be an issue which caused her resignation or caused/contributed to any alleged breach of contract.
11. The Tribunal had allowed the Claimant to give evidence about the process and so it was understandable why the Respondent sought to lead evidence in response. The Tribunal had allowed the Claimant to lead this evidence in part because she was a party litigant at the time and it wanted to allow her to fully present her case. More importantly, however, in explaining her grievance, the Claimant was able to more clearly set out what had been the issue which caused her to resign.
12. In the event, having reflected on the matter, counsel for the Respondent decided it was not necessary to lead evidence from these witnesses and it was common ground on all sides that the grievance process and outcomes were not matters which were relevant.
13. There was an agreed bundle of documents prepared by the parties. A reference to page numbers in this judgment is a reference to pages in that bundle.
14. This is not a case where there was any real dispute in fact beyond the precise contents of one meeting between CM and the Claimant. For the most part, both parties agreed that the documents led in evidence were accurate and said what they bore to say.
15. The Tribunal considered that the witnesses from which it heard were, also for the most part, credible and reliable. The Tribunal will address below in its findings of act and decision the few matters where it was not willing to accept certain evidence or resolved any dispute in favour of a particular party. However, the Tribunal should be clear that it considers that any such matters

arise from the inevitable effect that the passage of time has on the recollections of witnesses rather than any deliberate attempt by someone to mislead the Tribunal.

### Findings in fact

- 5 16. The Tribunal made the following relevant findings in fact.
17. The Respondent is a provider of social housing operating in the Glasgow area. It has approximately 1100 properties. It also operates two subsidiaries, a nursery and a trust. The social housing sector is a highly regulated sector.
- 10 18. It is an associate member of Employers in Voluntary Housing (EVH) and uses the EVH pay scales and grades as well as adopting the standard EVH terms and conditions for the contracts with their employees. They are not obliged to do so but, in common with many other employers in the sector, they choose to do so for reasons of consistency with other similar employers.
- 15 19. The EVH pay scales have various grades with incremental steps within each grade which are referred to as Spinal Column Points (SCP). For the purposes of this hearing, the relevant EVH terms relating to pay are found at p74 which provides for an automatic move up the SCP each year until the top of the grades is reached. There are also provisions allowing for employees to be
- 20 paid a responsibility allowance where they are covering a higher graded post for four weeks or more.
20. The Respondent does not use a job evaluation scheme to determine the grades of jobs within its structure. Rather, it uses a process described as “benchmarking” where jobs are compared with similar jobs in other EVH
- 25 employers to identify the degree to which there is comparison and then adopt the grade for those other jobs. Such a process involves comparison with a sufficient range of other jobs to ensure that a particular job is not an outlier and, rather, identify a common approach to duties, grades and pay across the sector.

21. The ultimate decision-maker within the Respondent is the Board. Only they have the authority to make decisions on staffing issues such as the grade of any job, the award of any responsibility allowance, any increase or decrease in hours or any similar change to the terms and conditions of any employee.
- 5 Any such proposed changes are presented to the Board by the chief executive with the business case being set out including the cost, impact on staff and the evidence relied on in reaching the recommendations being made. Examples of such presentations will feature below. The Board has a staffing sub-committee to which power to make staffing decisions is delegated.
- 10 22. The day-to-day operations of the Respondent are overseen by the chief executive. There is then a senior management team (SMT) who oversee the running of the various departments within the organisation.
23. There will be examples below of the Board being asked to agree to changes to duties and grades arising from a reorganisation or restructuring being initiated by the Respondent itself. There was, however, no previous example
- 15 of an employee seeking regrading because they considered that their job had changed to such a degree that it should be a higher grade.
24. There was, therefore, no evidence of how the Respondent would deal with such a request. The Tribunal accepted the evidence of CM (which was not
- 20 challenged by the Claimant) that the most likely approach to such an issue would be for the employee to raise the matter with their line manager who would then escalate the matter through SMT to the chief executive. If it was agreed that there was a business case for such a request then a paper would be presented to the Board for them to make the final decision. Any such
- 25 paper would require to set out the business case, the costs and include evidence, such as benchmarking against other jobs in the sector, showing that the grade sought was appropriate to the work being done.
25. The Claimant was employed as a finance officer on Grade 7 from 2006 until her employment came to an end on 1 June 2022. For the period relevant to
- 30 the case, she reported to GH who was the director of finance and IT. The work of the department had grown over time for a range of reasons; the

organisation had expanded when it took over housing stock from Glasgow Housing Association which also saw employees of that body transfer to the Respondent; the subsidiaries were added over time which added work such as a larger payroll; changes to financial reporting and other regulatory matters involved more work. As a result, a finance assistant post was created to assist with the increased workload; this was initially described as an “apprentice finance assistant” but the apprentice element was later dropped and the post became a finance assistant at Grade 3.

26. The Respondent operates an annual appraisal system which involves the employee meeting with their manager to discuss how the previous year had gone in terms of meeting objectives that had been set for that year, identifying any areas for improvement, recording achievements, setting objectives for the next year and identifying any training or development needs. The points discussed were recorded in a template form used for all employees.

27. The Tribunal was taken to a number of the appraisal forms completed in respect of the Claimant by her and GH. It was clear that the Claimant performed well, regularly achieving her objectives and was well regarded by GH. It was also clear from these forms that the Claimant had taken on new duties such as preparing management accounts for the Respondent’s two subsidiaries which had previously been done by GH. There was also a move toward the Claimant presenting these accounts to the Board but she was not as comfortable with doing so for the Trust as she was for the nursery. She was also involved in supervising the finance assistant role; this was a new duty as this role had not existed previously.

28. In the Claimant’s personal development plan for 2018/2019 (p239), there is, for the first time in the appraisal forms, a note that the Claimant was seeking to attain Grade 8. This was in the context of a training need being identified in relation to the Claimant supervising staff. A training course at another housing association had been identified for the Claimant to attend which it was said would assist her in supervising the finance assistant and attain Grade 8 status.

29. In 2018, the existing chief executive announced his retirement and CM was appointed to that role. This would leave her existing role of regeneration manager vacant and a paper was presented to the staffing sub-committee of the Board at their meeting on 30 January 2019 (pp241-249) setting out a number of options regarding this role. The option that was adopted by the Board was that the vacancy would not be filled and, rather, the duties of this role distributed to other jobs.
30. In relation to this option, the paper identifies what duties would be redistributed to other jobs and which jobs would be affected. It also sets out the ramifications of this in terms such as whether the changes create a new job which requires to be advertised. For the purposes of this case, the relevant issue is that consideration of the redistribution of duties also addressed the issue of whether or not the job should attract a higher grade as a result. In most, but not all, instances the existing jobs would be given a higher grade having been benchmarked against other jobs in the sector. Where the new duties being redistributed fell within the scope of the existing grade for the job then no increase in grade was awarded.
31. It was not in dispute that this redistribution of duties had no impact whatsoever on the finance department.
32. At the same time, a request was made to the chief executive (prior to CM taking up the role) for certain changes to be made in respect of the finance department. A memo dated 19 January 2019 (p240) was sent to the chief executive from GH, the Claimant and the finance assistant setting out what was sought and the reasons for this; there was a proposal to create a third subsidiary (although ultimately this did not proceed); it was anticipated that this would lead to an increase in workload for the finance team and the memo set out what additional work was expected; a request was made to increase the Claimant's hours from 28 a week to 32 a week over the same number of days to allow her to carry out tasks identified in the memo; there was also a request to regrade the finance assistant role to Grade 4 and a request for a pay increase for GH.



33. A paper was presented to the staffing sub-committee of the Board (pp250-257) at the meeting of 30 January 2019 containing proposals for miscellaneous staffing changes. At p254, this includes a recommendation for the Claimant's hours to be increased to 32 hours to allow her to take on additional work including the preparation and presentation of management accounts for the two existing subsidiaries as well as additional work anticipated to arise from the creation of the third subsidiary. This recommendation was approved.
34. On 15 May 2020, CM sent an email to the senior management team (pp271-272) regarding the staffing structure. This was in the context of the covid pandemic and the impact of this and the national lockdowns in place at the time. The view being expressed across the sector and by EVH was that no changes should be made to staffing structures at that time until the long term impact on the sector and the needs of organisations was clear. In these circumstances, CM was looking to make recommendations to the Board to keep certain temporary measures in place and seeking confirmation from senior managers that these were still required. These included additional responsibility payments being paid to staff taking on additional duties and the extension of certain temporary posts.
35. The Claimant's extra hours are raised in this email (p272) and CM notes that these were awarded on the basis of the Claimant taking on additional responsibilities but that she had not take on all of these, in part because the new subsidiary had been put on hold. CM also noted that the Claimant was also reluctant to appraise and line manage the finance assistant, preferring that this was done by GH. CM considered that there needed to be a business case for the Claimant's hours to be extended.
36. On or around 26 May 2020, CM had a discussion with the Claimant about these issues. During the course of this conversation, the Claimant stated to CM that she was looking to be regraded to Grade 8. CM responded to this by explaining that the Claimant would need to discuss this with GH regarding what duties she was doing and benchmarking these. CM suggested that PB

could assist with this and that GH may have examples of finance jobs which could be used. CM offered to send on what information she had.

37. CM followed this meeting with an email to the Claimant on 27 May 2020 (p274) enclosing a Grade 7 finance officer pack (pp276-282) which she had and suggested that PB may be able to assist with others if the Claimant wished to benchmark her job.
38. In or around July 2021, the finance assistant had left the organisation to take up a job elsewhere at a higher grade. There had been an attempt to recruit a replacement but a suitable candidate could not be found. Temporary staff were recruited but they required greater supervision from the Claimant than the previous finance assistant which increased her workload.
39. Nothing further regarding the Claimant's grade was raised with the Respondent until August 2021. By this point, GH had raised a grievance against CM and the Board which was being investigated. As part of that process, GH produced a paper setting out various changes he proposed to the structure of the finance department and the grades of the jobs within the department (pp308-325). The paper was drafted using the same template as other papers to the Board to which the Tribunal had been taken in evidence but it was not intended to be presented to the Board.
40. The Tribunal heard very little evidence about GH's grievance. In particular, it heard no evidence as to why GH had been asked to produce this and to what use it was ultimately put in the grievance process. All that can be said is that this was never a formal paper presented to the Board on which it made a decision.
41. In relation to the Claimant, GH's paper proposed that her job be re-titled "group finance officer" and be re-graded to Grade 8. To support this he set out a table detailing additional responsibilities which she had taken on and the complexity factors involved in these (p309). He also stated that there were few vacancies for finance officer posts in the past 2-3 years (the Tribunal pauses to note that when the Respondent benchmarked finance roles in April 2022, it was able to identify a number of finance officer vacancies which

predated this paper) but he produced job descriptions for two Grade 8 roles from other housing associations and produced a table (p309) setting out the differences between these jobs and the Claimants.

42. The Tribunal pauses to note that one of the job descriptions used in the paper was from 2012 (p322) and the other was undated (p324). GH's paper also did not benchmark the Claimant's role against Grade 7 finance officer roles. As will be clear from the findings of fact below, there were a number of Grade 7 finance officer roles advertised by other housing associations in recent years as well as a broader range of Grade 8 roles than the two jobs used by GH.
43. In October 2021, the Claimant went off sick with stress and was absent until January 2022.
44. As part of the Respondent's practices, an employee who goes off sick with stress is asked to complete a stress questionnaire to identify the causes of the stress and a meeting would then be arranged to discuss these as well as anything which would remedy the causes of stress.
45. This would normally be done by the employee's manager but GH was also absent from work at the same time. PB, therefore, arranged for the questionnaire to be completed and had an initial meeting with the Claimant on 2 December 2021. A further meeting was held between GH and the Claimant on 9 December 2021 as he had returned to work by this point.
46. The Claimant's stress questionnaire which she completed on 8 November 2021 appears at pp332-336 and identifies a number of matters as the cause of the Claimant's stress including:-
- a. The additional work required in supervising the temporary staff brought in after the departure of the finance assistant in July 2021. The Claimant considered that the role needed to be advertised at Grade 5 to secure a permanent replacement.
  - b. The evolution of the Claimant's job over time with additional duties being added without any mention of an increase in grade.

c. A feeling that she was not being taken seriously when she raised issues.

47. During the course of GH's grievance, the Respondent received legal advice that they should hold off carrying out any form of staffing review until the grievance process was concluded. They decided to follow this advice and this was confirmed to GH by email dated 23 November 2021 (p337).

48. A note of the meetings on 2 and 9 December 2021 to discuss the stress questionnaire is at pp338-347. It is in the form of a table recording the Claimant's issues in the first column, comments by PB in the second and comments by GH in the third. The following matters are relevant to the issues to be determined in this case:-

a. There was a discussion about the Claimant having to check the work of the temporary employee brought in to cover for the vacant finance assistant role; PB said that this person had now been in post for some time and may be making less mistakes; GH confirm that the temporary working was doing better and, although he was not perfect, he needed less supervision (p338).

b. The Claimant raised her concerns about the grade of vacant finance assistant role and the impact this would have on getting a suitable candidate to fill the role; PB explained that no guarantee could be made about the grade for this role and that the matter would be decided by the staff sub-committee of the Board with the explanation that the staffing review was on hold pending the outcome of GH's grievance; GH stated that he found it bizarre that the investigation was blocking progress on this (p340).

c. The Claimant raised the issue of others being re-graded when they took on additional responsibilities; PB replied that the Claimant should speak to GH about updating her job description; GH told the Claimant that this had already been done in August 2021 and submitted to the CEO as part of the staffing review but nothing had been done (p341). The Tribunal pauses to note that GH is making reference to the paper

5 he prepared as part of his grievance (p308-325) and he has misrepresented the position to the Claimant giving her the false impression (which she genuinely held up to the first diet of the Tribunal hearing) that a request for her to be regraded had been made to the Board. This is simply not correct and reference is made to the findings of fact made above regarding the purpose of this document.

d. The Claimant states to PB that she had been told by GH that CM had said in a meeting that some staff “may not have a job” and that the Claimant and the finance assistant “are lucky to have a job” (p344).

10 e. There is a reference by the Claimant to a discussion with CM about her grade and the fact that CM was looking to reduce the Claimant’s hours. In reply, GH asked the Claimant whether she would be looking for redundancy if her old job description was used. She said yes. The person taking the note of the hearing asked for clarification that the  
15 Claimant was saying that she wanted redundancy if her job description was not changed and the Claimant confirmed this was correct (p344).

f. At p347, the Claimant makes reference to the grade of the finance assistant and the fact that this was all tied up with the grievance and lawyers was not her issue. The Tribunal finds, that contrary to what  
20 had on occasion been asserted during the hearing, the Claimant was aware of the reasons why any review of staff grades had been put on hold.

g. On the same page, there is also a reference to the Claimant looking to be told why she was not being made a grade 8.

25 49. On 17 December 2021, PB contacted the Claimant by telephone to conduct a catch-up. A note of the discussion is at p348:

a. The Claimant informed PB that she was feeling better after the meeting on 9 December 2021 with GH. She makes specific reference to the issue of redundancy being raised.

b. There was a discussion of a revised job description for the Claimant's role and the Claimant asked if she would be expected to sign it off. PB confirmed that she would and the Claimant replied that she would not sign off any job description which was not reflective of a Grade 8 role.

c. The Claimant was asked to confirm her position on when she would return to work.

50. By email dated 20 December 2021 (p349), the Claimant confirmed to PB that she would return to work at the end of her current fit note. The Claimant, again, makes reference to the advice received by the Respondent not to carry out any restructuring whilst GH's grievance was ongoing. She also restates her position that she expects to be made redundant if her job is not re-graded. The Claimant returned to work in January 2022.

51. On 16 February 2022, GH attended the office to clear out his desk. By this point, his grievance had concluded and he was leaving the Respondent's employment. This was the first that the Claimant knew of this.

52. CM met with the Claimant the same day and a note of the meeting is at p351. There is a dispute about what was said at that meeting and the Tribunal prefers the version recorded in the contemporaneous note produced in the bundle given that it was produced at the time of the meeting and is not impacted by the passage of time in the same way as the recollection of witnesses can be affected. The Tribunal finds that the following relevant matters were discussed:-

a. CM started by apologising that she had to see GH attending the office to collect his things and that he had been asked not to attend the office that morning.

b. CM explained that she had read the Claimant's stress questionnaire and wanted to apologise if the Claimant had felt undervalued. She wanted to reassure the Claimant that she was a valued member of staff.

5 c. There was a discussion about the issues which had arisen over the last year including why posts such as finance assistant had not been regraded. CM stated that the past year had been difficult for her, both personally and professionally, and she had never intended to create the impression that she was giving the Claimant short shrift. In particular, CM stated that she had never said the Claimant was lucky to have a job and that this issue had been dismissed as part of GH's grievance.

10 d. CM stated that the grievance was now finished and she wanted to start again if the Claimant was agreeable.

15 e. There was a discussion about how the finance department would operate with GH's departure; CM explained that she was going to ask the Board to appointment an external consultant to deal with GH's work and this would not be something which the Claimant would be expected to do. This would give the Respondent space to consider longer term solutions to look at the structure of the department. It was also agreed that the temporary staff would be kept on to assist with the audit that was ongoing. The Claimant would report to CM for now.

20 53. On or around 19 April 2023, CM met with PB and the Claimant to discuss the future structure of the finance department:-

a. The Claimant was asked for her view and she suggested a senior manager on a SM grade although not as high as GH had held, finance officer on Grade 8 (that is, the Claimant) and a finance assistant on Grade 5.

25 b. CM informed the Claimant that she had an alternative view of the structure:-

i. The external consultant would be retained to provide strategic support.

ii. A Grade 8 finance manager.

- iii. A Grade 7 finance office post.
  - iv. A Grade 5 finance assistant post.
  - c. CM explained that the Grade 8 would require to fulfil certain duties such as line management of the other staff, dealing with insurance, reporting to the Board and preparing policies. There was a dispute between CM and the Claimant as to whether the role would also involve speaking to the press; the Tribunal prefers CM's version that it would not as the only officer authorised to speak to the press was her and there was no evidence that any other employee, at any grade, had ever had to undertake such duties.
  - d. The Claimant was asked if she would be willing to apply for the Grade 8 job if this was agreed by the Board and she indicated that she would not and that having to do these duties would make her ill.
  - e. CM asked whether she would try the post on a temporary basis with mentoring and support from the external consultant (who had carried out such a role elsewhere) but the Claimant was not willing to take up this option.
  - f. The Claimant's position was that she was looking to do the same job as she had been doing but paid at Grade 8.
54. On 21 April 2022, CM emailed PB and another employee (p370) enclosing a range of Grade 7 role job packs (which included job descriptions and person specifications) and making reference to Grade 8 job packs provided earlier. She was asking PB and the other employee to sense check her view that the Claimant's role of finance officer was a Grade 7 job. She also attached GH's paper from August 2021 with the purpose of giving them the argument he had made for a Grade 8 job.
55. The Tribunal notes that the following job packs were enclosed with CM's email of 21 April 2022 or had been provided under separate cover:



- a. Grade 7 finance officer role with Maryhill Housing Association dated January 2018 (pp371-377).
  - b. Grade 7 finance officer role with Rural Stirling Housing Association dated December 2020 (pp378-380).
  - 5 c. Grade 7 finance officer role with Shire Housing Association dated January 2022 (pp381-402).
  - d. Grade 7 finance officer role with West Whitlawburn Housing Cooperative dated October 2020 (pp429-439).
  - e. Grade 7 finance officer role with East Lothian Housing Association  
10 dated March 2019 (pp440-454).
  - f. Grade 7 finance officer role with Paragon Housing Association that is undated (pp455-457).
  - g. Grade 8 finance manager role with Partick Housing Association undated (pp458-461).
  - 15 h. Grade 8 finance manager role with Blairtummock Housing Association undated (pp462-464).
  - i. Grade 8 finance and corporate manager with Ardenglen Housing Association dated August 2019 (pp465-482).
  - 20 j. Grade 8 finance manager with Linstone Housing Association undated (pp483-484). The job description for this role includes an organisational structure that shows that there is a finance officer at Grade 7 at this housing association.
56. Using this information as benchmarking for Grade 7 and 8 roles, CM went to the Board with a recommendation to restructure the finance department to  
25 create a Grade 8 finance manager role, a Grade 7 finance officer role and a Grade 5 finance assistant role. This was approved by the Board and CM spoke to staff affected by the change on 28 April 2022. The Claimant was advised of the new structure on 28 April 2022.

57. The Claimant decided that, at this point, it was clear that she was not going to be re-graded to Grade 8 and, as a result, she no longer wished to work for the Respondent. She resigned by handwritten letter (p486) which she gave to PB; the letter is undated but it was not in dispute that she submitted the letter on 29 April 2022. The letter does not give a reason for her resignation.
58. The Claimant agreed to work during her notice period but went off sick on 11 May 2022 with stress and did not return to work until her employment terminated on 1 June 2022.
59. The Claimant submitted a grievance on or around 10 June 2022 using the Respondent's template form. In the grievance (p518) she states that the grievance is against the Respondent and the persons involved "*in the decision that has resulted in my constructive dismissal*". The Claimant goes on to confirm that "*The decision I am referring to was not to re grade me to a Grade 8*".

#### 15 **Claimant's submissions**

60. The Claimant agent produced written submissions and supplemented these orally.
61. He set out the relevant statutory provisions and caselaw which he considered relevant to the issues in this case. For the sake of brevity, the Tribunal will not repeat these as they were uncontroversial.
62. Mr Milne then went to address the specific issues in this case. He submitted that the act which triggered the Claimant's resignation was the discussion of the new structure for the finance department which occurred on 28 April 2022. It was said that it was at this point that it was clear at this point that the Claimant was not going to be regraded to Grade 8.
63. It was submitted that the Claimant did not subsequently affirm the contract given that she resigned on the very next day after this discussion.
64. Mr Milne went to submit that this act, in and of itself, was sufficient to amount to a repudiatory breach of contract on the basis that the Respondent had

carried out a close-minded benchmarking process in deciding on the grades of the jobs in the new structure, refusing to take account of the contents of GH's report of August 2021. Further, it was said that the benchmarking done by the Respondent was inadequate because it did not consider any senior finance officer at Grade 8.

65. If the Tribunal was not with him in relation to that submission, Mr Milne went to identify five acts which he said formed a course of conduct by the Respondent which, when taken together, amounted to a repudiatory breach. The five further matters are:

10 a. An alleged failure to regrade the Claimant in January 2019.

i. This refers to the restructuring which took place when CM became chief executive and her vacant post of regeneration manager was not filled.

15 ii. The duties of the vacant post were redistributed to other employees and some of them were regraded as a result.

iii. This is contrasted with the Claimant who was being given additional responsibilities around the same time but was only being given additional hours rather than a regrading.

20 iv. It was submitted that the Claimant was not being treated in an even-handed manner compared to other employees. It was said that there had not been any benchmarking process for the Claimant's role as had been done for others.

b. An alleged failure to consider the Claimant for regrading in May 2020.

25 i. It is submitted that the same issue arose at this date as arose at January 2019 when additional responsibility payments for other staff were being extended but only the Claimant's hours were being discussed.

ii. Reference is made to the discussion between CM and the Claimant on or around 26 May 2020. It is submitted that the

Claimant was raising issues around her duties and grading but no benchmarking process was carried out.

c. The alleged lack of support following the departure of the finance assistant, Jenna Laing.

5 i. It was submitted that the Respondent was aware that the finance assistant role ought to be a higher grade and was not being paid at the market rate. This resulted in no suitable applicants when the vacant role was advertised.

10 ii. Temporary staff had to be recruited to cover the work and the Claimant had to spend time supervising them.

iii. The Claimant had never been told the reason why the finance assistant role could not be regraded at the time.

d. Suggesting redundancy as an option and omitting to tell the Claimant that this was not being made and could not be made.

15 i. This is a reference to the comments made by GH at the stress meeting with the Claimant in December 2021.

ii. No-one else such as CM or PB corrected this position and clarified with the Claimant that redundancy was not an option.

20 iii. As a result of this, it was submitted that the Claimant soldiered on in the expectation that she would either be regraded or made redundant.

e. The allegedly close-minded benchmarking process carried out in April 2022. The submissions on this point have already been set out above.

66. Mr Milne went on to submit that the dismissal was unfair. The submissions  
25 concluded with comments on the Claimant's loss. Given the Tribunal's conclusions on the substantive issues, it does not intend to set these out for the sake of brevity.

67. In response to a question from the Tribunal as to whether the Claimant's case was, in effect, seeking to say that she had a right to a pay rise by the "back door", Mr Milne replied that there were a wide range of issues which were finally dealt with in April 2022 but the manner in which the Respondent acted was without reasonable and proper cause.

68. Mr Milne, and Mr O'Carroll, agreed with the Tribunal that it was not being asked to assess if the benchmarking done by the Respondent was correct but, rather, whether it was done with reasonable or proper cause.

69. In rebuttal of matters raised in the Respondent's submissions, Mr Milne commented on the fact that it did not matter whether the label of "redundancy" applied to what was discussed between GH and the Claimant in December 2021. What mattered was that there was some discussion of a financial package to leave. He also commented on the degree to which the Respondent had had fair notice of the case being presented on behalf of the Claimant given that she had previously been unrepresented.

### **Respondent's submissions**

70. The Respondent's agent produced written submissions and supplemented these orally.

71. Mr O'Carroll started by commenting on certain matters which arose from the submissions on behalf of the Claimant:-

- a. The suggestion of redundancy was raised only by GH and it was submitted that this was done to cause mischief.
- b. He agreed with the proposition raised by the Tribunal that what the Claimant really wanted was a pay rise but without having to take the leap of carrying out the Grade 8 job which was on offer.
- c. It was submitting that the alleged breach of contract was really the fact that the Claimant was not re-graded. Matters such as why the finance assistant role was not re-graded are peripheral matters and that the reason why this could not be done (that is, the investigation into GH's

grievance) was discussed in the meeting between the Claimant and GH in December 2021 (p340). There is nothing to criticise in the Respondent following legal advice.

- 5 72. Turning to the written submissions, Mr O'Carroll summarised the Respondent's position; they denied that there was a breach of contract but if there had been then the Claimant had acquiesced to this. It was submitted that the Claimant resigned for her own reasons, having been looking for other work since December 2021.
- 10 73. The written submissions then turned to the relevant law which, again, the Tribunal will not repeat for the sake of brevity. Similarly, the submissions set out facts which Mr O'Carroll invites the Tribunal to find relating to how the Respondent operated, the sector in which it did business and the chronology of the case which the Tribunal will not repeat in detail.
- 15 74. The thrust of Mr O'Carroll's submissions was that any regrading had to be something for which there was a business need, had to be affordable and had to be approved by the Board. When grading a job, the Respondent benchmarked that job against other jobs in the sector as an essential part of making a business case. It was submitted that this is what was done in January 2019 when redistributing the duties of the vacant regeneration manager role.
- 20 75. It was submitted that, when the issue of the Claimant's grade was raised with CM in May 2020, this was treated seriously and CM gave the Claimant a job pack to start a benchmarking process and directed her to both GH and PB to take further. However, nothing further came of this.
- 25 76. Reference is made to the paper prepared by GH in August 2021 and Mr O'Carroll makes various criticisms of it in terms of the robustness of the evidence provided to support what GH was seeking.
77. It was accepted that the Claimant's job had evolved over time and Mr O'Carroll highlighted certain duties which she had taken on. However, he

had submitted that it did not follow that such duties amounted to a Grade 8 post.

78. In terms of the benchmarking done in April 2022, it was submitted that a review of other finance jobs in the sector was carried out and that there had been no challenge to the evidence of CM that these jobs were comparable with the Claimant's role. Similarly, there had been no challenge by the Claimant to the fact that the Grade 8 roles which had been reviewed at the same time had duties which the Claimant did not do and did not want to do.

79. It was submitted that there was no breach of trust and confidence by the Respondent in not re-grading the Claimant.

80. The submissions went on to deal with matters such as acquiescence, voluntary resignation and failure to mitigate loss. The Tribunal has noted these but will not repeat them given that it has held that there was no fundamental breach of contract.

#### 15 **Relevant Law**

81. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee.

82. Section 95(1) of the 1996 Act states that dismissal can arise where:-

*"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."*

83. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:-

a. There must be a fundamental breach of contract by the employer

- b. The employer's breach caused the employee to resign
- c. The employee did not delay too long before resigning thus affirming the contract

84. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.
85. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
86. The question of what an employee is entitled to be paid for carrying out their duties is, for the most part, a matter of negotiation and agreement between the employee and their employer (subject to certain matters such as the right to the national minimum wage or the sex equality clause implied into all contracts of employment by the Equality Act 2010).
87. In particular, there is no legal right to a pay rise (beyond increases to the rate of the minimum wage or by operation of the sex equality clause) and this is, primarily, a matter of negotiation between the parties to the contract.
88. However, there can be circumstances where an employer who was deliberately refusing to give a pay rise to a particular employee in a capricious, arbitrary and inequitable manner could be in breach of the duty of trust and confidence although such cases would have to be extreme (*F C Gardner Ltd v Beresford* [1978] IRLR 63, *Murco Petroleum Ltd v Forge* [1987] IRLR 50, *IBM UK Holdings Ltd v Dalglish* [2018] IRLR 4).
89. The "last straw" principle has been set out in a range of cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd* [1985] IRLR 465. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents



are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

5 90. The “last straw” itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

91. The *Kaur* case also set out practical guidance for the Employment Tribunal in addressing the issue of whether a claimant had affirmed the contract in the context of a “last straw” case:-

10 “(1) *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?*

(2) *Has he or she affirmed the contract since that act?*

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

15 (4) *If not, was it nevertheless a part (applying the approach explained in *Omilaju v Waltham Forest LBC* [2005] IRLR 35) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation ....)*

20 (5) *Did the employee resign in response (or partly in response) to that breach?”*

25 92. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA). The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal.

93. In a constructive dismissal case, the reason for dismissal is the reason for the breach of contract by the employer (*Berriman v Delabole Slate Ltd* [1985] ICR 546, CA).

94. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

95. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are two matters which have generated considerable case law and which are worth highlighting

96. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduced to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called “Polkey” reduction).

97. Second, the Tribunal needs to consider whether the dismissal was a fair sanction applying the “band of reasonable responses” test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

## Decision

98. The Tribunal agrees with the submission made on behalf of the Respondent that the core of the Claimant’s case was that she was not re-graded from Grade 7 to Grade 8. This is the only reason given for her resignation in the only broadly contemporaneous document which gives such an explanation (that is, the form initiating her grievance at p518). It is quite clear that had the Claimant been re-graded then she would almost certainly still be employed by the Respondent and these proceedings would not have occurred.

99. This is important to recognise. Submissions have been made on behalf of the Claimant about other matters which give rise to an alleged breach of the

“Malik term” (the Tribunal will use this phrase as shorthand to describe the implied term of the contract relied on in this case) such as a lack of support or the suggestion of redundancy. However, none of those matters exist in a vacuum and they are all matters which flow from the central proposition in this case that the Claimant believed that she should be paid at Grade 8.

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100. The difficulty for the Claimant is that there is no general legal right to a pay rise. The amount which someone is to be paid for doing their job is almost wholly a matter of agreement between them and their employer with which the law rarely interferes (subject to the minimum wage and issues of unlawful discrimination).

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101. The same applies for increases to pay; it is, broadly speaking, a matter of negotiation and agreement between the employee and employer. There may be an express term of the contract providing for some sort of annual pay increase such as in this case where the Claimant’s terms and conditions provide for an annual pay rise on the incremental spinal column points within the grade (p75). However, absent such express terms there is no general legal right to a pay rise.

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102. For the Tribunal to find that there had been a fundamental breach of contract solely on the basis that the Claimant was not re-graded would be to introduce a right to a pay rise by the “back door” of the *Malik* term. This is not what that term is intended for and would undermine the principle that the terms of the contract are a matter of agreement between the parties.

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103. If the sole question for the Tribunal was whether there had been a fundamental breach of contract arising solely from the fact that the Claimant had not been regraded to Grade 8 then it would have no hesitation in finding that there was not.

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104. However, that is not the end of the matter and, as the case law identified above makes clear, there can be cases where a failure to award an increase in pay can amount to a breach of contract where, in extreme cases, the employer acts capriciously, arbitrarily or inequitably in doing so.

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105. The Tribunal considers that the conduct of the Respondent in this case as it relates to the grading of the Claimant's job comes nowhere close, at any point in time, to being capricious, arbitrary or inequitable for the following reasons.
106. First, to the extent that the changes made to the grades for other jobs are  
5 relied upon by the Claimant, these arose in very different circumstances from those of the Claimant. For example, the Claimant alleges a failure to regrade her in January 2019 when, at that time, other jobs were being regraded. At that time, the Respondent was restructuring its organisation; it had decided not to fill the vacant role of regeneration manager and redistribute the duties  
10 of that job to other staff. As a result, some, but not all, of the staff taking on the redistributed duties were regrading to reflect the higher value of those duties.
107. This is to be contrasted with the position of the Claimant at that time and there are two important considerations. First, the finance department was wholly  
15 unaffected by the restructuring that was taking place with none of the jobs in that department being asked to take on the redistributed duties. There was, therefore, no reason to consider the Claimant's grade as part of that restructuring. Second, the only request being put before the Board was for an increase in hours for the Claimant due to an anticipated increase in  
20 workload due to the creation of a new subsidiary.
108. The same applies to other circumstances where other staff were being regraded such as when a technical officer became a senior technical officer; there was a distinct change in their duties driven by the Respondent reorganising their operations.
- 25 109. The Tribunal accepts that the Claimant's job will, as inevitably happens with all jobs, changed over the years. This might be described as "job creep" where changes in working practices, technology, legal/regulatory requirements and other factors mean that a job slowly changes over time. This is different from the employer redesigning a job as happened in this case,  
30 for example, in January 2019.

110. It is also important to recognise that a change in duties does not necessarily equate to a change in pay or grade. If the duties accruing to a post over time involve the same or broadly similar level of knowledge, skills, demands and responsibilities then they may well be within the same grade or pay range.
- 5 111. This brings the Tribunal to the second reason, closely related to the first, that there was never a formal request for regrading escalated through the chain of management. There is no question that the Claimant had been raising the issue of Grade 8 with GH in her appraisals but, at no point, had either she or GH sought to take this further in a formal way.
- 10 112. It was the unchallenged evidence of CM that the Board were the only ones with the authority to re-grade the Claimant and so there had to be a request to them. At no point was any request made by the Claimant. Further, there was no request made to CM (or anyone else within senior management) which was not taken to the Board or otherwise blocked.
- 15 113. The closest the Claimant came to making such a request was during her discussion with CM in May 2020. This was left with the Claimant being asked to speak to GH about this in order to gather evidence to support any request for re-grading. It was certainly not dismissed out of hand by CM who provided the Claimant with some information that might help with any request and  
20 directed her to PB as a source of further information that may assist.
114. It was said that this was the only instance where an employee was asked to benchmark their job but it was also the only instance where an employee was seeking a re-grading because their job had changed over time. None of the witnesses could identify any other circumstance in which an employee had  
25 indicated a desire for their grade to be changed and the other examples given in evidence, such as the changes made in January 2019, arose from a formal restructuring by the Respondent where it would be expected that they would set out the changes proposed to duties and grades.
115. The discussion in May 2020 was prompted by CM's email to the senior  
30 management team seeking evidence from those managers to support a request to the board to continue certain temporary arrangements in the early

days of the Covid pandemic when the advice from industry bodies was not to make changes or carry out any planned restructuring until it was clear what impact the pandemic (and lockdowns) would have on the sector.

5 116. It was not a circumstance where further changes to grades or other changes were being made but, rather, CM was seeking to continue existing arrangements. The Claimant came into the discussion, not because of any request for regrading but because there was a question of whether there was still a need for the additional hours she had been given in 2019 as the anticipated increase in her workload arising from the new subsidiary had not  
10 materialised because the subsidiary had been put on hold.

117. GH made reference in his evidence to raising the issue of the Claimant's grade at management meetings but the Tribunal did not find this evidence to be particularly satisfactory; the Tribunal finds it unlikely that he would be raising this, on a regular basis, at Monday morning diary meetings as  
15 suggested; the more formal SMT meetings were minuted and no minutes of these meetings were produced at all, let alone any referencing the Claimant's grade; the detail of when he was raising this was lacking although that may well be a result of the passage of time.

20 118. The only other instance where there appeared to be a formal request to regrade the Claimant was in the paper produced by GH as part of his grievance (p308). However, this was never a formal request to the Board (although it was dressed up as if it were) but, rather, was something produced as part of GH's grievance. The Tribunal heard no evidence about the content and process of GH's grievance beyond its impact on the Claimant's case. It  
25 certainly heard no evidence of the context or purpose of the paper at p308 nor did it hear any evidence about what came of this paper.

119. In these circumstances, the Tribunal does not consider that this amounted to a formal request to the Board to re-grade the Claimant and it notes that no case has been advanced on behalf of the Claimant suggesting that it was.

30 120. The Claimant was certainly under the impression that it was a formal request but that impression was given to her by GH and not the Respondent.

121. Third, when the Respondent looked at the grades of other staff in the past and at the structure of the finance department in April 2022, it did so by considering what was required by the business, what duties would be done by job-holders and what similar jobs were being paid in other housing associations (that is, “benchmarking”).
122. There is simply no basis on which the Tribunal could conclude that the Respondent acted capriciously or arbitrarily in reaching its various conclusions about the grades of job and, rather, the Tribunal finds that the Respondent proceeded on an evidence based approach.
123. The Tribunal does not consider that, in this type of claim, it is appropriate for it to decide whether the Respondent was right or wrong in its conclusions. This would be effectively substituting its own decision for that of the Respondent. In any event, the evidence led before the Tribunal would not allow the type of assessment that might be made in other claims such as that envisaged in Schedule 3 of the Tribunal Rules for equal pay claims.
124. The Respondent have made an effort to determine the grades of the jobs within their organisation by using a benchmarking process. They looked at job descriptions for similar jobs in their sector and what other employers in the sector were paying for those jobs. In particular, in April 2022, they looked at a range of both Grade 7 and Grade 8 jobs in drafting the new job descriptions for finance officer and finance manager and determining the grades for those jobs.
125. They also had in mind the paper from GH produced during his grievance although little weight was ultimately given to that. The Tribunal does not consider that the rejection of GH’s arguments in that paper was arbitrary or capricious (or was done without reasonable or proper cause). The paper had a significantly smaller evidence base than the benchmarking done by CM in April 2022 had used. In particular, it looked at only two Grade 8 roles and no Grade 7 roles and this can be contrasted with the number of jobs at both grades used in the April 2022 exercise.

126. It is also the case that CM consulted with the Claimant and asked her for ideas about how the department should look going forward. Whilst CM may not have followed the Claimant's suggestions, the fact that she engaged with the Claimant at this time weighs against any suggestion of arbitrary or capricious action by the Respondent.
127. This is not a case where the job grades were simply plucked out of the air or had no explanation or rationale. The evidence produced to the Tribunal clearly demonstrated what the Tribunal considers was a genuine attempt by the Respondent to determine the grades of jobs by way of an evidence-based process. It was certainly not arbitrary or capricious.
128. It may well be the case that the Claimant does not agree with the conclusions reached by the Respondent and there was considerable questioning of witnesses from all sides about which duties the Claimant did that did not appear in other job descriptions or duties in those job descriptions which the Claimant did not do.
129. However, this was not an equal pay claim where the Tribunal is assessing whether jobs were like work or work of equal value. As noted above, and agreed by counsel for both sides, this was not a case where it was appropriate for the Tribunal to carry out such an assessment.
130. Rather, the question for the Tribunal was whether the decisions of the Respondent in respect of the grade of jobs were capricious, arbitrary or inequitable or, to put it another way, whether they lacked a proper and reasonable cause. Whichever way the question is framed, the Tribunal considers that the decisions of the Respondent regarding grading of the Claimant's job, or any other job, come nowhere close to meeting this threshold given the evidence-based rationale for the Respondent's conclusions.
131. Fourth, there is the fact that there was still a job for the Claimant as at April 2022. The restructuring of the finance department had resulted in a job at the same grade at which the Claimant had been employed (Grade 7) and there was no suggestion in her evidence that she could not have done this job.



132. Further, there was a new job available at Grade 8 for which the Claimant was given the opportunity to apply. The Respondent had indicated that she would be provided with mentoring and support to help her take on the duties of that role.
- 5 133. The Claimant did not want to take on the duties of the Grade 8 role and that is a choice she is entitled to make. However, the Tribunal does not find that these duties were created specifically to encourage her not to take on the role. There was simply no evidence to support this assertion.
- 10 134. The manner in which the finance department was restructured in April 2022 and the outcome of that in terms of what jobs would open to the Claimant are not, on the face, the actions of an employer who intend to destroy or seriously damage the employment nor are they actions which could be said to have that effect.
- 15 135. For these reasons, the Tribunal considers that there is no basis on which it could be said that the fact that the Claimant was not regraded in January 2019, May 2020 or April 2022 amounts to a breach of the Malik term, either individually or cumulatively.
- 20 136. Similarly, the Tribunal rejects any suggestion that the benchmarking process was close-minded or failed to take account of the wider dimensions of her job for the reasons set out above.
- 25 137. A further submission made on behalf of the Claimant in relation to this benchmarking process was that CM did not take into consideration any senior finance officer jobs at Grade 8. However, other than the two jobs identified in GH's report, there was no evidence before the Tribunal that there were any such jobs for CM to consider. There were no job descriptions for such roles produced in the bundle and put to CM in cross-examination. The Tribunal, therefore, has no evidential basis for concluding that CM was excluding, deliberately or otherwise, such roles from the benchmarking process she conducted in April 2022.

138. There are two other matters raised in the Claimant's submissions which are said to form part of the conduct said to breach the Malik term which are related to the Claimant's grading but are not directly concerned with that issue.
139. The first of these relate to an alleged lack of support when the existing finance assistant left that role. There are two elements to this issue.
140. First, it is said that the Respondent failed to regrade this post and there is no question that, unlike the Claimant's job, there had been formal requests made to regrade this role. The reason given by the Respondent for not regrading the role when the finance assistant left the business was that the Respondent had received legal advice not to take such action whilst GH's grievance was ongoing.
141. The Claimant did not seek to suggest that there was any other reason for this or that this was not the genuine reason why the post was not regraded at the time. When the finance department was reorganised after GH's departure, the finance assistant role was redesigned and regraded. This is consistent with the Respondent's position that they could not take action whilst the grievance was ongoing.
142. It is correct that the Respondent was not obliged to take the advice of their lawyers and they could have chosen to ignore this. However, the Tribunal considers that it is very difficult to see any basis on which it could be said that an employer whose actions were being guided by legal advice were not acting with proper and reasonable cause.
143. Second, there was an issue about the degree of support provided after the finance assistant left. The Tribunal notes that this was not a case where nothing was done and efforts were made to find a permanent replacement to no avail. In the meantime, temporary staff were recruited to assist in the work of the department.
144. The crux of this complaint were criticisms of the quality of the temporary staff employed to provide support until a permanent replacement for the finance assistant was found. It was not in dispute that they required greater

supervision than the previous job-holder and one of them was simply not capable which led them to being replaced. However, the Tribunal considers that these issues do not come close to breaching the *Malik* term; there was certainly no evidence that the Respondent was deliberately recruiting sub-par staff and there has to be recognised that there is always a degree of risk in recruiting staff that they will not meet expectations.

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145. The final issue raised relates to the discussion of redundancy at the stress meeting between the Claimant and GH in December 2021. It is said that the Respondent had suggested redundancy as an option and failed to tell her that this was not going to happen.

146. The first point to make is that the Respondent did not suggest redundancy and this was done by GH without any authority from the Board or the chief executive. The Tribunal accepts that he raised the issue in his capacity as a manager and so, from the Claimant's point of view, there was ostensible authority for him to do so.

147. However, even with ostensible authority, it is important to look at what was actually said at the meeting. GH did not offer redundancy to the Claimant. Rather he asked whether, if she was not regraded, she would be looking for redundancy. This is a subtle but important distinction; this was not a circumstance where GH was offering redundancy but rather exploring what solutions the Claimant was contemplating to her issues at work.

148. In these circumstances, there was never any offer of redundancy and so there was no reason for the Respondent to tell the Claimant otherwise. It was certainly not a matter that featured in any discussions which occurred after GH left in February 2022.

149. The Tribunal considers that the whole tenor of the discussions between the Claimant and CM after GH's departure was directed to an ongoing employment relationship rather than any suggestion of redundancy or the Claimant's employment coming to an end until she resigned.

150. To the extent that it is being suggested that, after the meeting with GH in December 2021, the Claimant was proceeding on the basis that she was either going to be regraded or given some financial package to leave then the Tribunal does not consider that to be a proper or reasonable interpretation of the discussion. It certainly could not be said that, from that discussion alone, the Claimant had been given a guarantee that one of those two things would definitely happen.

151. The Tribunal considers that, for the reasons set out above, none of these matters, either on their own or taken together, are capable of amounting to a breach of the *Malik* term.

152. There has, therefore, been no fundamental breach of contract by the Respondent and so the Claimant has not been dismissed as defined in s95(1)(c) of the Employment Rights Act 1996. The claim of unfair dismissal is, therefore, not well founded and is hereby dismissed.

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**Employment Judge: P O'Donnell**  
**Date of Judgment: 04 May 2023**  
**Entered in register: 10 May 2023**  
**and copied to parties**

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