EMPLOYMENT TRIBUNALS

Claimant: Ms M Wynter

Respondent: London Borough of Lewisham

Heard at: **London South Employment Tribunal (by remote video hearing)**

On: **28-30 June 2021 & 16 July 2021 (in chambers)**

Before: **Employment Judge Ferguson**

Members: **Ms N O'Hare**
Ms H Bharadia

Representation
Claimant: Mr J Bradbury & Mr G Williams (union representatives)
Respondent: Ms S Crawshay-Williams (counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Claimant's complaint of ordinary unfair dismissal fails and is dismissed.

2. The Claimant's complaint of automatic unfair dismissal (whistleblowing) fails and is dismissed.

3. The Claimant's complaints of detriments because of making protected disclosures fail and are dismissed.

REASONS

INTRODUCTION

1. By a claim form presented on 10 October 2019, following a period of early conciliation from 12 August to 12 September 2019, the Claimant brought complaints of ordinary unfair dismissal, automatic unfair dismissal (whistleblowing) and detriments because of making protected disclosures.

2. Because of restrictions relating to the Covid-19 pandemic the hearing took place by remote video hearing with the consent of the parties.

3. The issues to be determined were agreed as follows:

Constructive unfair dismissal

1. Was the Claimant dismissed?

1.1 Did the Respondent do the following things:

1.1.1 Not following points 2.7, 2.8, 2.9 and 2.14 of the Transfer Policy;

1.1.2 Instructing the Claimant to carry out sensitive tasks for which she is not trained;

1.1.3 Ms Gilzean and/or Mr Osei failing to address the problem when the Claimant raised it.

1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

1.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

1.2.2 Whether it had reasonable and proper cause for doing so.

1.3 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.4 Delay/ affirmation is not in issue.

2. It is not in dispute that if the Claimant was constructively dismissed the dismissal was unfair.

Automatic unfair dismissal (s.103A ERA)

3. Was the reason or principal reason for dismissal that the Claimant made a protected disclosure?

4. If so, the Claimant will be regarded as unfairly dismissed.

Remedy for unfair dismissal

5. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

6. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

7. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Protected disclosure

8. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

    8.1 What did the Claimant say or write? When? To whom? The Claimant says she made disclosures on these occasions:

        8.1.1 The Claimant's email to Ms Gilzean on 26 June 2019 ("PD 1")

        8.1.2 The conversation between the Claimant and Mr Osei on 2 July 2019 as described in the Claimant's witness statement at paragraphs 21-22 ("PD2")

        8.1.3 The conversation between the Claimant and Ms Gilzean on 3 July 2019 as described in the Claimant's witness statement at paragraph 31 ("PD 3")

    8.2 Did she disclose information?

    8.3 Did she believe the disclosure of information was made in the public interest?

    8.4 Was that belief reasonable?

    8.5 Did she believe it tended to show that:

        8.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

        8.5.2 a miscarriage of justice had occurred, was occurring or was likely to occur;

        8.5.3 the health or safety of any individual had been, was being or was likely to be endangered.

    8.6 Was that belief reasonable?

9. If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to her employer.

Detriment (s.48 ERA)

10. Did the Respondent do the following things:

    10.1 Ms Gilzean ignoring the Claimant's email of 26 June 2019;

    10.2 Ms Gilzean not discussing the Claimant's decision to resign with the Claimant before informing staff (instead immediately emailing staff to inform them of the resignation);

10.3 Ms Gilzean not respecting the Claimant's confidentiality and privacy by consulting the Claimant before emailing staff;

10.4 Ms Gilzean excluding the Claimant from the email to staff; and

10.5 Ms Gilzean humiliating the Claimant by inviting staff to suggest names for her replacement within minutes of her resignation.

10.6 Ms Gilzean's manner in the meeting on 3 July 2019 as described in the Claimant's witness statement at paragraph 28.

10.7 Ms Gilzean threatening the Claimant with disciplinary action on 3 July 2019;

10.8 Ms Gilzean refusing on 3 July 2019 to allow the Claimant to work in FSW for the remainder of her notice period and then refusing a formal transfer (both decisions subsequently reversed).

11. By doing so, did it subject the Claimant to detriment?

12. If so, was it done on the ground that she made one or more protected disclosures? The Claimant relies on PD1 and PD2 in respect of detriments 12.1 to 12.5. She relies on all three protected disclosures in respect of detriments 12.6 to 12.8.

Remedy for Protected Disclosure Detriment

13. Was the protected disclosure made in good faith?

14. If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

4. We heard evidence from the Claimant and, on behalf of the Respondent, from Tanya Gilzean. We had a bundle of 268 pages.

5. The Claimant has been represented throughout the proceedings by Community Trade Union (formerly the Independent Democratic Union). A legal officer from the union, Mr Bradbury, represented the Claimant on the first day of the three-day hearing. On the second day Mr Bradbury emailed the Tribunal at 8.31am requesting a postponement on the basis that he had woken with an upset stomach and was too unwell to continue with the hearing. He did not attend at 10.00am when the hearing was due to start that day, and nor did anyone else from the union. Mr Bradbury said in his email that he had passed his notes of the first day of the hearing, and his notes for cross-examination of Ms Gilzean, to the union, but no-one else was available to cover for him at short notice. The Claimant did not attend the hearing at 10.00am either and was evidently not intending to do so until the clerk called her. The Tribunal formed the impression that Mr Bradbury assumed that the postponement application would be granted. He did not appear to have considered the possibility of the hearing continuing on the third day, either if he recovered or if an alternative representative could be found. The Claimant's evidence had already concluded and it had been agreed at the start of the hearing that cross-examination of Ms Gilzean would take no more than three and a quarter hours. We consider that Mr Bradbury's assumption that the postponement would be granted was

discourteous to the Tribunal, the Respondent and his own client. We accept that he was unwell, and we are of course sympathetic to any representative who becomes unwell in the middle of a hearing, but he was well enough to email and telephone the Tribunal, and to communicate with the union and the Respondent's counsel. He should have made a greater effort to ensure that the hearing could be completed in the remaining time.

6. Having heard from the Respondent's counsel and from the Claimant in person, we directed that the hearing would continue on the third day, and that if Mr Bradbury was still unwell an alternative representative would need to be found. This direction was sent to the union by email at 11.53am on the second day.

7. At 7.00pm on the second day the union emailed the Tribunal with a renewed application to postpone. There was still no medical evidence provided, or any explanation for the lack of it. Mr Williams, another legal officer for the union, attended at 10.00am on the third day to the make the application orally. He said he had spent several hours preparing for the case, and was willing to do so if the application was refused, but he still did not feel fully prepared.

8. We refused the postponement application. We considered the Presidential Guidance on Postponements. We noted that there was no wholly satisfactory solution. It was not in either party's interests for the matter to go part-heard. Preliminary enquiries suggested that the earliest available date would be in October 2021. We considered there was a risk of prejudice to the Respondent because Ms Gilzean had not yet given evidence. She had attended ready to do so, and by the time of any relisted hearing, according to the Respondent she would no longer be employed by them. We were already hearing evidence about events that occurred two years ago, so it was not in the interests of justice for there to be any further delay. We were of course very concerned to ensure that the Claimant was able to have a fair trial, and noted that the situation had arisen through no fault on her part, so any failings of her representatives should not be visited on her. We took into account that Mr Williams is an experienced representative and had had all of the papers, including Mr Bradbury's notes, since early morning on day two. It is not a particularly complicated or document-heavy case. We noted that it is part of our duty to ensure that the parties are on an equal footing, and that we could ensure that the Claimant's case was properly and fairly put to Ms Gilzean. We allowed Mr Williams some further time to prepare and started the hearing at 1.30pm. Ms Gilzean's evidence concluded at 4.40pm.

9. In accordance with directions agreed at the conclusion of the hearing, we received written submissions from both parties on 7 July 2021.

FACTS

10. The Claimant began working for the Respondent as a social worker in the Family Social Work team on 10 June 2014. She worked exclusively in child protection. In early 2019 she was off work for a period of around five weeks due to work-related stress. During her sickness absence the Claimant's then line manager, Briege Gilhooly, suggested a transfer to the Connected Persons and Special Guardianship team within the Corporate Parenting Service. Ms Gilhooly recommended the Claimant to Tanya Gilzean, who was (and still is)

the team manager. Ms Gilhooly told Ms Gilzean that the Claimant had all the right skills for the job.

11. The Respondent has a "transfer and secondment scheme" and has published guidance on how transfers and secondments within Children's Social Care can be arranged. The guidance provides, so far as relevant:

> "2.1 Transfers or secondments requested by individual employees are for the purpose of providing continuous professional development opportunities and to support the retention of competent and highly skilled social work staff.
>
> 2.2 If an employee wishes to be considered for a transfer or secondment opportunity they should complete a Transfer Request form and discuss their request with their Service Manager. Employees will need to be able to demonstrate how the opportunity would benefit both themselves and the Directorate.
>
> …
>
> 2.7 The receiving Service Manager in the service unit identified will need to consider: -
>
> - if they have any vacancies
> - consistency and impact on the service
> - if the level of current skills, knowledge and experience is sufficient to undertake the requirement of the new unit
> - induction/support that would be required and how this would be provided
>
> 2.8 If the transfer/secondment is possible to progress this, the receiving Service Manager will meet with the employee to discuss their skills and experience. The final decision will be the receiving Service Manager's and there is no right of appeal against their decision.
>
> 2.9 Transfers are a permanent arrangement and the manager will need to be satisfied that the employee would be able to meet the specialist requirements of the post with minimal training and support.
>
> …
>
> 2.14 <u>Administration</u>
>
> If a transfer or secondment is agreed, the substantive manager must write to the employee to confirm this. HR can provide advice if required. The letter must include the effective date of the arrangement and the end date if it is a secondment. …"

12. The "receiving Service Manager" in the case of the Claimant's transfer was Ms Gilzean's line manager, Andrews Osei.

13. The work of the Connected Persons and Special Guardianship team primarily involves assessing family members and others to be appointed as Special Guardians of a child, where there is a real risk that the parents might not be able to look after the child. Ms Gilzean described Special Guardianship as "one step down from adoption". Her team consists of six social workers, two of whom are senior social workers. Members of the team are assigned cases on a points-based system according to complexity. The first task is to conduct a "viability assessment", for which the Respondent's internal deadline is four weeks. This involves a visit to the family member, taking around three hours, and writing up a report if they are considered not to be viable for Special Guardianship. The time required to write the report is variable, but Ms Gilzean said that on average it would take around three hours. The report would have to be sent to Ms Gilzean to "quality assure", and then to the Respondent's legal team. If the family member is considered viable for Special Guardianship the social worker would proceed to conduct a full assessment, the timescale for which was a further eight weeks. Ms Gilzean's evidence was that around half of the cases would proceed to a full assessment.

14. It is not in dispute that the Claimant had no experience of Special Guardianship prior to her transfer into the team, and that the work had significant differences to her previous work, but that some of the skills she had acquired in the Family Social Work team were transferable to the new team.

15. The Claimant and Ms Gilzean met on 14 May 2019 to discuss the transfer. On 21 May 2019 the Claimant confirmed that she wanted to go ahead with it. It was subsequently agreed that she would start on 24 June. Ms Gilzean would be her line manager.

16. The Claimant completed a transfer form. In the form she emphasised her experience from working in child protection for almost 5 years. This included:

> "I produce high-quality assessments, case reports, chronologies, evidence (including care proceedings statements and care plans) and other correspondence for a wide variety of readership (including service-users, courts, external agencies etc.)"

17. In answer to the question "What induction/support would be required?", the Claimant wrote:

> "- Time to read several examples of good quality viability and special guardianship assessments.
> - Joint visits with team members going on visits for information gathering for assessments.
> - For relevant policies, procedures, guidance and documentation that pertain to this Service to be made available to me."

18. The Claimant's evidence to the Tribunal was that she expected there would be a period of "protected time", of say two weeks, for a formal induction before she was allocated any work. This she said was because Ms Gilzean was aware that the Claimant had not dealt with Special Guardianship before, and the role is very different to what she had been doing in the Family Social Work team. She felt it was important to understand the style of questioning of family members

and that she be given time to understand and read around relevant guidance, policies and procedures.

19. Ms Gilzean's evidence was that the standard practice for social workers transferred into her team was that they would learn "on the job", with support and guidance, and would not be given protected time for a formal induction. The Claimant does not dispute that that was the normal practice; she simply says that her expectation was that she would be given some protected time.

20. On 6 June Ms Gilzean emailed the Claimant to let her know she had asked for two Seniors in the team to be the Claimant's "buddies" for her first week. She had also asked them to arrange shadowing. Ms Gilzean said she would organise for the Claimant to observe a Fostering Panel. This was arranged for 8 July.

21. On 21 June, the Friday before the Claimant was due to start in the new role, Ms Gilzean emailed the Claimant as follows:

> "Hi Melisha
>
> Our team are very much looking forward to welcoming you next week.
>
> Unfortunately I will be off on Monday as I have an emergency dentist appointment. However, [PK] will be around to assist you. I suggest you sit at desk 67 which is likely to be free. [PK] sits at 42 nearby. I am attaching some example reports which are a good standard for you to read through and get an idea of what we do. I am also sending you some allocations:
>
> […] viability (17-07 SGO 11-09-19) Orpington 2pts
> […] viability (18-07-19 SGO 12-09-19) Cambridgeshire 4pts
> […] CC/SGO (16-09-19 QA panel 07-10-19) Sidcup 4pts
>
> Two are SGO viabilities (possibly going on to full assessments) and one is a reg 24 fostering assessment. Don't worry too much about how to proceed with these but feel free to read through them and ask the team any questions as to how they get started with these processes.
>
> I will leave an iphone with [PK] for you. Andrews has said he will source a laptop but you may need to ask him. I have on ipad at home which I forgot to bring in so I will do this on Tuesday.
>
> Have a good weekend."

22. The three cases allocated to the Claimant included two Special Guardianship assessments where a viability report, if required, would need to be submitted on 17 and 18 July 2019. The Claimant would therefore have needed to conduct visits with the families before those dates.

23. The attachments to the email included included at least one example of a viability assessment and one "Reg 24" fostering assessment.

24. Ms Gilzean did in fact come into the office after her dental appointment on 24 June. She met with the Claimant for around 25 minutes. The Claimant says she raised some concerns about the complexity of some of the work and the deadlines. It is not in dispute that Ms Gilzean told the Claimant she did not need to contact any families at that stage, but that she could if she felt comfortable. That afternoon Ms Gilzean sent the Claimant some templates, including a viability template and an "Aide memoire form", which she explained in her evidence to the Tribunal was a guidance document she had created herself, designed to ensure consistency in approach within the team. Ms Gilzean accepted in her oral evidence that the Claimant presented as anxious on her first day, but said that it was not above and beyond how others have presented or how she herself had felt when starting something new.

25. Ms Gilzean accepts she told the Claimant she would send notes of the meeting, but never did so. She said in her evidence that she had not written them up by the time the Claimant resigned.

26. Ms Gilzean's evidence, which was not challenged on this point, was that there were no other policies or guidance documents that could have been provided at the time, although such documents do exist now. Nor was there any training from external providers for the work of the team.

27. In her oral evidence the Claimant said that for childcare reasons she could only do visits outside of London on a Friday, and she had an existing medical appointment on Friday 12 July. This meant that the only date she could do the family visit for the case she had been allocated in Cambridgeshire would be 5 July. The Claimant said she did not believe this date had been arranged with the family, and nor had she mentioned to Ms Gilzean that she had limitations on doing visits outside London, or that she would have to conduct this particular visit on 5 July. The Claimant did not mention in her witness statement anything about the Cambridgeshire visit, the restrictions on being able to travel outside London, or the need to do that visit on 5 July.

28. Ms Gilzean's evidence was that if she had known the Claimant could only do long distance visits on a Friday she might have said the transfer to her team was not suitable because such visits were not uncommon and staff needed to work around the availability of the family members. Ms Gilzean said she did not know the Claimant had this particular deadline in mind at any stage.

29. On 26 June the Claimant emailed Ms Gilzean as follows:

> "Dear Tanya,
>
> Thank you for meeting with me briefly on my first day (24.06.2019) and again making me feel welcome to the Team.
>
> Despite discussing a few things, I left the meeting still somewhat unclear as to whether or not I will be receiving an induction.
>
> One of the things that I requested on my Transfer Form as part of the Induction/Support that I would require is "Joint visits with team members going on visits for information gathering for assessments".

> I truly appreciate that you have been very timely in addressing the other areas of support that I require in regards to reading examples of good assessments and relevant documents relating to this area of work.
>
> I also know that you have asked the other team members to send invites for me to accompany them on visits, but as yet, I have not received any invites.
>
> I am conscious that you have allocated me 3 pieces of work - viability, SGO and Connected Person assessments and I really desire to complete them well. From the reading that you gave me, I truly understand how important it is for these assessments to be completed to a high standard to inform permanence decisions in the best interests of the child(ren).
>
> Despite working 5 years in CP, 1 do have gaps in my learning that I want to plug and I feel that I would benefit from a further discussion with you, just to ensure that arrangements for me are put in place.
>
> Many thanks in advance…"

30. The Claimant described in her witness statement the reasons for sending this email:

> "19. I felt that I was being placed in an impossible position. I felt that I was not adequately trained to carry out many of the tasks and that many of the deadlines were looming. The work that I was being instructed to carry out included documents that the courts rely upon to make permanency decisions, which is something that I was not trained to do. These decisions have an extremely serious impact upon both the children involved and the parents of those children. I was alarmed, and still am, that I did not receive any sort of formal induction.
>
> 20. I was very concerned about the impact that this would have on the children and parents involved in the cases, that I would be at risk of bringing my employer, the Respondent, into disrepute, and that I could, potentially, play an unknowing part in a miscarriage of justice. I was also conscious that I had obligations as a social worker regulated by, at the time, the Health and Care Professionals Council ("HCPC"), which include an obligation not to carry out work that I know I am not competent to do."

31. It is not in dispute that Ms Gilzean did not directly reply to this email. Her evidence was that she interpreted the email as being a concern primarily about shadowing. Shortly after the email was sent, on 26 June, a team meeting took place. The minutes (which are not disputed) record:

> "Team welcomed MW as a new member of the team. All staff were asked to create opportunity for MW to shadow when doing home visit and conducting meetings. AH suggested role play for MW to show the assessment process/documents to use/DBS/medical forms."

32. The following day Ms Gilzean emailed another member of the team asking her to arrange for the Claimant to shadow her on a particular viability assessment. She also asked the same team member to accompany the Claimant on her first visit, "so she can become more familiar with the process". The Claimant was copied into the email.

33. On 1 July Ms Gilzean sent the Claimant and the rest of the team some tools that she said she used to use in adoption assessments. She said these would need to be adapted for Special Guardianship, but had "served me very well when I was doing independent assessments to a tight time scale".

34. It is not in dispute that the Claimant did not undertake any shadowing before she resigned on 3 July. Ms Gilzean's evidence was that social workers are busy and sometimes forget to invite someone on a joint visit. She also explained that there is a high level of non-engagement and withdrawal from assessments, so there is a lot of uncertainty as to whether appointments will happen, which makes it difficult to plan. She said she did not feel that the fact the shadowing did not happen would have precluded the Claimant from doing the cases she had been allocated. She said in the early weeks with a new starter she would "feel the situation and see how the work is going", but it was standard practice in her team for people to learn on the job.

35. On 2 July Ms Gilzean sent the Claimant a meeting request for a supervision and appraisal, to take place on or around 9 July. The Claimant accepted the request.

36. At the end of the working day on 2 July the Claimant approached Mr Osei as she was leaving. She said she only had 10 minutes because she had to collect her child. It is not in dispute that a short meeting took place between the Claimant and Mr Osei. There were no notes of the meeting and Mr Osei was not called as a witness in the Tribunal, so the only direct evidence we had was the Claimant's account of what was discussed. She said the following in her witness statement:

> "21. By 2 July 2019, having received no response from Tanya Gilzean, I approached and spoke to Ms Gilzean's line manager, Andrews Osei, the Service Manager, for approximately 12 minutes. I explained how urgent the situation was and that something needed to be done immediately or crucial deadlines would be missed. I said that if nothing changed then I would be forced to resign because I was not in a position to undertake work that I was not trained to do.
>
> 22. During this conversation it was clear in my mind that I was making a protected disclosure. The nature of the conversation was such that it was very clear to Mr Osei that what I was saying was that to force me to assess vulnerable children for permanency decisions would put the Respondent at risk of breaching its legal duties, put me at risk of breaching my regulatory duties as a social worker, and put vulnerable children at risk of poor decisions being made for them in very serious circumstances. These disclosures were made in good faith and, I felt, strongly in the public interest.

> 23. I had approached Mr Osei at the very end of the working day, and I was, at the time, very concerned and what I would describe as flustered. I appreciated that he took the time to sit down with me and listen to me, but he did not provide much feedback. However, given it was the end of the working day, I expected Mr Osei to think about what I had said and take some action or approach me the next day in order to discuss it."

37. Ms Gilzean, in her evidence, gave an account of the meeting that she said Mr Osei had reported to her the following morning:

> "Melisha stated she had worked for the Council for 5 years and stated she had decided to resign and wanted to tell Mr Osei she was going. She stated she could not be bothered any more. She wanted to tell Mr Osei that she was going to leave and would not be back the next day. Mr Osei stated he explained if she was resigning there was an HR formal process to follow which required giving written notice and explained this to Melisha. I understand Melisha did not complain about me or raise any complaint or invite any concerns as now alleged."

38. Given that this is hearsay evidence, we prefer and accept the Claimant's account of the meeting. The Claimant's evidence is somewhat vague as to what exactly she said, as opposed to what Mr Osei should have understood, but we accept that she mentioned concerns about being asked to do work she did not feel properly equipped to do, and concern about missing deadlines.

39. The Claimant said in her oral evidence she mentioned the need to conduct a family meeting on 5 July. This is not mentioned in her witness statement, or indeed in her grievance following her resignation, where she also gave an account of the meeting. Given that the meeting had not been arranged at that stage, and the Claimant had not mentioned this supposed deadline to anyone previously, we consider it very unlikely that she would have mentioned this to Mr Osei during the short meeting. The first mention of it was in her oral evidence during cross-examination. In all the circumstances we do not accept this aspect of the Claimant's evidence. We find that she mentioned a concern about deadlines in general terms only.

40. The following day, 3 July, the Claimant spoke to HR at around 10.30 or 11.00am to ask about the process for resigning. She then drafted a resignation letter. She sent this to Ms Gilzean at 12.35pm. The covering email reads:

> "Dear Tanya,
>
> Please see attached a letter confirming my formal resignation effective from today's date. I have spoken to Gill in the HR Department who informed me that I am required to give one month's notice (4 weeks). Therefore, my last working day will be Wednesday 31st July 2019.
> …
> Apologies, however I have not seen you around this week to discuss my resignation with you in person.
>
> A copy of this letter has been given to the HR Department."

41. The letter itself gave no indication of the reason for the Claimant's resignation. The Claimant said she had enjoyed her 5 years working at Lewisham Council.

42. Moments after receiving the email Ms Gilzean telephoned the Claimant and they arranged to discuss it after lunch. Ms Gilzean said in her evidence to the Tribunal that at that stage she believed, having spoken to Mr Osei, that the Claimant had left and was not going to return. She thought the Claimant had attended the office only to collect her belongings.

43. At 12.47pm, Ms Gilzean emailed all staff in the team except for the Claimant informing them that the Claimant had resigned and asking them to suggest names for her replacement.

44. The Claimant and Ms Gilzean met that afternoon. The Claimant says Ms Gilzean was slouched in her chair throughout the meeting, spoke to her in an abrupt manner, and did not ask why she had resigned. The Claimant asked if she could serve her notice in the Family Social Work team, or otherwise be "properly inducted" into the Connected Persons team. There was a discussion about whether the Claimant was refusing to work in Ms Gilzean's team. The Claimant's evidence to the Tribunal was:

> "During the meeting, I explained that I did not feel comfortable undertaking pieces of social work that I had not been suitably informed, prepared and equipped to do, particularly because the work is to assess permanency for vulnerable children. I explained that my wish was not to refuse to do work but rather to avoid practising dangerously."

45. The witness statements suggested that there was a dispute about whether Ms Gilzean threatened the Claimant with disciplinary action, but following the oral evidence there was little, if any, dispute as to what was said. Ms Gilzean accepted that the Claimant was asking to work out her notice in Family Social Work and that she (the Claimant) suggested speaking to the Chief Executive about it. Ms Gilzean said something along the lines of: "Well, you can go to Lucie [the Chief Executive] if you want to but I'll be speaking to HR to seek advice as to how to proceed; as you are saying you are not doing the work". Ms Gilzean's evidence was that she did not intend that as a threat of disciplinary action; said they were "stuck" because the Claimant insisted on working out her notice period but refused to work without a "full induction", which did not exist. We accept that she did not intend to threaten disciplinary action, but we also accept that that was how the Claimant interpreted what Ms Gilzean said because she alluded to the Claimant refusing to work.

46. It was ultimately agreed that the Claimant would work her notice in the Family Social Work team. Initially Ms Gilzean said this would be an informal arrangement and the Claimant's "D number" would remain in her team. This meant that for the purposes of the Respondent's records Ms Gilzean would remain the Claimant's line manager. The Claimant was unhappy about this and by 5 July 2019 it was agreed that the Claimant's D number would be changed, and she was formally transferred to Family Social Work until her employment ended on 31 July.

47. The Claimant raised a grievance on 8 July 2019, claiming that she had been bullied by Ms Gilzean. She also alleged that the transfer policy had not been

complied with, and that the "combination of these instances" resulted in her having to resign "in order to safeguard my professional integrity and uphold my high standards of social work practice".

48. The Claimant said in her oral evidence that all of the conduct she complains about that took place after her resignation was motivated by the fact that she had resigned, because Ms Gilzean had taken umbrage at her having done so.

THE LAW

49. Section 95(1)(c) of the ERA provides:

> **95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
>
> …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

50. Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

51. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

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

    51.2. The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

    51.3. The employee must leave in response to the breach.

    51.4. The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

    (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221; WE Cox Toner (International) Ltd v Crook [1981] ICR 823)

52. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606 and clarified in subsequent case-law as follows:

    > "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

    Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (Morrow v Safeway Stores Ltd [2002] IRLR 9).

53. Pursuant to section 98 ERA it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons, or "some other substantial reason". Conduct is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and "shall be determined in accordance with equity and the substantial merits of the case."

54. As to whistleblowing, the ERA provides, so far as relevant:

> **43B Disclosures qualifying for protection**
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
>
> …
>
> **47B Protected disclosures**
>
> A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> …
>
> **103A Protected disclosure**
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
>
> …

55. For the purposes of s.43B the employee must prove that he or she held a reasonable belief that the information disclosed tended to show a relevant failure. This involves a subjective assessment of what the employee believed at the time of the disclosure and an objective assessment of whether that belief could have been reasonably held, taking into account the position of the employee (Babula v Waltham Forest College [2007] ICR 1026).

56. In a constructive dismissal case, the requirement on the employer to show the reason for dismissal must be read as a requirement to show the reasons for their conduct which entitled the employee to terminate the contract (Berriman v Delabole Slate [1985] ICR 546).

CONCLUSIONS

Constructive unfair dismissal

57. We must first consider whether any of the matters relied upon by the Claimant at paragraph 1.1 of the list of issues, either individually or cumulatively, amounted a breach of the implied term of trust and confidence.

58. The Claimant accepts that the transfer policy was not contractual, but says that the Respondent failed to follow aspects of it, which led to a breach of the implied term.

59. It is not entirely clear what aspect(s) of the transfer policy the Claimant contends were not followed, or in what respects. The transfer policy does not say that the Respondent has to accept whatever induction the employee requests, and the Claimant does not suggest that it does. Further and in any event, the Claimant's three support/ induction requests from the transfer form were accepted and Ms Gilzean attempted to deliver them. The Claimant did not request a "protected period" before being allocated work.

60. The Claimant does not take any point on paragraphs 2.7 and 2.8 of the policy referring to the "Service Manager", and these tasks apparently having been delegated to Ms Gilzean. For the avoidance of doubt, we do not consider it arguable that Ms Gilzean taking on these tasks, with no objection from the Claimant at the time, could have amounted to a breach of the implied term.

61. Paragraph 2.7 required the Respondent to consider the matters listed, including "induction/ support that would be required and how this would be provided". It is obvious from Ms Gilzean's emails shortly before the Claimant was transferred that this was complied with. Paragraph 2.8 requires a meeting to take place to discuss the employee's skills and experience. That happened on 14 May 2019.

62. As to paragraph 2.14, there does not appear to have been a formal letter from the Claimant's manager in Family Social Work, but the Claimant accepted in cross-examination that this paragraph had effectively been complied with by emails between the Claimant, her former manager and Ms Gilzean, which included agreeing the start date of 24 June. To the extent there was any failing here, it was technical and could not have caused or even contributed to a breach of the implied term.

63. We observe that the transfer took place on an entirely consensual basis and the Claimant did not raise any concerns about the process until after she had resigned.

64. We find there was no failure by the Respondent to follow the transfer policy that could have had any negative impact on the relationship of trust and confidence between the Claimant and the Respondent.

65. Secondly, the Claimant claims that the Respondent instructed her to carry out sensitive tasks for which she was not trained.

66. We accept that notwithstanding the Claimant was an experienced social worker, this was an entirely different department with different working methods, which were entirely unfamiliar to her. She obviously required some support and induction in order to do the job professionally and competently.

67. We accept the Respondent's evidence, indeed it was not disputed by the Claimant, that the standard practice is for social workers to learn "on the job" in the Connected Persons and Special Guardianship team. There was nothing in the Claimant's transfer form to suggest that she would not have been capable of doing that with support. Further, Ms Gilhooly had expressly told Ms Gilzean that the Claimant had all the necessary skills for the job.

68. The Claimant now says that she expected a protected period of two weeks for an induction, with no work allocated. She did not say that in the transfer form or at any time before her resignation to Ms Gilzean or Mr Osei.

69. Ms Gilzean's evidence, which we accept, was that there was no formal training or induction policy for her team. Such guidance or policy documents as existed were provided to the Claimant. She was allocated "buddies" to help her in the first week or so. Ms Gilzean also asked other members of the team to arrange shadowing. There may have been a mismatch in expectations between the Claimant and Ms Gilzean, but we accept that Ms Gilzean did everything that the Claimant had requested to the extent that it was possible.

70. The Claimant was told on her first day that she did not need to contact families initially. Ms Gilzean did not know of any "deadline" of 5 July, when Claimant now says she would have had to conduct the family visit in Cambridgeshire. Ms Gilzean scheduled a supervision meeting for 9 July, which was still 8 days before the first deadline for a viability assessment. That would have allowed sufficient time for the Claimant to do the family visits before the deadlines, or for any problems to be addressed.

71. We therefore do not accept that the Respondent instructed the Claimant to carry out work for which she was not trained. At no stage was the Claimant told that she had to do work despite not feeling comfortable doing so.

72. Finally, the Claimant alleges that Ms Gilzean and Mr Osei "failed to address the problem when the Claimant raised it". The Claimant relies on her email of 26 June and argues that Ms Gilzean and Mr Osei failed to address her request for an induction by the time she resigned on 3 July.

73. We accept Ms Gilzean's evidence that she interpreted the email of 26 June as being a concern about shadowing opportunities. That, in our view, was a reasonable interpretation. We accept that the Claimant queried at the start of the email "whether or not I will be receiving an induction", but she then specifically mentioned the request for joint visits on her transfer form. She expressly accepted that Ms Gilzean had been "very timely in addressing the other areas of support" in terms of having the opportunity to read examples of good assessments and other relevant documents. She also accepted that Ms Gilzean had tried to set up joint visits; the specific complaint was that she had not yet received any invites. The Claimant also requested "further discussion" with Ms Gizlean.

74. We accept that it would have been better if Ms Gilzean had directly replied to this email and/or arranged a meeting sooner than the supervision meeting on or around 9 July, especially given that the Claimant was visibly anxious on her first day. It is not accurate, however, to say that Ms Gilzean failed to address the problem the Claimant had raised. Immediately after the email there was a team meeting at which Ms Gilzean asked other members of the team to arrange shadowing for the Claimant. The following day Ms Gilzean approached a particular member of the team asking her to set up two types of shadowing, one on her own case where the Claimant would observe, and another where the member of staff would accompany the Claimant on her first family visit. Ms Gilzean also arranged the supervision meeting for on or around 9 July.

75. The Claimant in her oral evidence described Ms Gilzean's failure to reply to the email as being a matter of "common courtesy". That might be correct, but it is nowhere near sufficient to meet the threshold for a breach of the implied term of trust and confidence. We also note that the Claimant did not follow up on the email at any time before she resigned on 3 July. She accepted in cross-examination that she could have approached Ms Gilzean at the team meeting or at any time afterwards. One would expect her to have chased up the issue at least once if she felt that Ms Gilzean had not addressed her concerns and she was so troubled that she felt she had to resign. The Claimant did not ask for help with any particular case and nor did she ask for deadlines to be adjusted. We have already found that neither Ms Gilzean nor Mr Osei knew of the 5 July being a "deadline" in the Claimant's mind because of a possible family visit on that day. Ms Gilzean's approach of "feeling the situation" in the first few weeks, and arranging a supervision meeting in good time before the first formal deadline of 17 July, was not unreasonable, let alone "calculated or likely to destroy or seriously damage the relationship of confidence and trust".

76. As for Mr Osei, the first time the Claimant raised any concerns with him was at the very end of the working day on 2 July. She does not say that she requested a response by a particular time the following day or that he promised one. It is not clear what the Claimant says he should have done. There is no basis on which we could find that he "failed to address the issue" in the few hours of 3 July before the Claimant resigned.

77. We therefore find that there was no breach of the implied term of trust and confidence, so the Claimant was not constructively dismissed. Both the ordinary and automatic unfair dismissal complaints fail.

<u>Detriments due to protected disclosures</u>

78. For each of the disclosures relied upon at paragraph 10.1 of the list of issues the Claimant relies on the same types of wrongdoing that she says she believed the information tended to show. This is set out in her particulars of claim as follows:

> "17. The disclosures above all relate to the Claimant's safety and suitability to carry out certain regulated activities of a sensitive nature. The work the Claimant was asked to do significantly impacts the lives of members of the public. It is averred there was a clear public interest in all three disclosures.
>
> 18. The Claimant understood the situation as equating to a request to carry out tasks which her regulator would have found to be an act of misconduct (ERA 1996 s.43B(1)(b)). If the Claimant complied with the management instruction and produced a defective document for the court, there would be a substantial risk of a miscarriage of justice (ERA 1996 s.43B(1)(c)). At any rate, any errors carried out in a role involving the care of vulnerable service users inherently increases the risk to a service user's health and safety (ERA 1996 s.43B(1)(d))."

79. As regards breach of a legal obligation, the Claimant has never identified provisions in any regulatory code of conduct that she says were at risk of being breached. She claims in her witness statement that the HCPC rules include an obligation not to carry out work that she knows she is not competent to do. We heard no evidence on this, but our findings below are made on the assumption that the Claimant was subject to such an obligation.

80. As for the email of 26 June, we have already found that this was primarily about a request for shadowing. To the extent that the Claimant was disclosing any information, it was that she had not yet received any invites to carry out joint visits. She expressed a desire to carry out the work she had been allocated to a high standard, and implied that she needed to do the shadowing in order to achieve that, but that does not constitute a disclosure of information. Even if it did, the Claimant could not reasonably have believed that it tended to show a person was likely to fail to comply with a legal obligation, that a miscarriage of justice was likely to occur, or that the health and safety of any individual was likely to be endangered. She did not say, or even imply, that because she had not been offered the shadowing opportunities she had been forced into a position of having to carry out work for which she was not equipped and this was a danger to her and others. She simply asked for the shadowing to be put in place and asked for a conversation with Ms Gilzean. It was not a qualifying disclosure.

81. As for the conversation with Mr Osei, we have accepted that she told him she was concerned about having to do work she was not properly equipped to do, and there was the possibility of deadlines being missed, but that is still some way from saying that she was being directly instructed to do work that she was not qualified to do. At its highest she was saying that she did not feel comfortable with the work she had been allocated and needed further help and guidance. No-one had told her that, despite those concerns, she had to do it anyway, and she did not suggest to Mr Osei that they had done so. In those circumstances she cannot reasonably have believed that what she said to Mr

Osei tended to show that a person was likely to fail to comply with a legal obligation, that a miscarriage of justice was likely to occur, or that the health and safety of any individual was likely to be endangered.

82. As for the conversation with Ms Gilzean on 3 July, it is not clear what the Claimant says was the information disclosed that amounted to a qualifying disclosure. The Claimant had already resigned, and on her own case Ms Gilzean did not ask why she had done so. The conversation was about what the Claimant would do during her notice period. The Claimant may have said that she was not prepared to work her notice in Ms Gilzean's team unless she was "properly inducted", but that is not a disclosure of information, still less information that she could reasonably have believed tended to show the type of wrongdoing relied upon.

83. We therefore conclude that none of the matters relied upon by the Claimant in paragraph 10.1 of the list of issues constituted qualifying disclosures. Her complaint of detriments because of protected disclosures therefore fails.

84. It is unnecessary for us to address the issues of whether the alleged detriments are made out, or whether they were motivated by the Claimant's email of 26 June or the two conversations she relies upon. For completeness, however, we have not accepted that Ms Gilzean "ignored" the email of 26 June. All of the other alleged detriments occurred after the Claimant's resignation and the Claimant said in her oral evidence that Ms Gilzean did these things because the Claimant had resigned, not because of the email of 26 June or the conversations on 2 or 3 July. Further, the Claimant accepted in cross-examination that Ms Gilzean was facilitating her transfer to the Family Social Work team.

85. Similarly, it is unnecessary for us to determine whether the Claimant acted in good faith in doing the things relied upon as qualifying disclosures. It is worth saying, however, that we would not have accepted the Respondent's argument that the Claimant did those things in order to set up a claim and a basis for compensation, having already decided to resign for personal reasons. If the Claimant were attempting to set up a whistleblowing or constructive unfair dismissal claim, one would have expected her to say in much clearer terms that she felt she was being put in an impossible situation, and indeed she would have said in her resignation letter that that was why she resigned. We accept that the Claimant wanted to do the job well and was asking for help and support in order to achieve that. It is somewhat surprising that a social worker of her experience would resign so suddenly, but we do not need to make a finding about why she did so. We simply record that we would not have accepted that the alleged disclosures were made in bad faith, with a view to resigning and claiming compensation.

_____

Employment Judge Ferguson

Date: 27 July 2021