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EMPLOYMENT TRIBUNALS

Claimant: Mr Patheko Kambala
Respondent: Barts Health NHS Trust
Heard at: East London Hearing Centre
On: 7 April 2017 and 26 May 2017
Before: Employment Judge Foxwell

Representation:

Claimant: Mr O Ly (Counsel)
Respondent: Ms H Patterson (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim of breach of contract as to notice is dismissed on withdrawal.
2. The claim of constructive, unfair dismissal is not well-founded and is dismissed.
3. The claim of failure to provide written particulars of employment contrary to section 4 of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

The parties

1 The Claimant, Mr Patheko Kambala, was employed by the Respondent, Barts Health NHS Trust (or its predecessors), from 27 October 2003 until his resignation in

August 2016. He was based at Whipps Cross University Hospital throughout his employment, working there for 15 months as an agency worker before being taken on as an employee.

2 On 13 December 2016, the Claimant presented claims of unfair dismissal, breach of contract and for failure to provide written particulars of employment contrary to Section 4 of the Employment Rights Act 1996. Those are the claims which came before me for determination.

The hearing

3 The hearing was listed over two days on 6 and 7 April 2017 but could not be heard on 6 April 2017 due to a lack of judicial resources. When the matter came before me on 7 April 2017 I agreed a timetable with counsel to conclude the evidence relating to liability within that day. Unfortunately, this proved impractical and I had to adjourn the case part-heard to 26 May 2017 when I completed the evidence and heard counsels' submissions. I timetabled evidence on each day but extended cross-examination time for both counsel in the interests of justice.

4 The Claimant gave evidence in support of his claim and called no other witnesses. This is quite normal and I draw no inference from the number of witnesses a party calls. The Respondent called two witnesses:

4.1 Tammy St John, who has been a Senior Sister Theatres/Senior Team Leader since 2014. Miss St John has worked at Whipps Cross in other nursing roles since 1999.

4.2 Carol Waspe, who is Theatre Matron. Mrs Waspe has held this post for the last three years and has been employed by the Trust since 2000.

5 In addition to the evidence of these witnesses I considered the documents to which I was taken in an agreed bundle and references to page numbers in these Reasons relate to that bundle.

6 Finally, I received oral and written submissions from counsel which I have considered. Mr Ly produced a folder containing 21 authorities: this was disproportionate in a case where the legal principles are well established and were not in dispute. I do not propose, therefore, to set out here the name of each case he produced.

The Issues

7 One of the reasons why I was unable to conclude the evidence on 7 April 2017 is that the parties had not agreed a single list of the factual issues to be decided by the Tribunal. I therefore spent time with them at the commencement of the hearing to draft such a list. The issues were drafted by counsel and agreed as follows:

Constructive Unfair Dismissal contrary to s95(1)(c) Employment Rights Act 1996

1. *Did the Respondent breach the implied term of mutual trust and confidence and/or the implied term to provide a safe and secure working environment by reason of all or any of the following:*
 - a) *Ms St John and Ms Waspe constantly belittling the Claimant at work and adopting an aggressive and bullying attitude;*
 - b) *Imposing a new job description on 22 August 2014 (27th October 2014 – statement paragraph 42) from Theatre Health Care Support Worker to a Porter and humiliating the Claimant as a result;*
 - c) *On 18 September 2015, Ms St John following the Claimant into the changing room and shouting at him (Para 11, Amended Particulars);*
 - d) *On 22 September 2015, Ms St John following the Claimant to the toilet and humiliating him in front of patients and other staff members (Para 11, Amended Particulars);*
 - e) *In September 2015, Ms St John approaching the Claimant in the coffee room and telling him that he cannot wait like others in the coffee room, he must wait standing;*
 - f) *Accusing the Claimant of taking unauthorised leave from 13 August 2015 for two weeks when in fact the leave was unauthorised by his supervisor Helen McMahon (Para 13, Amended Particulars);*
 - g) *On 30 October 2015, Ms St John refusing to give him another day in lieu after the Claimant had missed his training and worked as usual (Para 14, Amended Particulars);*
 - h) *On 24 February 2016, suspending the Claimant from his night shift following an allegation that he had been asleep whilst on night duty on 20 February 2016 (Paras 17 & 18, Amended Particulars);*
 - i) *Not initiating the disciplinary investigation until 12 July 2016 (Para 17, Amended Particulars) and only preparing a report after unfair dismissal of the Claimant;*
 - j) *Harassing, subjecting the Claimant to disciplinary procedures, and threatening him with dismissal whilst off sick (Para 17 Amended Particulars);*
 - k) *Treating the Claimant's letter dated 24 May 2016 as an act of bullying against Ms St John and triggering further disciplinary allegations against the Claimant. The Respondent's letters of 21 July 2016 and 25 July did not mention the Respondent's letters of 21 July 2016 and 25 July 2016 did not mention the Claimant's grievance (Paras 19-22 Amended Particulars);*
 - l) *Failing to suspend the disciplinary process in order to deal with the*

Claimant's letter dated 24 May 2016 under its grievance procedure first (Para 27, Amended Particulars)?

2. *If so, were the above breach(es) sufficiently serious to entitle the Claimant to resign on 8 August 2016 and treat himself as dismissed? The Claimant stated that the last straw was suspending the Claimant on 24 February 2016 and the subsequent allegation made by Ms Youngman that the Claimant had not emptied the bins on 27 February 2016 (Page 68B of the Bundle).*
3. *Did the Claimant resign in response to the above breach(es)?*
4. *Did the Claimant delay in resigning such that he waived the breach(es)*

Wrongful Dismissal

5. *Was the Claimant entitled to receive his notice pay?*
6. *If so, was the Claimant paid his notice pay?*

Remedy

7. *The Claimant does not seek reinstatement or re-engagement (Section 9.1, Claimant's ET1 Form). The Claimant is seeking compensation.*
8. *If the Tribunal finds that any of the Claimant's claims above are well founded:*
9. *What, if any, basic award is the Claimant entitled to if successful in his claims?*
10. *If the Claimant is entitled to a basic award, should any reduction be made to reflect contributory fault on the part of the Claimant?*
11. *What, if any, level of compensatory award would it be just and equitable for the Tribunal to award? In respect of any compensatory award made should any deductions or uplifts be made to reflect the following:*
 - i. *Whether the Claimant has complied with his duty to mitigate his loss under section 123(4) of the Employment Rights Act 1996;*
 - ii. *To the extent that there was any procedural unfairness, whether the Claimant would have been dismissed in any event, Polkey v A E Dayton Services Limited [1987] ICR 142 applied, and if so, by what percentage should the Tribunal reduce the compensatory award;*
 - iii. *Whether the Claimant's conduct contributed to his dismissal, and if so, by what percentage should the Tribunal reduce the compensatory award;*

iv. *The application of the statutory cap (if applicable).*

12. *What, if any, notice pay is the Claimant entitled to?*

8 During the process of agreeing the issues I expressed concern to Mr Ly that the Claimant's statement contained a substantial amount of evidence about events in the early part of his employment. I questioned how this could be relied on in support of the claim of constructive dismissal. He said that this was a final straw claim (see below) but that the Claimant was relying on events before 2014 as "background" only. He also described the final straw as being what happened on night shifts in February 2016. This was consistent with the Claimant's Grounds of Claim. Mr Ly said that the Claimant was not pursuing a claim for notice pay, which I therefore dismiss, and he did not address me on the claim under Section 4 of the Employment Rights Act 1996 in closing submissions.

Legal Framework

9 It is well established that an employee who claims to have been constructively dismissed must show that his employer has acted in repudiatory breach of contract. Furthermore, he must establish that he resigned in response to this breach and not for some other reason (although it need only be a reason and not the reason). It is open to the employer to prove that the employee affirmed the contract despite the breach, perhaps by delay or taking some other step to confirm the contract.

10 In this case the Claimant asserts a breach of the implied term of trust and confidence ("the implied term"). Such a breach occurs where an employer conducts itself without reasonable cause in a manner calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see *Mahmud v BCCI [1997] IRLR 462*). The Claimant also alleges that the Respondent was in breach of the implied term that it should provide a safe and secure working environment.

11 The Claimant's claim that his employer acted in breach of contract is also based on the 'last straw doctrine'; this provides that a series of acts by the employer can amount cumulatively to a breach of the implied term even though each act when looked at individually would not be serious enough to constitute a repudiatory breach of contract. Inherent in a last straw case is the fact that there was one final act which led to the dismissal ('the last straw') and the nature of this was considered by the Court of Appeal in *London Borough of Waltham Forest v Omilaju [2005] IRLR 35*. There the Court of Appeal held that the last straw need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of trust and confidence. If the act relied on as the final straw is entirely innocuous however then it is insufficient to activate earlier acts which may have been, or may have contributed to a repudiatory breach.

12 The question whether a repudiatory breach of contract has occurred must be judged objectively (*Buckland v Bournemouth University Higher Education Corporation [2010] ICR 908*); this requires the Tribunal to assess whether a breach of contract has occurred on the evidence before it. Neither the fact that an employee reasonably believes there to have been a breach, nor that the employer believes it acted reasonably in the circumstances is determinative of this: the test is not one of 'reasonableness' but simply whether a breach has occurred. Of course, where parties are acting reasonably it is less

likely that there has been a breach of contract but this is not necessarily so.

13 The Court of Appeal considered the characteristics of a repudiatory breach of contract in the case of *Tullett Prebon plc & ors v BGC Brokers LP & ors* [2011] IRLR 420. Maurice Kay LJ, who delivered the leading judgment held as follows at paragraphs 19 and 20:

"The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693, at page 698F, per Lord Denning MR, who added:

"The circumstances ... are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).

In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61):

"... the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

That, it seems to me, was essentially the approach of the Judge in paragraphs 105 and 106 of his judgment. "

14 I have taken this guidance into account when determining the Claimant's claim.

15 I have reminded myself too that a breach of contract cannot be 'cured' by subsequent reasonable behaviour on the part of an employer: the right of an employee to resign in response to a repudiatory breach only ends when he has acted in a way which affirms the contract despite the breach (for example by delay).

16 If an employee establishes that he has been constructively dismissed it remains open to an employer to show a potentially fair reason for dismissal under section 98 of the Employment Rights Act 1996. In this case the Respondent does not advance any such reason and concedes that, if the Claimant was dismissed, the dismissal was unfair.

17 The Claimant's claim of constructive unfair dismissal turns, therefore, on the following basic questions:

17.1 Judged objectively, did the Respondent act in repudiatory breach of contract?

17.2 Did the Claimant resign because of this breach (the breach need only be a reason)?

17.3 At the time of his resignation had the Claimant lost the right to resign for this

breach because of his earlier affirmation of the contract?

Findings of Fact

18 The Claimant was first employed by the Respondent as an Operating Department Orderly (“ODO”). One of the principal tasks of an ODO is to collect and return patients from the wards. Historically this role was known as “Porter”. I was shown a job description for the role, then known as Healthcare Support Worker/Orderly, dated February 2010 which sets out a variety of tasks including supporting cleanliness and providing cover for housekeepers during periods of leave (page 68d). There is no evidence to show that these duties changed.

19 In November 2008, the Claimant was the subject of an allegation of sexual harassment in the work-place. While the allegations against him were not upheld following an investigation by the Respondent, they had a profound effect on his personal life. Sadly, his marriage broke down and his children, who were in his wife’s custody following their separation, were taken into care in March 2009.

20 In September 2011, the Claimant was told that he was to be given custody of his children and it is in this context that he approached his then manager, Paul Singh, about changing his hours. On 19 October 2011, he made a written application to reduce from full-time working (37 ½ hours per week) to 3 shifts a week between 9.00am and 3.00pm (page 177). The Claimant was offered three shifts per week but from 9.00am to 1.00pm and he commenced this new pattern on 21 November 2011 (page 182).

21 The Claimant was on extended unpaid leave between February and August 2012. His request for a further extension of this leave was refused and he returned to work in September 2012.

22 In late 2013 Paul Singh offered the Claimant the role of Nursing Assistant/Health Care Support Worker (“HCSW”). This was a Band 2 role like that of an ODO but was theatre based. The Claimant was pleased with this offer which he regarded as a promotion and he accepted it. He started in his new role in November 2013 and the change to his contract was confirmed in writing on 14 March 2014 (page 194). The Claimant had two periods of sickness absence in the new role, one day in May 2014 and two weeks between 23 September and 7 October 2014.

23 The Claimant alleges at paragraph 14 of his Grounds of Claim that the Respondent imposed a new job description on him on 22 August 2014 but there is no evidence to support this. Indeed, it is not the account he gives in his witness statement and Mrs Waspe, who by that time had taken over from Mr Singh, denies doing so.

24 One of the significant factual disputes is whether the Claimant was working between 10.00am and 2.00pm as HCSW or 9.00am and 5.30pm in 2014. The Claimant maintains that he worked the former pattern whereas Mrs Waspe said that it was the latter and that the theatre could not accommodate someone working shifts which did not coincide with operating times. In any event, it is in this context that the Claimant says that he was approached by “Sister Charlie” in October 2014 and alleges that she told him that Mrs Waspe wanted him out of theatre as she did not like the hours he was working. Mrs

Waspé denies saying this this and I accept her evidence. In these circumstances, I find it less than probable that Sister Charlie spoke to the Claimant as he alleges.

25 In assessing credibility I have had regard to the consistency of the witnesses' evidence with contemporary documents. I found Mrs Waspé and Miss St John's accounts to be consistent with one another and the documents. I did not find the Claimant's to be. One example is a letter he sent on 24 May 2016 (page 286) in which he said he had had a car accident the day before. His evidence to me, however, was that this had happened in November 2015 (witness statement at paragraph 63). I think it unlikely that this misrepresentation in his letter was accidental. I give other examples of the Claimant's inconsistency below.

26 On 22 October 2014, the Claimant submitted a written flexible working request (page 212) asking to change his hours to 9.00am to 3.00pm with effect from 29 October 2014. He described his job title in his application as "HCSW/ODO". The reason he gave for the request was "*because of my caring responsibilities as a lone parent*". I observe that this written request is inconsistent with the Claimant's evidence that he was working between 10.00am and 2.00pm at that time as it would have amounted to an application to increase rather than reduce his hours. I also note that there is no reference to him being under pressure to change nor did he raise a grievance against Sister Charlie or Mrs Waspé. Mrs Waspé's evidence, which I accept, is that she met the Claimant to discuss his request and explained that his proposed hours could not be accommodated on the HCSW rota as he would then be out of synchronisation with other theatre staff. She said, however, that his proposal could be accommodated on the ODO rota. She also explained that, if he moved he would be assigned housekeeping duties to cover maternity absence. This was within his job description as described above. She confirmed this outcome and the success of the Claimant's flexible working application in a short letter dated 27 October 2014 (page 211).

27 It is clear from the documents that the Claimant then had second thoughts and presented a further application for flexible working on 29 October 2014 (pages 216 – 220), proposing that he work two days a week between 1.00pm and 8.00pm as part of the theatre team. This second application is a more detailed document than his earlier one. The first point I note is that he described his previous working pattern as 16 hours a week over two days, Thursdays and Fridays, which is consistent with Mrs Waspé's evidence that he worked full days. Secondly, the Claimant referred to his proposal of 9.00am to 3.00pm as being "*not helpful for a team in theatre as HCSW*"; which is consistent with Mrs Waspé's account of what she said at her meeting with the Claimant a day or two before.

28 Mrs Waspé met the Claimant to discuss this second application and told him that she could not consider it as the Trust's flexible working policy only allowed one request every 12 months (see paragraph 1.5.1 at page 170d). She confirmed this outcome in writing on 31 October 2014 (page 221). It was in this context that the Claimant resumed work as an ODO and was assigned to housekeeping duties.

29 On 5 November 2014, the Claimant went off work sick. He returned on 6 January 2015 (page 223). He did not provide a medical certificate covering his absence until 9 January 2015 (page 227). Following his return to work Mrs Waspé wrote to him on 12 January 2015 inviting him to attend a Stage 1 sickness absence review meeting under the Respondent's sickness absence policy (page 230). Contemporaneous emails show that

she did this based on HR advice that the Claimant's Bradford score was high and merited such a meeting. The meeting took place on 20 January 2015 and notes of it are at page 233a. The Claimant explained that he was suffering from financial problems and had childcare issues. He asked to change his hours to 10.00am to 2.00pm (4 hours) four days a week and Mrs Waspe agreed to this. She confirmed this outcome in her letter of 20 January 2015 (page 234). The Claimant expressed his gratitude for the change at the time, writing "*thank you for this change and for understand especially for my parental responsibilities (sic)*" (page 233).

30 Mrs Waspe met the Claimant on 10 June 2015 to review his flexible working arrangement. She said that the Claimant should have submitted a further request to Miss St John if he wished to carry on with his amended hours. Her account is that the Claimant became agitated and began shouting such that she felt intimidated. The Claimant's evidence is that at about this time Miss John had told him that Mrs Waspe did not want him back in theatre. He says that he had then been called into a meeting with Mrs Waspe and, when he complained about doing housekeeping duties, she had shouted at him. I note the Claimant's evidence that he was suffering from depression at the time of these events.

31 I find it less than likely that Mrs Waspe shouted at the Claimant in this meeting and more probable that the Claimant raised his voice to her. I find it unlikely that he intended to be aggressive rather his manner reflected his mental state, his unfulfilled desire to return to theatre and his frustration at having to undertake housekeeping duties. In any event Mrs Waspe called the meeting to a halt and reconvened it the following day, this time with a note taker present. At this second meeting she agreed to continue the Claimant's flexible working pattern and to redistribute his housekeeping duties across the whole body of ODO's. She confirmed this in writing in a letter dated 11 June 2015 (page 288). She reminded the Claimant that he was not entitled to a break during his four hour shifts and that the Trust's PC's were only to be used for the Respondent's work: this demonstrates that there had been problems with the Claimant taking unauthorised breaks and using PC's for personal purposes. She noted too that the Claimant had apologised for his behaviour the previous day.

32 In June 2015, the Claimant made an application for two weeks leave in the second half of August using the Respondent's electronic staff records system ("ESR"). Miss St John rejected the application via the ESR as other ODO's had already booked this time off (page 239a). The Claimant was not the only ODO to have an annual leave application rejected in this period. I note also that the Claimant had been reminded to book any leave in school holidays as early as possible in a letter dated 3 March 2015 (page 235). The Claimant did not report for work on 13 August 2015 and was absent for the following two weeks. I find on the balance of probabilities that he was looking after his children during the school holidays. Miss St John contacted the Claimant about his absence on 20 August 2015 and he was required to attend a meeting with her and Mrs Waspe on 26 August 2015. The Claimant's explanation at this meeting was that he had arranged leave with his supervisor, Helen McMahan, directly on 5 August 2015 and that she had told him that his request was "*bound to be accepted*". Ms Waspe pointed out that Ms McMahan did not have authority to grant leave and said that his absence would be treated as unauthorised and unpaid. She confirmed this outcome in a letter dated 26 August 2015. The Claimant raised no grievance or any other complaint about this at the time.

33 I find on the balance of probabilities that the Claimant's leave was unauthorised and that he knew this was the case: he was aware of the ESR system having applied through it in June; he knew too that it was Miss St John and not Ms McMahon who granted or refused ODOs' leave requests. Finally, the highest the Claimant's evidence goes is that Ms McMahon told him that his leave was "*bound to be authorised*" not that it was.

34 In September 2015, the Claimant submitted a further flexible working request asking to work 10.00am to 2.00pm on Tuesdays and 8.00pm to 8.00am on Friday nights. The Claimant said that he was making this application as his ex-wife's family were now looking after his children on a Friday night. In a letter dated 23 September 2015 Mrs Waspe agreed to a slightly modified schedule, 9.30am to 2.30pm on Wednesdays and 8.00pm to 8.00am on Friday nights, as with breaks the Claimant's proposal had only amounted to 15 hours a week. The Claimant complains in his witness statement (paragraph 16) of being required to work these new shifts on 22 October 2015 yet the contemporaneous documentary evidence shows that they arose at his request and with his agreement.

35 The Claimant complains of three incidents involving Miss St John which he says happened in September 2015. He alleges that on one occasion she shouted at him to get out of the coffee room in front of others; on another that she followed him into a changing room and berated him for being there; and on a third occasion that she followed him into a toilet and shouted at him. Miss St John denied shouting at the Claimant but said that she had had to keep tabs on him as he tended to "disappear". I accept her evidence that ODO's and HCSW's are required to make themselves conspicuous when available for work and that the Claimant had a habit of not doing so. I also accept her evidence that on 22 September 2015 she knocked on a changing room door before opening it to find the Claimant with a book at a time when his colleagues were extremely busy. She highlighted her concerns about this at the time in a letter to the Claimant dated 23 September 2015 (page 247). I find it likely that Miss St John told the Claimant to leave the coffee room on his short shifts as he had no reason to be there as it would not have made him conspicuously available for work. I reject the Claimant's case that Miss St John shouted at him but I have no doubt that she had cause to speak to him firmly.

36 The Claimant complains that he had to attend work rather than having a "study day" on 30 October 2015 when he was refused entry onto a pre-booked training course, having arrived late. He subsequently attended the course on 7 January 2016 which he describes as his day off. His complaint is that he has not been given time off in lieu. There is no suggestion that he was unpaid for the training day he missed or the one he attended.

37 Miss St John met the Claimant on 25 November 2015 to discuss a complaint she had received about his work on the night shift from Sister Nicolette Youngman. Miss St John asked him to use his initiative to ensure that cleaning tasks were completed. The Claimant apologised and he said that he would, (page 251).

38 The Claimant had 10 days leave over the Christmas period and was due to return to work on 1 January 2016 but failed to do so. Miss St John spoke to him about this on 6 January 2016, (page 251a). His explanation for failing to return to work on time was that he thought he was off until 32 December; this is simply not credible. Miss St John said that

his absence would be treated as unpaid, unauthorised leave (page 252).

39 On 20 February 2016 Raj Rammohun, Senior Charge Nurse Theatres, made a complaint that the Claimant had been sleeping on the night shift. His original written complaint is missing but he repeated it in an email dated 16 June 2016 (page 288). He said that he arrived at work at approximately 7.20am and went to the coffee room between theatres 3 and 4 which he found to be in darkness. He said that he turned on the light to discover the Claimant sleeping on chairs with a pillow and blanket. Mr Rammohun said that when he asked the Claimant if he had been sleeping and whether he had completed his work the Claimant got up and left without saying anything. Mr Rammohun said that he subsequently saw the Claimant changing laundry bags.

40 On 24 February 2016, the Claimant was called to a meeting with Miss St John. She explained the allegation against him and said that it would be investigated. She asked him to write his own statement of events but the Claimant refused to do so. She told him that he would be removed from night shifts pending the investigation but that he would be permitted to work on the forthcoming Friday night, 26 February 2016. She followed this meeting up in writing on 24 February 2016, saying that the allegation was a serious disciplinary one and enclosing a copy of the Trust's disciplinary policy. The Claimant was informed that Sister Ellen Butler would investigate.

41 The Claimant worked the night shift on 26 February 2016 and was the subject of another complaint arising from it. Sister Youngman said in an email dated 29 February 2016 (page 258) that she had arrived at work at 7.30am on Saturday 22 February and had seen the Claimant coming out of a changing room at 7.40am in his outside clothes. She said that she asked him why he had changed when he still had work to do but that the Claimant ignored this. She said that the Claimant then started to empty bins in the recovery room despite not wearing scrubs or gloves. She said that when she asked him to stop he replied "*you people will pay*".

42 On 29 February 2016, the Claimant was signed off work with a diagnosis of neck pain and stress. He was not to return to work before submitting his resignation.

43 On 21 March 2016 Mrs Waspe wrote to the Claimant regarding the disciplinary investigation (pages 261 – 263). She said that a new investigator was to be appointed because Sister Butler could no longer undertake the investigation. It had turned out that she did not have sufficient seniority under the Respondent's disciplinary procedure to undertake a disciplinary investigation although that was not explained to the Claimant in the letter. The Claimant was also told of the additional disciplinary allegation arising from Sister Youngman's complaint.

44 In a separate letter dated 24 March 2016 Mrs Waspe invited the Claimant to a Stage 1 sickness absence meeting scheduled for 12 April 2016. Mrs Waspe had noticed that the address given on the Claimant's medical certificates was different from the one held in the Respondent's records, so she sent the letter to this new address by recorded delivery. The Claimant did not attend the meeting and she wrote to him afterwards to say that continued absence was likely to lead to progression to the next stage of the policy (page 265).

45 On 20 April 2016 Mrs Waspe wrote to the Claimant inviting him to a second stage

sickness absence review meeting scheduled for 28 April. She enclosed a copy of the sickness absence policy. Once again the letter was sent by recorded delivery to the address given in the Claimant's medical certificates. The Claimant failed to attend this meeting and on 28 April 2016 Mrs Waspe wrote to him saying that his failure to engage could lead to disciplinary action (page 268). This letter was sent by recorded delivery too. There is a file note dated 3 May 2016 which says that the letters sent to both addresses held for the Claimant had been returned (page 269). I accept that this is accurate.

46 On 10 May 2016 Mrs Waspe sent a further invitation to the Claimant to attend a long-term sickness absence meeting scheduled for 24 May 2016. The Claimant did not attend this meeting but submitted a grievance dated 24 May 2016 (pages 286 – 287). I accept the Respondent's evidence that it received this on 14 June 2016.

47 The Claimant's grievance was addressed to Miss St John: he alleged that he had been unfairly suspended from night duties and described his treatment in inflammatory terms. He accused Miss St John of "*fabricating*" accusations, telling him off "*like a slave*" and described her treatment of him as a "*form of torture, abuse and ill treatment*".

48 The Claimant attended an Occupational Health appointment on 16 June 2016. The OH Practitioner said that he was unfit for work but was likely to be fit for a phased return by the end of June. Following this the Claimant was invited to a further sickness absence review meeting scheduled for 7 July 2016 by letter dated 16 June 2016 (page 283). This letter was sent to his original address and not the one which had been shown on his medical certificates.

49 On 16 June 2016 Ms St John made a complaint about the tone of the Claimant's grievance letter against her (page 285). She said that she felt intimidated and bullied by it.

50 The Claimant did not attend the sickness absence meeting in early July 2016 but he did attend a re-scheduled review on 12 July 2016. A phased return to work beginning at the end of July 2016 was agreed at this meeting (page 295) and Mrs Waspe confirmed this outcome in a letter dated 13 July 2016 (page 296).

51 While all of this was going on Mrs Waspe was having difficulty in finding a replacement for Sister Butler as investigator. The Claimant was not privy to these problems. Eventually, on 21 June 2016 Deborah Forrest was appointed to investigate the disciplinary allegations after another potential investigator had had to stand down when it was realised that she had not had the Respondent's internal disciplinary process training. On 12 July 2016 Sister Forrest wrote to the Claimant outlining the disciplinary allegations against him and inviting him to an investigatory meeting on 1 August 2016 (page 293).

52 On 19 July 2016 Mrs Waspe commissioned Tara Matare to investigate the Claimant's grievance and Miss St John's counter-complaint under the Trust's bullying and harassment policy (page 298). On 21 July 2016 Mrs Waspe sent two letters to the Claimant in which she said that these complaints would be investigated under the bullying and harassment policy. In the closing paragraphs of both she wrote that she was enclosing a copy of the Trust's disciplinary policy for reference. Her evidence, which I accept, was that this was a typographic error and that the bullying and harassment policy was indeed sent with the letters.

53 On 8 August 2016, the Claimant wrote to Mrs Waspe resigning (page 313). His letter is headed *“to avoid slow killing strategies I have decided to resign”*. He complained of being *“bombarded with letters”* whilst he was off with serious stress. He then set out a series of complaints in 16 paragraphs and summarised his treatment as *“degradation, discrimination, racial abuse and public humiliation”*. He said that the decision to resign was *“a most difficult one”*. It is right to say that the Claimant had received a number of important letters from the Respondent in quick succession in July 2016.

54 Mrs Waspe replied on 12 August 2016 asking him to reconsider his resignation and inviting him to a meeting to discuss his concerns on 22 August 2016. The Claimant did not contact Mrs Waspe about this or attend on 22 August 2016 so on 24 August she wrote accepting his resignation (page 322). The Claimant was paid four weeks pay in lieu of notice.

55 The Claimant telephoned Mrs Waspe to discuss his resignation at the end of August 2016, saying that he had been encouraged to do so by his pastor, but she explained that it was now too late as his resignation had been accepted.

56 Against that background I find the Claimant’s employment ended on 24 August 2016 when his decision to resign was accepted and he was given pay in lieu of notice.

Conclusions

57 In this section of my reasons I set out my conclusions on the issues agreed at the outset of the hearing. I also deal with my findings in respect of further matters raised by Mr Ly during his closing submissions. There was a lively discussion about whether these additional matters had been raised as part of the issues agreed at the commencement of the hearing. He assured me that they had and I have therefore accepted this at face value.

58 I start with the list of issues agreed on 7 April 2017 adopting the same numbering for the sake of clarity and convenience.

(a) *Ms St John and Ms Waspe constantly belittling the Claimant at work and adopting an aggressive and bullying attitude.*

59 I do not find that this allegation is established on the facts. On the contrary, the documentary evidence shows considerable forbearance on their part and Mrs Waspe’s efforts to help the Claimant. I accept Miss St John’s evidence that the Claimant was resistant to being managed; one example is his continued use the coffee room during four hour shifts when he was not entitled to a break.

(b) *Imposing a new job description on 22 August 2014 (or 27th October 2014 according to the Claimant’s statement at paragraph 42) from Theatre Health Care Support Worker to a Porter and humiliating the Claimant as a result.*

60 I reject the Claimant’s case that the change from HCSW to ODO was imposed. I find on the balance of probabilities that it was agreed between the Claimant and Respondent as a means of accommodating his requirement for reduced hours compatible

with school times. The Claimant knew that as part of this that he was to be assigned to housekeeping as maternity cover. I do not find that this was a repudiatory breach of contract or part of one.

(c) On 18 September 2015, Ms St John following the Claimant into the changing room and shouting at him (Para 11, Amended Particulars).

61 I accept Miss St John's evidence that she did not follow the Claimant into a changing room or shout at him on 18 September 2015. This allegation fails on the facts. I also accept her evidence that she had had to speak to the Claimant about using his mobile telephone, reading a book or newspaper or browsing on a PC during working hours.

(d) On 22 September 2015, Ms St John following the Claimant to the toilet and humiliating him in front of patients and other staff members (Para 11, Amended Particulars).

62 I find that there was an occasion on 22 September 2015 when Miss St John went to look for the Claimant who was missing from his shift. I find that she knocked on a changing room door before opening it to find the Claimant sitting on a bench in the corner reading a book. She wrote to the Claimant regarding this incident on 23 September 2015 (page 247). I reject the Claimant's case that Miss St John followed him into a toilet or that she humiliated him in front of patients and other staff members. This was another occasion when the Claimant was acting elusively at work and had to be looked for. Judged objectively, I do not find that this passage of events constituted a repudiatory breach of contract or part of one.

(e) In September 2015, Ms St John approaching the Claimant in the coffee room and telling him that he cannot wait like others in the coffee room, he must wait standing.

63 I find that the Claimant was told that he should not wait in the coffee room during his four hour shifts because he was not entitled to a break on short shift; ODOs were expected to be conspicuous to other staff and to be ready to help. Judged objectively, I do not find this instruction to constitute a repudiatory breach of contract or part of one.

(f) Accusing the Claimant of taking unauthorised leave from 13 August 2015 for two weeks when in fact the leave was unauthorised by his supervisor Helen McMahan (Para 13, Amended Particulars).

64 The Claimant did take unauthorised leave. This claim fails on the facts.

(g) On 30 October 2015, Ms St John refusing to give him another day in lieu after the Claimant had missed his training and worked as usual (Para 14, Amended Particulars).

65 I am not satisfied on the evidence that the Claimant was entitled to time off in lieu as he alleges. He was paid for the hours he worked on 30 October 2015, which was a working day: he spent it at work rather than at training because he turned up late for the

course and was not admitted to it. This pleaded claim fails on the facts.

66 The Claimant was required to attend similar training in early January 2016 on a day which was not his usual working day. Insofar as he may have required to work additional hours that week to accommodate this and insofar as this may have been in breach of his terms and conditions, judged objectively the breach was not a repudiatory one. Furthermore, the Claimant affirmed the contract despite any such breach by continuing to work for the Respondent until the end of February 2016 and by remaining employed by it and drawing pay until August 2016.

(h) On 24 February 2016, suspending the Claimant from his night shift following an allegation that he had been asleep whilst on night duty on 20 February 2016 (Paras 17 & 18, Amended Particulars).

67 I find that the Claimant was prejudiced by his suspension from night duties because of the impact of this on his childcare arrangements but this was treatment with cause in view of the serious disciplinary allegations raised against him. The Respondent had power to suspend the Claimant or temporarily redeploy him under its disciplinary procedure. Judged objectively I do not find that this treatment was a repudiatory breach of contract or part of one.

(i) Not initiating the disciplinary investigation until 12 July 2016 (Para 17, Amended Particulars) and only preparing a report after unfair dismissal of the Claimant.

68 I find that there was significant delay in progressing the disciplinary investigation against the Claimant. While such a delay might constitute or contribute to a breach of the implied term of trust and confidence, I do not find that this is the case here on the evidence presented. This shows that the Claimant had disengaged from the Respondent almost completely from the date he went off sick, 29 February 2016, until June 2016 at the earliest when he attended an OH appointment for the first time and submitted a grievance (dated May 2016). He did not attend any meetings with the Respondent until 12 July 2016. Sister Forrest wrote to the Claimant on the same day to confirm her appointment as investigator and to invite him to the meeting on 1 August 2016 which he then failed to attend. Judged objectively, therefore, I find that the Respondent's delay in appointing an investigator (which was for reasons beyond Mrs Waspe's control) was not a repudiatory breach of contract or part of one.

69 Sister Forrest did not provide a report on the disciplinary allegations against the Claimant but this became unnecessary after his resignation was accepted. This could not have been a reason for the Claimant's resignation in any event. I note that Ms Matare provided a grievance outcome after the Claimant's resignation.

(j) Harassing, subjecting the Claimant to disciplinary procedures, and threatening him with dismissal whilst off sick (Para 17 Amended Particulars).

70 The Claimant became the subject of a disciplinary procedure based on alleged misconduct before he went off sick. Sickness was not a reason to stop this and I find that the Claimant was treated in accordance with the Respondent's sickness absence policy

while off sick. Judged objectively, therefore, this did not constitute a repudiatory breach of contract or part of one.

(k) *Treating the Claimant's letter dated 24 May 2016 as an act of bullying against Ms St John and triggering further disciplinary allegations against the Claimant. The Respondent's letters of 21 July 2016 and 25 July 2016 did not mention the Respondent's letters of 21 July 2016 and 25 July 2016 did not mention the Claimant's grievance (Paras 19-22 Amended Particulars).*

71 Miss St John raised a complaint about the Claimant as he had about her; she was entitled to have it investigated. There was no outcome given to this by the Respondent prior to the Claimant's resignation.

72 There was a typographical error in the letters Mrs Waspe sent to the Claimant concerning his grievance and Miss St John's where they both referred to the disciplinary procedure. I am satisfied nevertheless by Mrs Waspe's evidence that she sent the bullying and harassment policy with these letters and that the Claimant knew that it was being dealt with as such from the opening paragraphs. Judged objectively, I do not find that this allegation constitutes a repudiatory breach of contract or part of one.

(l) *Failing to suspend the disciplinary process in order to deal with the Claimant's letter dated 24 May 2016 under its grievance procedure first (Para 27, Amended Particulars)?*

73 There is no general requirement for an employer to do this and I was not taken to any specific requirement in the Respondent's procedures. This claim fails on the facts.

74 I turn then to the matters raised by Mr Ly in his closing submissions as the straws comprising an alleged repudiatory breach of contract. He said they were as follows:

- 74.1 The occasions when the Claimant asked for his flexible working requests to be accommodated.
- 74.2 The move from the role of HSWR in theatre to ODO in October 2014.
- 74.3 The fact the Claimant was made to work as a housekeeper.
- 74.4 Miss St John treating the Claimant in an undignified manner in September 2015.
- 74.5 Nicolette Youngman calling the Claimant smelly and saying, "*this stupid doesn't listen - move from my face*".
- 74.6 The accusation levelled against the Claimant of sleeping on a night shift on 20 February 2016.
- 74.7 Taking night duties away on 26 February 2016.

- 74.8 Failing to interview the Claimant's four colleagues before taking night duties away or at all.
- 74.9 Nicolette Youngman's allegations against the Claimant made on 29 February 2016 (being dressed to leave before the end of a shift and emptying bins without scrubs or gloves).
- 74.10 The way in which the Respondent acted following his letter to Ms St John dated 24 May 2016.
- 74.11 Mrs Waspé's letter to Deborah Forrest dated 15 June 2016 (page 288b).
- 74.12 Letters to the Claimant concerning his grievance and Miss St John's allegation against him dated 21 July 2016 which referred to the disciplinary policy rather than the bullying and harassment policy.
- 74.13 The letter sent to the Claimant under the sickness policy dated 4 August 2016 (page 309).

75 I have already dealt with issues 1, 2, 3, 4, 7, 10 and 12 from this new list in the findings set out above and I therefore deal with the allegations under subparagraphs 5, 6, 8, 9, 11 and 13 only below. For the sake of clarity I shall adopt the same numbering as Mr Ly did in his submission to me.

Nicolette Youngman calling the Claimant smelly and saying, "this stupid doesn't listen - move from my face".

- (5) The Claimant alleges at paragraph 9 of his amended Grounds of Claim and paragraph 39 of his witness statement that on an unspecified occasion in 2014 Nicolette Youngman called him "*smelly*" and said in his presence "*this stupid does not listen - move from my face*". The allegation was not put to the Respondent's witnesses in evidence, although I accept they may not have been able to comment on the allegation. At the commencement of the hearing Mr Ly had said that he was not relying on events in 2014 other than as background and this may also have informed his and Ms Patterson's approach to the evidence. In closing submissions, however, Mr Ly said that I had misunderstood his concession and that he was simply not relying on events in 2014 as the trigger for the Claimant's decision to resign. Nevertheless, the Claimant's case on the significance of this comment is confused and confusing. Doing the best I can I accept the Claimant's evidence that Sister Youngman said something about his clothing being unclean on an occasion in 2014 though I bear in mind that he worked in a hospital where the expected standards of hygiene are high. Sister Youngman may also have said something about the Claimant's approach to his work which he found upsetting. For all of that this was an event which took place two years before his eventual resignation and before a number of consensual changes to his hours and duties. In these circumstances when judged objectively I do not find that her comments constituted a repudiatory breach of contract or part of one. Furthermore, even if they did I find that the

Claimant affirmed his contract of employment despite such a breach by his continued service under it for 24 months or so. This claim fails.

The accusation levelled against the Claimant of sleeping on a night shift on 20 February 2016.

- (6) I find that Nurse Rammohun made a complaint about the Claimant allegedly sleeping on duty on the night shift of 20 – 21 February 2016. The Claimant accepted in evidence that this was a serious allegation and a potential disciplinary issue. In these circumstances it cannot be a repudiatory breach of contract or part of one for the Respondent to investigate it as such. This claim fails on the facts.

Failing to interview the Claimant's four colleagues before taking night duties away or at all.

- (8) The Claimant alleges that the Respondent should have interviewed his four colleagues about the events on the night of 21 February 2016 before taking his night duties away. As noted above, the Respondent has power under its disciplinary policy to suspend or temporarily redeploy (page 72). It chose to exercise the latter power by moving the Claimant from the night shift because of the allegation he faced. This decision cannot be described as irrational given that the allegation was one of sleeping on duty and sleeping is something most of us do at night. There is no requirement for an employer to undertake a full investigation before taking the interim step of suspension or redeployment prior to investigation. It would be reasonable for the Claimant to expect his colleagues to be spoken to as part of the investigation but not as part of the decision to suspend or redeploy. This ground fails.

Nicolette Youngman's allegations against the Claimant made on 29 February 2016 (being dressed to leave before the end of a shift and emptying bins without scrubs or gloves).

- (9) I find that Sister Youngman made allegations about the Claimant apparently being dressed to leave before the end of his shift and then attempting to empty bins without wearing scrubs or gloves. Given the charge the Claimant already faced, I find that these were properly the subject of disciplinary investigation: they were further allegations of the Claimant avoiding his full duties and resisting being managed. Judged objectively I do not find that adding these allegations to the investigation was a repudiatory breach of contract or part of one. The Respondent did not decide that the allegation was true (although I have no reason to doubt its truth) so this cannot be a reason for his resignation.

Mrs Waspe's letter to Deborah Forrest dated 15 June 2016 (page 288b).

- (11) Mr Ly relied on the terms of a letter sent by Mrs Waspe to Deborah Forrest describing the ambit of her investigation (page 288b – c). This letter

contained the disciplinary charges to be investigated as one might expect but, as Mr Ly pointed out, the letter also made reference to Miss St John's complaint about the Claimant which was not part of the disciplinary allegations but was to be investigated separately by Ms Matare. Mrs Waspe told me that she could not remember why this had been included in the letter. Mr Ly's point was that this was potentially prejudicial to the Claimant. While I can see that this was a possibility, I find that it is an allegation of no relevance in this case as the Claimant was unaware of the correspondence at the time of his resignation so it cannot be a reason for it. Furthermore, Sister Forrest did not complete an investigation or give an outcome so there is no question of this having been influenced by the terms of the letter. For these reasons when judged objectively this cannot form part of a repudiatory breach of contract.

The letter sent to the Claimant under the sickness policy dated 4 August 2016 (page 309).

- (13) A final point raised by Mr Ly was Mrs Waspe's reference to possible dismissal at Stage 3 of the sickness absence procedure in a letter to the Claimant dated 4 August 2016. She wrote that if the Claimant did not return to work within 28 days of their last meeting (which was under Stage 2) his case would be referred to a senior manager under Stage 3. The context of this letter was that the Claimant had been expected to return to work at the end of July 2016. His current medical certificate was due to expire on 7 August 2016 and I find that Mrs Waspe wished to know what the Claimant's intentions were. I find that she had a duty to explain to him what the Respondent's position might be were he to continue to be absent from work. Judged objectively I do not find that the terms of this letter constituted a repudiatory breach of contract or part of one. The Claimant had been absent since the end of February 2016 and had not returned to work at the end of July as anticipated; the Respondent was entitled to manage this absence in accordance with its sickness absence policy.

76 For the reasons given above the Claimant has failed to establish a repudiatory breach of contract whether under the implied term of trust and confidence or the duty to provide a safe place of work. In reaching this conclusion I have had regard to the last straw doctrine. It follows that his complaint of unfair dismissal and the associated complaint of breach of contract are not well-founded and are dismissed.

77 There is ample evidence that the Claimant was provided with written particulars of employment and of changes to those particulars so his claim under Section 4 of the Employment Rights Act 1996, which was not developed in any meaningful sense in evidence and argument before me, is also dismissed.

Employment Judge Foxwell

26 June 2017

