



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Nicola Stacey

**Respondent:** Care UK Clinical Services Limited

**Heard by CVP**

**On:** 29 and 30 November 2021

**Before:** Employment Judge Martin

**Representation**

**Claimant:** In person

**Respondent:** Mr N Caiden - Counsel

## RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for unfair dismissal is not successful and is dismissed

## RESERVED REASONS

1. On 5th November 2019 the Claimant presented a claim to the Tribunal alleging that she had been constructively unfairly dismissed by the Respondent. The Respondents denied all claims in its ET3 Response form and Grounds of Resistance presented on 20 December 2019.
2. The Respondent had prepared a list of issues which had been sent to the Claimant party the hearing. The Claimant was asked to tell the Tribunal if she had any disagreement with it. No disagreement was identified and therefore these form the issues which I need to determine.

### The Issues as agreed

(Page references in bold are to the joint bundle; ERA = Employment Rights Act 1996)

3. By ET1 presented on 29 January 2020 (p.1), the Claimant claims that her resignation with notice on 2 September 2019 (p.231) amounted to an unfair

constructive dismissal as defined by s.95(1)(c) ERA and s.98 ERA, contrary to s.94(1) ERA. The sole claim before the Tribunal therefore is one of unfair constructive dismissal.

4. Accordingly for liability purposes the issue is whether, contrary to the s.94(1) ERA right not to be unfairly dismissed, the Claimant's resignation with notice on 2 September 2020 amounted to a constructive unfair dismissal within the meaning of s. 95(1)(c) ERA and s.98 ERA, having regard to the following:
  - i. Did the Respondent commit a 'repudiatory breach' of contract?
  - ii. If so, was the Claimant's resignation because of any such repudiatory breach.
  - iii. If so, did the Claimant nonetheless waive / affirm such a repudiatory breach prior to her resignation.
  - iv. If not and so there was a constructive dismissal, was this a fair dismissal within the meaning of s.98 ERA?
5. As regard to the repudiatory breach, paragraph 3(1) above, it is assumed the Claimant is relying upon the 'implied term of mutual trust and confidence' (namely 'without reasonable and proper cause it conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between it and the Claimant').
6. In terms of the alleged factual allegations which appears from the ET1 (p.10 and p.15) the Claimant is asserting amount to a breach of the 'implied term of mutual trust and confidence' these, are in chronological order
  - i. prior to August 2018, delay in the Respondent having the Claimant seen by Occupational Health.
  - ii. circa end of April 2019, Sam Buckler failing to inform the Claimant as to the nature of the complaint made against her by the complainant.
  - iii. failure to provide the Claimant adequate notice of the nature of the complaint made by the complainant prior to the meeting of 9 July 2019.
  - iv. delay in concluding the grievance investigation process in relation the complainant grievance against the Claimant, received on 10 April 2019, which was only concluded on 2 September 2019.
  - v. failure to include supportive statements received in the investigation that was concluded on 2 September 2019.

### **The hearing**

7. The Claimant represented herself and Mr Caiden representative Respondent. I heard from the Claimant, and for the Respondent from Ms Buckler and Mr O'Brien. I had before me written witness statements for all witnesses, an agreed bundle of documents comprising 294 pages, a cast list and chronology. The chronology has been appended to this judgement for ease of reference. Both parties provided written submissions.

**The relevant law**

8. s.95 Circumstances in which an employee is dismissed.
  - (1) For purposes of this Part an employee is dismissed by his employer if...
    - (c) the employee terminated 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.
9. I was referred to the following case law by the Respondent, which I considered in coming to my conclusions:
  - i. **Buckland v Bournemouth University** [2010] EWCA Civ 121 - the strict 'objective' contract breach ('repudiatory breach') test applies to constructive dismissal cases
  - ii. **BG plc v O'Brien** [2001] IRLR 496 (EAT) – the question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. If the conduct has that effect, then the question of whether there has been a reasonable and proper cause for the behaviour must be considered...
  - iii. **Woods v WM Car Services (Peterborough) Ltd** [1981] IRLR 347 - to amount to a breach of the implied term of trust and confidence the acts must amount to 'destroy or seriously damage' the employment relationship such that the employer is no longer intending to be bound by the employment contract.
  - iv. **Lewis v Motorworld Garages Ltd** [1985] IRLR 465 (CA) - *"The conduct must therefore be repudiatory and sufficiently serious to enable the employee to leave at once"*.
  - v. **Hadji v St Luke's Plymouth** UAEAT/0095/12/BA – sets out the essential principles of waiver
  - vi. **Eminence Property Developments Ltd v Heany** [2010] EWCA Civ 1168 - *"So far as repudiatory conduct, the legal test is simply stated....It 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"*:
  - vii. **Fereday v S Staffs NHS Primary Care Trust** (UKEAT/0513/ZT -
  - viii. **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978 at [51] and [2018] IRLR 833 and **Williams v Alderman Davies Church in Wales Primary School** [2020] IRLR 589 (EAT) –

provides guidance on how to approach multiple breaches and 'last straw' cases.

- ix. **Omilaju v Waltham Forest LBC** [2004] EWCA Civ 1493, [2005] IRLR 35
- x. **Cockram v AirProducts plc** [2014] ICR 1065 (EAT) - Note that giving more notice than contractual required and for one's own end is something that can amount to an affirmation of contract
- xi. **Wright v North Ayrshire Council** [2014] IRLR 4 - the repudiatory breach must be an effective cause of the resignation (not the effective cause). If an employee resigns for several reasons, and one of these is found to be repudiatory, a constructive dismissal has been caused.
- xii. **Savoia v Chiltern Herb Farms Ltd** [1982] IRLR 166 (CA) -. If a 'constructive' dismissal is found to have occurred, it is possible for it to be fair
- xiii. **Delabole Slate Ltd v Berriman** [1985] IRLR 305 (CA) – in constructive dismissal cases the reason for dismissal is not obvious and will normally be for some other substantial reason justifying dismissal.

### **My findings of fact**

10. I have come to the following findings of fact on the balance of probabilities having regard to the written and oral evidence before me. I have limited these findings to those are relevant to the issues set out above and necessary to explain my decision. Even if not specifically recorded below, I considered all evidence given during the hearing.
11. The Claimant entered into an agreement for employment with the Respondent on 29 November 2016. Her continuous employment began on 16 January 2017. She was employed as a Theatre Manager. The Respondent provides healthcare services including giving treatment and care to NHS patients at several hospitals. known within the Respondent as "Treatment Centres", at various locations in England. The Claimant was employed in the Will Adams Treatment Centre in Gillingham.
12. The Respondent had the following policies which are relevant to the issues in this case. All the policies are non-contractual. The relevant parts are set out below:

### 13. Grievance Policy

#### **“Our Policy**

*This policy provides a clear and transparent framework to deal with concerns, problems or complaints raised by employees in the course of their employment in relation to:*

- matters affecting themselves as individuals; or*
- matters affecting their personal dealings or relationships with other employees.*

#### **Accountabilities**

- Line Managers will Usually deal with grievances. They may consult with HR and in exceptional circumstances may appoint an Investigating Manager to investigate and produce a report which they will Use to decide in relation to the grievance.*
- The HR representative will provide advice in respect of the application of this procedure. They will support the Line Manager in the process of making an informed, fair and reasonable decision.*
- The Grievance process gives employees the opportunity to bring forward information and put their case at any interviews/meetings.*

#### **General Principles**

##### **Confidentiality**

*Care UK’s aim is to deal with grievances sensitively and with due respect for the individuals involved. All employees must treat as confidential any information communicated to them in connection with a matter which is subject to this Grievance Policy.*

##### **Timescales**

*Grievances will normally be acknowledged within 5 working days and an invitation to a grievance meeting normally sent within 14 working days. Whilst every endeavour will be made to comply with timescales. due to the complexity and or specific circumstances of a case, timescales may be extended. in such circumstances the individuals concerned will be advised of the reasons for any delay.*

##### **Mediation**

*At any stage in this procedure the parties to the grievance may request that the matter be referred for mediation. Mediation is likely to be most appropriate in cases involving interpersonal relationships. There may, however, be circumstances in which alternative non adversarial discussions may be undertaken with the aim of promoting a speedy resolution.*

*Mediation is voluntary and will take place only If all parties agree. It is, however, hoped that employees will recognise the benefits of seeking to resolve issues via mediation and will be agreeable to and cooperate with this approach.*

...

### ***The investigation***

*Where the grievance forms a complaint which relates to other employees, the individuals involved (the Respondents) will be informed in writing of the nature of the complaint about them and will be given the opportunity to respond. The Respondent should also be informed of the procedure, be asked to identify potential witnesses and be provided with appropriate sources of support. As detailed in Appendix A, there is no right to be accompanied to this investigation meeting.*

*Facts should be clarified and evidence/witnesses identified. The procedure and possible outcomes of the investigation should be clarified with all parties by the Manager carrying out the Investigation.*

*The Manager carrying out the investigation should determine who to interview and ensure, where practicable, that a reasonable balance is maintained in terms of the number of witnesses interviewed. investigatory interviews will normally be held in the following order: the individual making the complaint, an individual who is the subject of the complaint and finally any witnesses. if any individuals require counselling support, details of the Employee Assistance Programme can be found on the Care UK intranet.*

*Witnesses should be restricted to supplying factual information rather than acting as character witnesses. The investigation should focus on seeking factual information from witnesses in relation only to the formal complaint that has been made”.*

### **14. Disciplinary Policy**

#### ***Examples of Gross Misconduct***

*The following list, which is not exhaustive, provides examples of offences that are normally regarded as gross misconduct: —*

*.....*

- Bullying of another employee including physical or verbal assault or violence towards an employee except in self-defence.*
- Acts of discrimination or harassment of a fellow employee, patient or other third party on any grounds.*

*.....*

### **15. Dignity at Work Policy**

#### ***“Our Policy***

*Care UK is committed to creating a work environment free of harassment, bullying and victimisation, where everyone is treated with dignity and respect. Care UK regards any form of bullying and/or harassment as unacceptable behaviour. Any incidents of harassment will be regarded extremely seriously by Care UK and will normally be grounds for disciplinary action which may include dismissal. Some harassment is unlawful discrimination and serious harassment may be a criminal offence.*

*The Company recognises that complaints may be received from employees that relate to being bullied, harassed or victimised by a colleague, a manager, a service user or customer. A complaint should be raised in accordance with the Company's Grievance Policy.”*

16. In March 2018 the Claimant signed a referral form to be referred to Occupational Health ('OH'). She reminded her line manager in March and again in July 2018 and it was sent to OH on 20 August. There was no evidence from the Respondent explaining why this delay happened. Once seen by OH, the recommendations made were carried out. She raised a grievance against her line manager on 23 August 2018 which was concluded on 3 October 2018.
17. On 14 January 2019 the Claimant was off work due to anxiety and depression. She was signed off sick until March 2019 when she returned to work on a phased basis to start with. This followed an OH report dated 28 February 2019. Shortly after she returned to work a grievance was made by a colleague alleging bullying and harassment by the Claimant.
18. On receipt of the grievance, Ms Buckler arranged to meet with the complainant on 26 April 2019. During this meeting the complainant said she wanted to follow the formal grievance route rather than the informal procedure.
19. On 29 April 2019 Ms Buckler completed the terms of reference of grievance (156) and started to identify an appropriate person to be the investigating officer.
20. Before the Claimant could be informed of the grievance (the procedure is that before this happens the complainant is invited to a meeting to discuss their grievance further) the Claimant was made aware by colleagues that a grievance or complaint had been made against her by other staff. Presumably the complainant had told other staff that she had made the grievance. This led to the Claimant asking Ms Buckler about it on 10 May 2019.
21. There was a dispute about whether Ms Buckler told the Claimant that a complaint had been made or that a grievance had been made. Ms Buckler said she said the terminology she used was grievance, whereas the Claimant said it was a complaint. I do not see much difference between the two. The Claimant says that if she knew it was a formal grievance, she would have prepared herself more for the interview. However, as set out below the Claimant knew that the complainant had complained and was able to participate in the interview and could recollect events. I do not find that even had Ms Buckler used the word 'complaint', that this prejudiced the Claimant. The Claimant was understandably upset to have found out in this way and Ms Buckler acknowledged that it should not have happened as it did.
22. On 10 June 2019 a consultant doctor made a separate grievance against the Claimant. This was treated as a separate grievance and investigated separately by a different investigating officer than the Grievance raised by the complainant. That grievance was not upheld.
23. I have seen emails produced by the Respondent which show that it was difficult to find an appropriate person to hear the grievance raised by the complainant. Emails show that efforts were made and that initially an

appropriate person was identified. However, after being appointed, this person had an accident and was unable to continue with the investigation. On 24 June 2019 Ms Agatha Pollock was appointed to investigate the grievance. Ms Pollock worked outside the WTC. She was employed at the same grade and level as the Claimant. Ms Pollock started her interviews on 2 July 2019.

24. Ms Pollock began by interviewing the complainant in accordance with the policy. She then interviewed other witnesses finally interviewing the Claimant on 9 July 2019. The nature of this investigation was evaluating one person's word against another's.

25. The Claimant was invited to the investigation meeting by letter dated 2 July 2019:

*"Dear Nic.*

***Investigation interview invitation***

*I am writing to inform you that you are required to attend an investigation/fact find interview on Tuesday 9th July at 11 am which is to be held at the Will Adams NHS Treatment Centre.*

*The interview forms an integral part of an ongoing investigation with regard to a formal grievance that has been submitted.*

*if you are unable to attend, please contact me as soon as possible.*

*if you have any special requirements to assist you in the investigation interview, please contact me on receipt of this letter.*

*Yours sincerely  
For and on behalf of Care UK"*

26. The Claimant attended this meeting. At the start Ms Pollack asked, "I assume you know what this is all about" to which the Claimant replied, "I do, yes". Ms Pollack asked the Claimant to give her understanding and the Claimant replied, "It has come from 2 members of my staff, so I understand that Saine has taken objection to the way I spoke to her about some specimens that were lost and that's all I know". This was just one of the allegations in the grievance. It was then explained to her that the grievance was for bullying and harassment. The matters grieved on were put to the Claimant and the Claimant gave full answers. She did not say she did not understand what was being asked or that she could not answer questions as she had not been given prior notice of the allegations or that she needed more time. She admitted many of the allegations and said that her mental health was a factor in how she reacted to situations. The Claimant became quite upset during her interview particularly in relation to the most serious of the allegations. The Claimant signed the notes of the meeting.

27. Given that this document will be in the public domain, I do not intend to set out the details of the Claimant's mental health issues or details of the most serious allegation (which was not upheld). It is sufficient to say that her



issues were serious at times. I have also not named individuals who were not giving evidence or at the Tribunal as they did not have any opportunity to put their views across.

28. Ms Pollack completed her report. The recommendation from Ms Pollack was that the Claimant “*should be taken down the Disciplinary route as per ‘Disciplinary’ policy which states employees are responsible for adhering to the Company standards of conduct and performance at work*” (sic). Other recommendations were made including matters such as having a clear management structure, clear lines of accountability and a job description and mentor for the complainant.
29. The date on the report is 15 July 2019. Ms Buckler has no input into the grievance investigation from when an investigating officer is appointed until the report is received. It is then Ms Buckler’s role to decide as to whether the grievance is to be upheld or not and whether any further actions should be taken. The Claimant was not notified of it until 2 September 2019.
30. Ms Buckler could not explain the date on the report, other than to say she believed it was incorrect and that the date of 15 July 2019 was in fact the date the report was started. In any event, I am satisfied that Ms Buckler did not receive the final report until sometime after 14 August 2019 (although she had received a draft report by 2 August 2019) when she was on annual leave. I say this as there is email correspondence of 14 August 2019 with the Claimant chasing up the outcome and Ms Buckler saying she had not yet received the final report. Once received she communicated the decision to both the complainant and the Claimant promptly.
31. The Claimant’s evidence is that Ms Buckler told her that the grievance had been upheld in its entirety including the most serious allegation. Ms Buckler said that she was very clear that she said all allegations apart from the most serious one was upheld. The Claimant became upset in this meeting.
32. Later that day she left a letter of resignation on Ms Buckler’s desk. This letter said:

*“Dear Sam*

*Please accept this letter as notification of my resignation from the position of Theatre Manager at The Will Adams Treatment Centre.*

*in accordance with my contract I am giving three months notice therefore the last day of my contract will be Monday 2<sup>nd</sup> December 2019. I am prepared to take any annual leave or time owing during this time in accordance with the needs of the business.*

*I have been very disappointed today to learn the result of the grievance that was submitted by [the complainant]. I will be taking legal advice on this as the process was not followed in the correct manner.*

*As I have mentioned to you in recent meetings I have found the atmosphere in theatres with Dr [ ] and [the complainant] very difficult and intolerable at times*

*and have struggled a great deal with this following my sickness absence due to mental health problems.*

*They have both made it very clear that they want me out of my position as theatre manager, Dr [ ] being very vocal about this to the staff and particularly Jess while I was off sick after my breakdown.*

*I feel unable to work at WATC now as I am concerned for my mental health and fear that continuing to work here could cause another breakdown which I fear I would not have the strength to fight this time.*

*Yours Sincerely”*

33. The same day, Ms Kate Stacey (the Claimant's wife) telephoned Ms Buckler asking her not to action the Claimant's resignation. The Claimant also asked for this the next day. Ms Buckler's evidence was that she could not talk about matters relating to the Claimant with Miss Kate Stacey for confidentiality reasons. She referred the letter of resignation to Mr O'Brien and Ms Turner from HR. The request to withdraw the resignation was refused.

34. On 3 September 2019 the Claimant wrote to the Respondent, "*After further consultation with my solicitor and on his advice I attach my own grievance regarding the grievance and subsequent investigation raised against me.*" The reference to 'further consultation' leads me to find that the Claimant sought legal advice before Ms Buckler gave her the outcome of the investigation and before she sent her letter of resignation.

35. Ms Turner, (HR Manager) responded:

*“Dear Nic,*

*The grievance submitted appears to be a reaction to the disciplinary notice issued by Sam, arising out of the grievance outcome notified to you on Monday 2<sup>nd</sup> September. Care UK Grievance policy states: The procedure cannot be Used to challenge formal outcomes in other procedures which have an appeal process, namely: Disciplinary policy.*

*Complaints about these matters should be considered during meetings held under these procedures.*

*Therefore a grievance cannot be used to stall other processes, and as such, the company are not classifying your complaint as a grievance, and will proceed accordingly with the disciplinary process. Should you wish to submit this information as part of a disciplinary hearing, it will be up to the Chair to consider it in light of the situation.”*

36. Ms Buckler agreed with the recommendation that the Claimant should be invited to a disciplinary hearing based on the investigation report received. She arranged that Mr O'Brien; Service Director for Care UK's Northwest Ophthalmology Service should chair the disciplinary hearing. The Claimant was invited to the disciplinary hearing by letter dated 2 October 2019. The letter stated: "*The purpose of the meeting will be to discuss an allegation of bullying and harassment and unprofessional behaviour from a grievance raised by [the complainant] which was subsequently upheld.*" The letter enclosed a

substantial amount of documentation including the investigation report, terms of reference, witness statements (including one by Miss Kate Stacey), interview notes and the relevant policies. Miss Kate Stacey's name did not appear in the report in the list of those interviewed, however the notes of her interview were included. Her name was inadvertently not put in the list.

37. The Claimant sent Mr O'Brien several character references and a thank you card she had previously received from the complainant. These were considered by Mr O'Brien during the disciplinary process. The Claimant also produced a 13-page typewritten document defending the allegations.
38. At the start of the meeting Mr O'Brien acknowledged that mental health issues had been raised as a thread and that the Claimant should request a break if she needed one. Mr O'Brien went through the allegations in turn, and I am satisfied that the Claimant had the opportunity to answer fully and put forward her position. She was accompanied by Miss Kate Stacey. The meeting lasted nearly two hours. The Claimant was invited to send Mr O'Brien further information after the meeting if she wanted to.
39. The outcome of the disciplinary hearing was that the Claimant was given a first written warning. Mr O'Brien said that the allegations proved amounted to gross misconduct, but he was aware of the Claimant's experience and of her mental health issues which he thought impacted on how she reacted to things. He accepted the character references at face value. He gave his decision on each of the allegation he acknowledged that the time scale for the grievance investigation was delayed. As the Claimant had resigned the warning would remain until the effective date of termination of her employment. The Respondent did not accept the Claimant's request to withdraw her resignation.

## **My conclusions**

40. Having found the factual matrix above I have come to the following conclusions on the balance of probabilities.
41. I understand that the Claimant is very upset by what happened and I have sympathy for her and her mental health issues. However, I must put those sympathies aside when considering this case.
42. The Claimant says she asked to withdraw her resignation, and this was refused. Whilst this was not the focus of the hearing, I find that the Respondent was entitled to refuse to accept her withdrawal of her letter of resignation. The letter was well written, referred to the contract of employment and could not reasonably be said to have been written on the spur of the moment. Whilst I have no direct evidence on this, I find that it was most likely that this letter had been pre-prepared (given it was handed in only 20 minutes after the meeting on 2 September 2019) to use if needed. The legal position is that when a letter of resignation is given which conforms to legal and contractual matters an employer is not bound to accept any request to withdraw that resignation. For the avoidance of doubt, I find that the Claimant resigned.

43. For the Claimant to succeed in her claim for constructive unfair dismissal she must show that she resigned in response to a fundamental breach of contract by the Respondent. The Buckland case sets out the test: *“an employer will not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”*. The case law states that the type of conduct alleged must be such to *“destroy or seriously damage”* and I accept the Respondent’s submission that a breach of the implied term must be repudiatory but that *“equally not every act, even something deemed unreasonable, would amount to a breach of the term”*. In essence the employer must be making it clear that it is no longer intending to be bound by the employment contract.
44. My focus is on the Respondent’s conduct and not the Claimant’s reaction to it. I must decide if there has been a breach of contract from the evidence adduced before me. The term relied on in this case is the implied term of mutual trust and confidence.
45. I acknowledge the issues raised by the Claimant that predate the grievance made by the complainant. However, my focus is on what happened once that grievance had been made. It is unfortunate that the Claimant found out about the grievance from other staff as the process is meant to be confidential. This was acknowledged by Ms Buckler on 10 May 2019. It is unfortunate that there was a further breach of confidentiality by someone when the grievance report was completed. The two people who had been told about the report by Ms Buckler namely the Claimant and the complainant were written to in identical terms about the need to preserve confidentiality. I find this email to be reasonable in the circumstances.
46. Once the grievance had been made there was a process which needed to be followed. That process requires the Respondent to first speak to the complainant to ascertain further details about her grievance and how she wanted to proceed. It was only then that the investigation could be commenced. Therefore, when Ms Buckler told the Claimant on 10 May 2019 that she could not discuss it with her at that stage she was acting appropriately and within the ambit of the policy.
47. Miss Buckler completed the terms of reference for the grievance investigation in a timely manner and tried to find somebody appropriate to conduct the investigation. Unfortunately, this proved to be quite difficult. I can see from the email correspondence the efforts made and although the desired timetable set out in the policy was not met, I find that the Respondent acted reasonably and will good cause, even though this inevitably caused a delay in the grievance being concluded.
48. Turning specifically to the factual allegations set out in the list of issues I find as follows:
- a. *Prior to August 2018, delay in the Respondent having the Claimant seen by Occupational Health*

- i. The factual background is set out above. It is very regrettable that the OH referral was not acted on in a timely manner. It is difficult without evidence to say that the reason was forgetfulness. However, I note that once the OH report was received the recommendations were acted on. This does not indicate that the Respondent was abandoning or refusing to perform the contract. It was unreasonable, however not sufficient to show a breach of contract. In any event, even if this was a breach of contract, the Claimant did not resign because of this as she carried on working for over a year after the OH report was received thus affirming any breach of contract.
- b. *circa end of April 2019, Sam Buckler failing to inform the Claimant as to the nature of the complaint made against her by the complainant*
  - i. The factual background is set out above. The policy specifically says that the first step on receiving a grievance is that the complainant is interviewed to ascertain whether he or she wishes the grievance to be dealt with formally or informally and to obtain further information. This is what happened. It is unfortunate that the Claimant learnt about the grievance before being formally told by management. This was to do with a breach of confidentiality. When Ms Buckler told the Claimant she was unable to give her any details, this was in accordance with the policy. This is not a breach of contract even though the Claimant might perceive it as being unreasonable.
- c. *failure to provide the Claimant adequate notice of the nature of the complaint made by the complainant prior to the meeting of 9 July 2019*
  - i. The Respondent's position is that the Claimant received adequate notice of the nature of the complaint. There was a conflict of evidence. Ms Buckler said that she spoke to the Claimant about it in informal meetings which were not minuted. The Claimant says this did not happen. The letter inviting the Claimant to the investigatory meeting is set out above. This does not give detail about the purpose of the meeting or what it was about.
  - ii. However, the Claimant knew that a grievance had been taken out against her by the complainant. At the start of the interview, she was asked what her understanding was and set out one of the allegations made. She was informed of the precise nature of the grievance at the start of the hearing. Had this been a disciplinary hearing my view would be very different. A failure to advise of the allegations prior to the disciplinary hearing would be difficult for an employer to defend.

- iii. I do not consider this to have been an attempt by the Respondent to ambush the Claimant. The Claimant was able to participate in the meeting and did so in some detail. Her recollection of events was clear. She says she did not have the opportunity to plan and to defend herself however there was nothing she said she could have done with more notice than she did. She obtained character references for the disciplinary hearing, and they were considered, that is where planning was necessary. The Claimant read the notes of the interview and signed them. She made no complaint at the time.
  - iv. Whilst I consider it would have been preferable for the Claimant to have had some more information as she was the subject of the grievance, I do not find that it was a breach of such severity to seriously damage mutual trust and confidence.
- d. *delay in concluding the grievance investigation process in relation to the complainant's grievance against the Claimant, received on 10 April 2019, which was only concluded on 2 September 2019*
- i. The most significant delay was in finding an appropriate person to conduct the grievance investigation. The facts relating to this are set out above. I find that the efforts to find an appropriate person were reasonable and done with the intent of finding someone impartial so that the Claimant would not be prejudiced (i.e., not her line manager as she had taken a grievance against her previously).
  - ii. Once Ms Pollack was appointed investigating officer on 24 June 2019, she started the investigation promptly on 2 July 2019. The Claimant was not interviewed until 9 July 2019 and there was a suggestion that holidays may have delayed this. However, the delay here is not material.
  - iii. The report was received by Ms Buckler when she was on annual leave in August 2019. This made a further short delay inevitable. Once Ms Buckler had the report she acted quickly.
  - iv. Whilst I appreciate that the Claimant would be anxious in having to wait for the outcome of the grievance, I find that the Respondent acted with reasonable and proper cause throughout the process. Ideally the process should have been much shorter, but the Respondent has explained the reasons for the delays to my satisfaction.
- e. *failure to include supportive statements received in the investigation that was concluded on 2 September 2019*

- i. Here the Claimant is referring to the character references and other documents she provided to Mr O'Brien. These were not provided during the grievance investigation. Not all the character references are dated, but those that are, are dated in October and November 2019. The nature of the grievance investigation was to fact find on the allegations made by the complainant. The character references would not have assisted in the fact find but did assist the Claimant in the disciplinary process.
  - ii. I do not find that the Respondent acted in a way that showed it no longer wanted to be bound by the terms of the Claimant's employment contract. I find the Respondent acted reasonably and that the Claimant was not prejudiced as she was able to, and did, provide these documents to Mr O'Brien.
49. Clearly the outcome of the grievance investigation was disappointing to the Claimant and upsetting for her. In her evidence she said that she was not reacting to the outcome and would have accepted it if the proper processes had been carried out. Whilst the Claimant may perceive the Respondent to have acted unreasonably, I do not find that the Respondent breached the implied term of mutual trust and confidence. The Respondent had to act when it received the grievance, and I have found that whilst the process was not perfect, that it was not such to destroy or seriously damage their working relationship.
50. Even if I had found the Respondent to have acted in a manner such as to damage or seriously damage the working relationship, in relation to matters happening before the grievance outcome, the Claimant accepted the breaches by first not complaining and secondly continuing to work for the Respondent. I accept the submission made by the Respondent that the Claimant waived or affirmed all breaches that she says the Respondent made up to the date she received the outcome of the investigation.
51. If the Claimant is relying on a cumulation of events that together amount to a breach of contract, (as the Claimant is a litigant in person, I am considering this although not expressly argued by the Claimant) I must consider what the most recent act on the part of the employer was that the Claimant says caused or triggered her resignation. Following the guidance in *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978 I find that the last act was the meeting with Ms Bucker when she gave the outcome of the grievance investigation (2 September 2019). The Claimant resigned within about 20 minutes of this meeting concluding so there can be no question of affirmation. I do not find that this meeting was a repudiatory breach of contract. The meeting was held to give the necessary outcome and next steps. I then considered if it was a part of a course of conduct comprising several acts and omissions which, viewed cumulatively and objectively amounted to a repudiatory breach of the implied term. Given the factual matrix and my conclusions so far, I do not consider this to be the case.
52. The meeting with Ms Buckler on 2 September 2019 can not in my view be considered a breach of the implied term or be such to link it to the previous

allegations made by the Claimant. The Claimant was told, in accordance with her employment contract that the grievance had been upheld and that the Respondent was initiating its disciplinary process.

53. In her resignation letter the Claimant cites her mental health as being the primary motivating reason for her dismissal. I can see that her mental health was an issue before the grievances against her were made. The Claimant said in evidence that she did not put everything into her letter of resignation. It was put to her that this is what she would have done if other matters were the motivating factors for her resigning. I have seen many letters of resignation, and the Claimant's letter is well written, cohesive, and as I have found most likely written with the benefit of advice. If other factors were the reason for her resigning, I have no doubt she would have included them in her letter.
54. The Claimant said in her submissions that there was no evidence to support the allegations made against her. The test for the grievance investigation is as is it for this tribunal hearing, the balance of probabilities. This means that in situations where there is effectively one person's word against another it can be decided that one person's evidence is to be preferred either in isolation or when considering their evidence in the context of the other witnesses' evidence.
55. In all the circumstances the Claimant's claim is dismissed.

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Employment Judge Martin

Date: 01 December 2021



## Appendix 1 Chronology

### 2017

16 Jan C's employment with R starts (Contract 35-49)

### 2018

Mar C starts feeling unwell

20 Aug OH consultation occurs

23 Aug C grievance against her line manager (108-111)

3 Oct Outcome to grievance (114-115)

### 2019

14 Jan C signed off sick

28 Feb OH Report (144-146)

Mar C returned to work initially on phased return

10 Apr Grievance dated 4 April received by R (151-154)

26 Apr Meeting with complainant re grievance received (155 and 175-180)

29 Apr Terms of reference of grievance set (156)

10 May C informed allegedly of formal grievance

10 Jun Consultant doctor makes grievance against C

24 Jun Agatha Pollock appointed to investigate grievance after alleged difficulty in appointing investigators and original appointing Trevor Money getting injured

2 Jul Grievance investigation meetings with complainant and witnesses (181-187, 198-220)

C invited to grievance investigation for 9 Jul (162)

9 Jul Grievance investigation meeting with C (188-197)

2 Sep C is informed of outcome of grievance (221)

2 Sep C's letter of resignation (231)

5 Sep C emailing wanting to withdraw resignation (242)

6 Sep R confirming that withdrawal of resignation declined (243)

11 Sep Letter informing complainant of outcome of grievance (244-245)

2 Oct Disciplinary investigation invite (249-250)

9 Oct Disciplinary hearing takes places (283-287)

24 Oct Outcome of disciplinary hearing (288-290)