



EMPLOYMENT TRIBUNALS

Claimant

Ms A. Stack

Respondent

Barnet, Enfield and Haringey Mental
Health NHS trust

v

Heard at: Watford

On: 22 and 23 May 2017

Before: Employment Judge Heal

For the Claimant: Mr. J. Gidney, counsel
For the Respondent: Ms. T. O'Halloran, counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well founded.
2. There will be a remedy hearing on 1 September 2017.
3. I have made the following case management orders.

ORDERS

1. So as to arrive on or before **18 August 2017** the claimant shall send to the respondent and the tribunal an updated schedule of loss which shall include a pension calculation.
2. The parties shall disclose documents relevant to remedy by sending copies to each other to arrive on or before **4 August 2017**. This order is made on the usual CPR basis.
3. The claimant may send to the respondent an updated witness statement on remedy (if so advised) to arrive on or before **4 August 2017**.

REASONS

1. By a claim form presented on 8 December 2016, the claimant presented a complaint of constructive unfair dismissal.

2. I have had the benefit of an agreed bundle in two volumes running to 688 pages altogether. Pages 678 A to T and 686 A to K were added to the bundle by the parties before the hearing started. Pages 689 and 690 were added to the bundle at the outset the hearing by consent.
3. The respondent has provided me with a cast list, a list of issues, and a chronology. The claimant has also provided me with a chronology and with a skeleton argument. I am grateful to both representatives for their work and care in preparing these helpful documents.
4. I have heard oral evidence from the following witnesses:

Ms Alison Stack, the claimant and
Ms Anna Mbachu, service manager of the 'Hub'.

5. Both of those witnesses gave evidence in chief by means of a prepared typed witness statement which I read before the witness was called and then the witness was cross examined and re-examined in the usual way.
6. I also read and received as evidence in chief the witness statement of Mr Kerby Francis, grievance investigation officer and inpatient team leader. Ms O 'Halloran applied for me to receive that evidence without Mr Francis being called because Mr Francis is currently immobile due to injury. Neither party wished this hearing to be postponed further and, by consent, I have accepted Mr Francis' statement in evidence subject to the weight that is appropriate to give it, taking into account that I have not heard him give evidence or answer questions.

Issues

7. At the outset of the hearing, using a draft list of issues provided by the respondent, and following discussion with both parties, I identified the issues as follows:
8. Did the respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant by:
 - a. preventing the claimant from returning to work on 21 December 2015 once she was signed off as fit to return? The respondent contends it was not satisfied that it was safe for the claimant to return to work in the absence of a risk assessment as recommended by occupational health. The claimant does not rely separately and individually on the matters set out at paragraphs 8 to 14 of her particulars of claim, however those matters are relevant because they lead up to and, depending on my findings of fact, may or may not explain why the respondent prevented the claimant from returning to work on 21 December.
 - b. Ms Mbachu ignoring the claimant's attempts to contact her to discuss her return to work and failing to explain her decision-making? The respondent will say

Ms Mbachu did not repeatedly ignore the claimant's attempts to contact her and the decision was explained.

c. Ms Mbachu aggressively telling the claimant to leave the premises on 21 December 2015? The respondent contends the claimant refused to discuss the matter in Ms Mbachu's office and she was obliged to inform the claimant of this at her desk.

d. Ms Mbachu escorting the claimant of the premises in front of colleagues? The respondent will say Ms Mbachu was walking to the staff kitchen as the claimant was leaving.

e. Ms Mbachu not supporting the claimant's phased return to work by forcing the claimant to take annual leave? The respondent will say the claimant had accrued significant annual leave, which needed to be taken by the end of the financial year in line with the respondent's annual leave policy.

f. Ms Mbachu repeatedly rejecting the claimant's holiday requests with no reason given? The respondent contends Ms Mbachu did not repeatedly reject such requests: Ms Quidley triggered an automated message on 2 February 2016 stating that annual leave had been denied when she entered the claimant's period of sickness.

g. Ms Mbachu's consistently changing the claimant's shifts without consultation or advance notice, contrary to an agreement in place between the respondent and the claimant? The respondent will say shift patterns changed for all administrative staff between August 2015 and December 2015, Ms Mbachu was unaware of any previous agreement, and the respondent gave the claimant 3 weeks' notice before moving her to the new shift patterns.

h. Failing to deal with the grievance in a timely manner? The respondent contends any period of delay was beyond its control and the claimant was kept updated throughout. (This issue relates only to the delay in dealing with the grievance, and not to any complaint about the conclusions drawn).

9. If so, does such conduct amount to repudiatory breach of contract, so as to justify the claimant resigning?

10. Did the claimant resign in response to this breach or for some other, unconnected reason?

11. Did the claimant waive the breach by way of delay, or otherwise affirm the contract of employment before resigning?

12. If not, what was the reason for the dismissal? (The respondent will not attempt to say that any dismissal was fair).

13. The respondent does not rely on any issues of 'Polkey'.

14. Did the claimant contribute by her conduct to her own dismissal and if so, by what percentage should any compensation be reduced? The conduct relied upon by the respondent is that the claimant herself delayed the occupational health assessment, she refused a reasonable management instruction not to attend work on 21 December 2015 and she refused a reasonable request to go into Ms Mbachu's office to discuss why she should not be at work.

Concise statement of the law

15. So far as is relevant section 95 of the 1996 Act provides:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

... (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

16. To succeed in establishing a claim under section 95(1)(c) the claimant must show that the employer is guilty of a fundamental or repudiatory breach of the contract of employment. Behaviour that is merely unreasonable is not enough. The test is not one of whether the employer was acting outside the range of reasonable responses but the question is whether, considered objectively, there was a breach of a fundamental term of the employment by the employer.
17. More precisely, the legal test is whether, '*looking at all of the circumstances objectively, that is from the perspective of the innocent party, the contract breaker has clearly shown an intention to abandon altogether or refuse to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract-breaker towards the employees is of a paramount importance.*' (*Tullett Prebon v BGC Brokers LP* [2011] IRLR 420.)
18. Although unreasonableness on the part of the employer is not enough an employee may rely upon the "implied term of trust and confidence". Properly stated the term implied is "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*"
19. The duty not to undermine trust and confidence is capable of applying to a series of acts which individually might not themselves be breaches of contract.
20. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a

background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. The question is, does the cumulative series of acts, taken together, amount to a breach of the implied term?

21. The employee must leave in response to the breach of contract, which may mean the tribunal deciding whether it was *an* effective (but not necessarily the sole or *the* effective) cause of the resignation. Accordingly, if an employee leaves both in order to commence new employment and in response to a repudiatory breach, the existence of the concurrent reasons will not prevent a constructive dismissal arising. What is necessary is that the employee resigned in response, *at least in part*, to the fundamental breach by the employer. Elias P (as he then was) in *Abbey Cars (West Horndon) Ltd v Ford* EAT 0472/07 commented that 'the crucial question is whether the repudiatory breach played a part in the dismissal', going on to observe that even if the employee leaves for 'a whole host of reasons', he or she can claim that he or she has been constructively dismissed if the repudiatory breach is one of the factors relied upon.
22. There is *no* legal requirement that the departing employee must tell the employer of the reason for leaving however.
23. A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends.
24. The fact that a dismissal is constructive (within sub-section (2)(c)) does not of itself mean that it will be held to have been unfair (though in practice that will often be the case); we must still go on to consider fairness in the normal way: in this case however unfairness is conceded if dismissal is proved.

Facts

Standard of proof

25. I have made the following findings of fact, on the balance of probability. What that means is this: I do not have a perfect method of discovering exactly what took place, where facts are disputed. Therefore, I read and listen to the evidence placed before me by the parties and I decide on that evidence and that evidence only, what is more likely to have happened than not.

The parties and protagonists

26. The respondent runs the 'Hub' which is an emergency mental health line intended to be the first point of contact for people in mental health crisis

in Barnet, Enfield and Haringey. It provides a telephone screening service of referrals from a number of different sources including GPs, families and friends. It is staffed by a team of clinicians and administrators. Ms Mbachu is its service manager. By profession, she is a mental health nurse and she has been a manager since 1 June 2015.

27. Ms Mbachu is in charge of management in terms of running the rota, ensuring that the Hub has the appropriate mix of skills available on any one day and taking responsibility for the health and safety of staff. She has to do all this bearing in mind the budget.
28. The administrators are supervised by an administrative manager who at the relevant time was Ms Sharon Quidley.
29. The claimant began her employment with the respondent on 6 June 2005. She was transferred to the Hub as a band 3 administrator in June 2014. This work chiefly involved answering telephone calls, passing referrals onto the clinicians, emailing clinicians with dates of referrals, diverting calls to other units and making data entries. Her line manager in 2015 and 2016 was Ms Sharon Quidley.

Chronology

30. On 13 October 2014, the claimant submitted a grievance about her shift patterns. This was resolved informally, and the claimant reached an agreement with Joanne Barnes, who was then the administrative manager, that she would only be expected to work the 12 p.m. to 8 p.m. shift one week in every 3 weeks. Ms Barnes' email to the claimant confirming this is dated 13 October 2014 and is sent to the claimant, with a copy to her union representative. It was not copied to human resources. When Ms Mbachu took over as service manager it was not one of the documents made available to her and she did not know about it until January or February 2016. If it was on the claimant's personal file, that was kept by human resources and was not made available to Ms Mbachu. Ms Barnes did not tell Ms Mbachu about it at their handover.
31. The claimant was absent from work from July 2015 until December 2015 because she had an operation to treat carpal tunnel syndrome on her right side.
32. The operation took place on 29 July 2015. The claimant's recovery was delayed by a series of falls.
33. On 23 September 2015, Ms Quidley wrote to the claimant to tell her that she was being referred to the Occupational Health Department. Ms Quidley noted in her letter that she had been unable to contact the claimant for several weeks. Unbeknown to the claimant, her mobile telephone was not working properly but she did not realise this because she lacks skills in using her mobile telephone.

34. The claimant missed the date of her assessment by the Occupational Health Department because she made some mistake, the circumstances of which are not clear.
35. The claimant did attend an occupational health assessment on 13 December 2015. Dr Miah wrote a report dated 15 December 2015 which recorded the history of the claimant's right sided carpal tunnel syndrome. There was a mild swelling of the median nerve which was expected to settle over the following few months. The claimant had a good range of movements in her right wrist and she felt that she was improving daily. Power in that wrist was mildly reduced but this was expected to improve with exercise and physiotherapy. She had similar symptoms on the left side but was, 'not keen for that to be operated on yet.' The reason for the operation on her right side was that she was right handed and the condition had a significant impact on her functioning on a day-to-day basis.
36. Dr Miah was happy for the claimant to return to work on a phased basis once the claimant's current fit note expired at the end of that week. Dr Miah suggested that the claimant work alternate days and then resume normal working hours from the 2nd week.
37. Dr Miah suggested that the respondent carry out a risk assessment to ensure that the claimant would be able to manage her tasks. Dr Miah noted that the claimant did not feel there would be any problem in her ability to do the role. The letter continued,

'I understand you have some concerns about her ability to do the role and the impact it may have on her health condition. I do not feel this should be an issue. I feel she should make a recovery in due course and be able to do her full role without any problems. However if there are any issues in the future then we will need to deal with them as they arise.'

38. The claimant's GP signed a statement of fitness for work on 16 December 2015. Dr Beale advised that because of the claimant's carpal tunnel repair she may be fit for work, taking into account a phased return to work. The doctor added,

'I would support Mrs Stack's return to work as planned Monday 21st and Wednesday 23rd December (phased return) and planned annual leave with subsequent return to full-time work.'

39. The claimant expected to return to work on Monday, 21 December 2015. Accordingly, she attempted to contact her managers in order to discuss her return. Sharon Quidley referred to the claimant to Ms Mbachu because Ms Quidley was due to go on annual leave. The claimant made several attempts from 16 to 18 December to speak to Ms Mbachu and left messages for her, but Ms Mbachu did not contact her.

40. Ms Mbachu, herself, unknown to the claimant, was very busy at this time arranging inductions for new members of staff. She knew that the claimant was trying to get hold of her but she did not telephone her back. She had read the occupational health report and knew the context in which the claimant was seeking to speak to her. She told me in evidence that on 18 December, she delegated the task of speaking to the claimant to Robert Noyland, a senior administrator. He had been performing a manager's role for a year. (This date of 18 December cannot be correct given the correspondence of 17 December.)
41. By email dated 17 December 2015 Sharon Quidley wrote to Ms Mbachu asking whether she had read the report from occupational health. She said that the report had not asked for any modifications and there was no problem with the claimant's wrist. She asked Ms Mbachu what she would like to do.
42. Ms Mbachu replied on the same day that in view of a written statement from 'Rob' [Noyland] she would like 'this' to be mentioned to occupational health, *'and the fact that she has said that she is unable to use her hand in answering phone, the HUB duties is not suitable for her. This is because, whilst staff are on the phone, they must be able to use their hands in documenting... and searching for information.... simultaneously.'*
43. I have not heard evidence from Robert Noyland and so I prefer and accept the claimant's evidence of the conversation she had with him which resulted in his statement referred to above. The claimant asked Mr Noyland for a head set. He asked her why she needed a head set. She explained that her hand surgeon thought it was a good idea to try using a headset to avoid undertaking the repetitive action of answering a telephone. He suggested that the claimant pick up the telephone with her left hand. The claimant said that she was right handed. She did not say that she could not pick up the telephone or that she was unable to use her left hand. She told him that there were headsets in the Hub and it was not urgent. She told him that if he could not find it (a headset) she would look for it when she returned.
44. Mr Noyland sent an email to Ms Mbachu dated 17 December 2015. He said,

'Alison rang me stating she was going to return to work Monday and Wednesday w/c 21st Dec. She then requested a headset.

When asked why, she stated she was unable to pick up the phone with her right hand. I suggested she could use her left hand to pick up the phone, to which she responded "no I can't, I have carpal tunnel syndrome in that hand but I can't be bothered to get it operated on yet".

This left me with the impression she was unable to use her left hand due to carpal tunnel syndrome.'

45. As I have said above, not having heard from Mr Noyland, I prefer the claimant's account of this conversation. Ms Mbachu was not given that account however.
46. Ms Mbachu had asked Mr Noyland to confirm his conversation with the claimant to her by email, asking him to give details of any problems raised. This she said would enable adequate risk assessment regarding suitability to undertake duties to be carried out prior to the implementation of phased return to work.
47. Neither Mr Noyland nor Ms Mbachu took the precaution of doublechecking with the claimant their understanding of what she was saying. I note that Mr Noyland said that he was left with the *impression* that the claimant was unable to use her left hand but he did not clarify whether this was really what the claimant was saying or how serious any impairment was. There is no evidence that anyone checked to see if headsets were indeed available. The inconsistency between Mr Miah's report and Mr Noyland's account was not noticed or checked. Mr Noyland did not copy the claimant in on his email to Ms Mbachu and so the claimant had no opportunity to correct his impression or account.
48. On Friday, 18 December 2015 the claimant telephoned the Hub and spoke to Kyieka Downie. The claimant asked Ms Downie if she could speak to Ms Mbachu. Ms Downie was taking the call while sitting in the open office. Ms Mbachu was present and, within the claimant's hearing, told Ms Downie that she did not want to take the call and that the claimant should be put through to Mr Noyland instead.
49. Once again therefore, Ms Mbachu delegated the call. She did so although she was the senior manager present, she knew the claimant was expecting to return to work on the following Monday, she knew that there were concerns about whether it was appropriate for the claimant to do so, and there was real reason for her to check the impression Mr Noyland had received that the claimant was unable to use her left hand. All of those were good reasons for Ms Mbachu to take charge of the situation, demonstrate concern for the claimant and make time to speak to the claimant herself even though she was under pressure to deal with the induction of new members of staff. I find that she was instead avoiding the claimant on this and the previous occasions when the claimant had been attempting to speak to her.
50. I have not heard Mr Noyland give evidence about this conversation with the claimant. I accept the claimant's account. She could hear Ms Mbachu in the background instructing Mr Noyland what to say. He told the claimant that Ms Mbachu had told him that she was not to return to work on Monday. Given that the claimant had a 'fit note' which said that she could return on Monday she asked Mr Noyland to explain. He was unable to do so. The claimant asked to speak to Ms Mbachu but Mr Noyland told her that Ms Mbachu did not want to speak to her.

51. The claimant sent an email to Ms Mbachu immediately afterwards asking her to *'put it in writing in an email'* and state the reasons why she was refusing to allow the claimant to return to work on 21 December. She explained that the occupational health report and her GP statement of fitness for work said that she was fit for work and that she was happy to go back to work on Monday, 21 December 2015. She said that she would be returning back to work at 8 am on that day as advised by both doctors. She attached both the occupational health report and her GP's statement of fitness for work. The claimant received no reply to this email.

52. She subsequently received a further email from Mr Noyland dated 18 December 2015 which said,

'Anna spoke to me, and in view of what was expressed by yourself during telephone conversation and the subsequent request that additional tools i.e. the headset are needed, she has requested for a meeting with the OH and HR in order to minimise the risk and ensure that the condition you have isn't exacerbated.'

Anna informed me you been advised to contact Sharon on Monday via telephone, and that she had informed HR of this.'

53. On 21 December, the claimant did go back to work. She did so because she had nothing in writing from her own line manager or Ms Mbachu to confirm that she should not return to work. Sharon Quidley told her to remain at her desk until a return to work interview.

54. There is a conflict of evidence between the claimant and Ms Mbachu about what happened next. On balance, I prefer the claimant's account. I have not, thus far, found Ms Mbachu's evidence reliable. Whatever the underlying personal motive might be - and I do not consider I have to make a finding about that - Ms Mbachu's behaviour was that of a manager avoiding an employee, not entering into communication to find out the true position or to discuss solutions, and not explaining herself to the employee as might have been appropriate. I find that consistent with the claimant's account of what happened next. Moreover, although I have not heard evidence from Ms Quidley, the claimant's account is corroborated in certain respects by Ms Quidley's evidence to the grievance investigation. Although Ms Mbachu was busy, I do not consider that provides reasonable and proper cause for her avoidance of the claimant and the important issues she raised.

55. I find that before the claimant could meet with Ms Quidley, Ms Mbachu saw the claimant at her desk, went over to her and said, *'pack your things and leave right now.'* She gave the claimant no further explanation for this instruction. This took place in the open office with other members of staff present. Ms Mbachu told the claimant that she wanted to speak to her before she left.

56. The claimant called Sharon Quidley to let her know what had happened. Ms Quidley went to speak to Ms Mbachu.

57. Meanwhile, the claimant spoke to her union on the telephone. The union advised her not to speak to Ms Mbachu without a representative.
58. Having spoken to Ms Quidley, Ms Mbachu went to the claimant and asked her to meet with her in her office. The claimant refused because she had no union representative. Ms Mbachu became annoyed and again told the claimant to leave. The claimant asked her to put that instruction in writing with reasons. Ms Mbachu said that she had just sent the claimant an email.
59. The claimant requested that she should be allowed to print off that email but Ms Mbachu refused. She told the claimant that she could do it in her manager's office. The claimant said that she might not be able to do that and Ms Mbachu then allowed the claimant to print the email off at her desk. Throughout this conversation Ms Mbachu was standing over the claimant. As soon as the claimant had printed the email, Ms Mbachu escorted her off the premises.
60. The claimant spoke to Ms Quidley who apologised for the way she had been treated. The claimant then went to see Mr Trevor Payne of Human Resources to discuss the incident. Mr Payne took the matter no further however.
61. The claimant later received a letter from Ms Quidley telling her that she would be on special leave from 21 to 24 December. On the 'E-roster' this was recorded as annual leave for 23 and 24 December.
62. The claimant was then absent from work until 12 January 2016. On that day she returned to work for a risk assessment which concluded that it was safe for the claimant to return to work.
63. At the return to work interview, Ms Quidley agreed a phased return to work of 2 days a week in the first week, and then an additional day's work each week until the claimant reached 5 days a week.
64. At the return to work interview, the claimant told Ms Quidley that it was her son's birthday on 13 January and she asked to be able to work the early shift. Ms Mbachu refused because the shift had already been allocated to somebody else. She therefore asked if the claimant would take it as annual leave and the claimant did so.
65. I do not make findings about the allegations of making deductions from the claimant's pay because they are not in the list of issues.
66. On the same day, Ms Mbachu changed the claimant's shift patterns so that they were inconsistent with the agreement she had reached in 2014 with Joanne Barnes. Ms Mbachu did so in ignorance of the agreement in 2014. She made the decision and implemented the change while the claimant was on sick leave so as to create a working pattern that made the respondent less reliant on bank staff and so was more economical. When the claimant informed Ms Mbachu of the agreement, Ms Mbachu said that it could not be

accommodated due to business needs and it would put other administrators at a disadvantage because they would have to cover additional late shifts. Ms Quidley subsequently spoke to Mr Trevor Payne of human resources who said that the claimant should be given 3 weeks' notice of the change in shift patterns. The claimant was then given that notice.

67. On the claimant's return, she found a memorandum to 'all staff' dated 11 January 2016 which said that if staff did not submit their remaining annual leave requests by 15 January to their manager, annual leave would be allocated to them. This was to ensure that they did not carry over annual leave days and it covered the entire financial year 2015/16. It continued,

'The only exception is when a staff returns from a long-term sick and has insufficient time left in the leave year to enable them to take their accrued leave. The onus is on you to arrange and agree your annual leave with your managers. Brought forward leave should be taken within the first quarter of the new leave year.'

68. The claimant herself had sufficient time in her leave year to take her annual leave before the end of March. She had agreed with Sharon Quidley that she would do so. She and Ms Quidley had a lengthy meeting in which they agreed when the claimant would take her leave. They went through the relevant dates and looked at the e-roster to see if there were any clashes with other members of staff. Ms Quidley approved that leave as the claimant's line manager.

69. However Ms Mbachu telephoned Ms Quidley to say that it would not be possible for the claimant to take leave on the agreed dates.

70. The claimant had leave booked for 21 to 24 March. On 28 January Ms Mbachu told her that she could not take that leave on those dates although the claimant had already made arrangements for how to use the leave. The claimant had to take the dates 1 to 5 February as leave instead although this should have been her first week of working for 5 days. This prevented her from completing her phased return from sick leave in the week scheduled. Ms Quidley attempted to discuss the matter with Ms Mbachu on the claimant's behalf but Ms Mbachu would not change her mind. It seemed to Ms Quidley that Ms Mbachu was not working with her and that it was very difficult for the claimant to succeed with any of her requests for annual leave.

71. Ms Mbachu's explanation in her witness statement for the change in agreed leave dates does not make sense. She says that she requested the claimant to take annual leave from 1 to 5 February because she needed to take all her leave before 31 March 2016 if she was not to lose it. However the claimant had booked the leave for 21 to 24 March so she would not have lost it. The claimant had made the same allegation in her grievance giving the final leave date as 24 March. The explanation given by Ms Mbachu in the grievance investigation is confusing and the investigator found it so at the time. On 20 January 2016 it appears Ms Mbachu told Ms Quidley that the decision was also based on the needs of the service to have both administrative and clinical staff in the Hub. That is not included in the witness

statement explanation. I do not accept the explanation which she now gives, given the changes it has gone through, so that I find that she made this decision arbitrarily.

72. In January 2016 the claimant made 8 requests for annual leave between February and March 2016. She worked through all these with Sharon Quidley, who approved them. I accept that the reason why all these requests were denied on 2 February was an automatic response to the claimant being off work sick on 1 February. (She remained off work with stress until 27 June.) I do not find that this was an action by Ms Mbachu.
73. On 1 February 2016 the claimant attended her GP's surgery. Her GP advised that she was not fit for work for 2 months because of work-related stress. The GP added this comment, '*Alison is in discussions with the Union and with Solicitors regarding potential constructive dismissal and will remain off sick until progress is made*'.
74. The claimant was not in fact actively considering resigning at that point, despite the reference to constructive dismissal. She did not resign then because she wanted to file her grievance and see if things improved. She wanted to return to work.
75. On 25 February 2016 the claimant submitted a detailed grievance complaining about the above and other matters. She complained about 9 separate matters in total.
76. By 16 March 2016, the claimant had not received an acknowledgement of her grievance. The respondent did not explain to the claimant why it took so long to acknowledge the grievance. On 16 March the claimant chased the respondent asking whether her grievance had been received and what was the next step. She found this delay, the lack of progress and lack of communication frustrating and stressful.
77. Trevor Payne of Human Resources replied to her on the same day acknowledging receipt and telling her that her grievance had been forwarded to senior management for a response. Mr Payne said that having spoken with the claimant's union he understood that she wished for a formal investigation and asked her to confirm that.
78. By email dated 18 March the claimant's union representative confirmed on her behalf that the claimant did not wish her grievance resolved informally.
79. It appears that Mr Bello, assistant clinical director, was on leave between 4 March and 17 March. During that time it seems that the respondent had left the matter in abeyance. Once the union confirmed that the claimant did not want informal resolution, it appears that nothing further was done until 29 March when Mr Payne prompted Mr Bello about the appointment of an investigator.

80. Mr Bello's initial internal enquiries seeking an investigator came to nothing. Members of staff with relevant experience and seniority were already busy dealing with complaints and investigations. The respondent had to find a person who was more senior not just than the claimant but also more senior than Ms Mbachu. The respondent sought an investigator from other boroughs but without any success. Whether the situation would have been different had the respondent not allowed more than a month to go past before it started its search is something about which I have no evidence. In any event, the respondent did not keep the claimant informed about its difficulties.
81. Mr Kerby Francis was identified as the investigator by 25 May and appointed on 6 June 2017.
82. By email dated 27 May, Mr Payne told Mr Francis that the timescale for completing the investigation and report was 2 weeks, however because of the number of incidents reported and potential number of witnesses to interview this could be reviewed during the investigation.
83. On 10 June 2016, Mr Francis interviewed Mr Noyland and Ms Quidley. He then interviewed Kyieka Downie on 15 June.
84. By letter dated 16 June Mr Francis invited Ms Mbachu to an investigation interview 22 June 2016. On the same day, 16 June, he interviewed Jimmy Kasisira and Lorna Hilton.
85. Meanwhile, Ms Mbachu told Mr Francis that she did not want to be interviewed without a union representative present. Her interview was therefore postponed to 27 June. On 22 June she told him that the union representative would not be able to attend on 27 June. On 23 June, Ms Mbachu suggested 3 alternative dates to Mr Francis. However Mr Francis had already booked annual leave so he was unavailable for those dates. Ms Mbachu herself would be abroad from 18 to 31 July. On 29 July Mr Francis sent Ms Mbachu an email from her to find on her return asking when she and her representative would be available for the grievance interview. However Ms Mbachu then began a period of sick absence and did not return until 21 August. On 27 August the union representative sent Mr Francis some suggested dates and after an exchange of email correspondence a meeting was scheduled for 23 September. The claimant was not told about any of these difficulties as they unfolded.
86. The first the claimant was told about any progress in the investigation was her invitation to a grievance interview which she attended on 17 June. After that interview, the claimant repeatedly attempted to discover what progress was being made with the grievance but without success. She telephoned Mr Kerby Francis on several occasions and he told her that no progress was being made due to sickness and annual leave. There are documents in the bundle showing the respondent taking the initiative in keeping the claimant up-to-date, but these post-date her resignation.

87. On 24 June, the claimant's GP signed a statement of fitness for work to say that she may be fit for work, taking into account some adjustments. Accordingly, the claimant attended a return to work interview on 27 June.
88. The claimant became aware that 2 separate hours been deducted from her wages, she thought unfairly. She added these 2 matters to her grievance on 27 July. At this stage, 2 days before she resigned, she still felt that she could rely upon the respondent to deal with her grievance sufficiently to add these matters to it.
89. On 29 July the claimant asked Mr Francis for a further update. Mr Francis told her again that no progress had been made. The claimant felt that this was another failure to tell her about the progress of her grievance and noted that once again she had to chase the respondent before anyone would tell her anything. She describes this as the 'final straw'. She felt bullied by Ms Mbachu and felt that her grievance about that had been outstanding for 5 months. So far she had been called to one meeting about it but there was no conclusion in sight. She resigned because of Ms Mbachu's treatment of her, because of the delay in dealing with the grievance and because, '*no one seemed to take any notice of it*'.
90. The claimant drafted a letter of resignation setting out her reasons for resigning. She went to see Sharon Quidley and told her that the investigation was going on too long, things were not resolved, and no one seemed to take any notice of the grievance. She told Ms Quidley that she felt she had had enough, she could not come back to work, so she was going to resign.
91. The claimant and Ms Quidley had a discussion about whether it was appropriate for the claimant or Ms Mbachu to move to a different place of work. Ms Quidley said that the manager could not move. The claimant said that she was happy working in the hub and it was unfair that she should have to move.
92. At that point Ms Quidley showed the claimant a template for a resignation letter which she took from the respondent's intranet. She told the claimant to submit her resignation using that template. Therefore, the claimant did not submit the resignation letter with reasons which she had drafted and later disposed of that letter without saving it.

93. The consequence of that was that her resignation letter said simply,

'Dear Ms Quidley,

Please accept this as official notice of my *Resignation* from my role(s) of Administrator. I expect my last day of employment with the Trust will be Monday, 08 August 2016.

Please insert any additional/more personal information in this section if you wish.

Yours sincerely,

Alison Stack

Administrator'

94. Ms Quidley looked on the trust website to see what the claimant should do about her resignation. She helped her to fill in a pension form. This came about because it was on the respondent's website, not because the claimant's real intention in resigning was to seek a pension.
95. The claimant did subsequently visit Malaysia to see her mother, but this was an intention she formed after her resignation. She did not resign for the purpose of travelling to Malaysia.
96. Subsequently, Mr Francis did carry on investigating the grievance. On 26 October he told the respondent that he hoped to complete the grievance finding report by 7 November. On 11 November, the respondent told the claimant that it hoped to complete the report by 25 November. On 8 December she was told that the grievance decision would be sent within 7 working days and the report in fact was completed on 22 December 2016. The claimant was not sent the report but on 29 December she was informed that her grievance, 'as a whole has not been upheld'. I make those findings for completeness, not because, having happened after the date of resignation, they can be relevant to the claimant's decision to resign.

Analysis

97. I consider that the respondent did prevent the claimant from returning to work on 21 December although she was signed off as fit to return. The situation is not absolutely clear cut because Dr Miah did suggest a risk assessment. The choice however was not the stark choice between allowing the claimant back to work without any risk assessment or discussion or not allowing her back at all until the risk assessment had been carried out. The situation called for communication between the claimant and a manager who was prepared to make appropriate enquiries herself about what was the real position from the claimant's point of view and what practical steps the respondent could take to enable her to come back to work. Instead, Ms Mbachu avoided the claimant's telephone calls, avoided speaking to her when she could have spoken to her, failed to take steps to find out whether Mr Noyland's impression was accurate and instead of attempting to find a solution, simply sent a message that the claimant should not come back to work. She did therefore prevent the claimant from returning to work. In all the circumstances I have set out she did so without reasonable and proper cause.
98. The issue of ignoring the claimant's attempts to contact Ms Mbachu is also raised as a separate issue and so I deal with it accordingly. Ms Mbachu was busy over the relevant period carrying out a demanding task which needed her attention. I consider it highly unlikely however that the circumstances were such that she could find no time to telephone or email

the claimant and find a convenient time when they could both speak to each other. The evidence overall shows that Ms Mbachu was avoiding the claimant and therefore I find that she did not take steps to communicate with the claimant, although she could have done.

99. I have preferred the claimant's evidence to that of Ms Mbachu about the events of 21 December. I have found that Ms Mbachu did have an aggressive demeanour when she told the claimant to leave the premises on 21 December 2015. I do not doubt that she was surprised and even frustrated to find that the claimant had come to work when she had been told not to do so. However, that is not reasonable or proper cause to tell an employee, 'pack your things and leave right now' or to escort an employee off the premises.
100. I have found that Ms Mbachu did change the claimant's annual leave without reason so that the claimant was not able to complete the last phase of her phased return by working the first full week as scheduled. I have rejected Ms Mbachu's reasons for doing so.
101. I have not found however that the 8 holiday requests were rejected by Ms Mbachu. This happened automatically when the claimant began her sick leave.
102. The claimant's shifts were changed contrary to the agreement with Joanne Barnes. Ms Mbachu did not know about that agreement although the respondent should have had systems in place which make sure that she did. The shift patterns changed for all staff during this period and others as well as the claimant found it difficult. The claimant was in fact given notice when the matter was brought to the attention of human resources. I do not regard this as a matter which contributes to the breach of contract.
103. The respondent did not deal with the claimant's grievance in a timely manner. To some extent this was caused by circumstances beyond its control: the lack of availability of an investigator and the intervention of sickness and the holiday period. However the respondent allowed more than a month to pass before it acknowledged the claimant's grievance and began to take steps to find an investigator. The respondent was not active in making sure that the claimant knew what was going on and it left it to her to chase for communication as she began to become anxious. There is no sense in the internal correspondence of the respondent applying pressure on anyone involved to move the investigation along with any sense of urgency. The respondent allowed time to pass without communicating properly with the claimant so that an objective person looking at the situation from her point of view would conclude as she did that no one seemed to be taking any genuine notice of her grievance.
104. Taking into account the facts that I have found, I consider that the respondent was in repudiatory breach of contract. Without reasonable and proper cause, Ms Mbachu avoided and failed to communicate with the claimant about sensitive matters vital to the claimant's return to work so as to

enable the claimant to return to work at an appropriate time. It was reasonable the claimant actually to go to work on 21 December because she found herself in a peculiar situation in which her senior manager was not communicating with her. Ms Mbachu then failed to demonstrate the sensitivity needed and instead reacted with hostility in a manner which - looked at objectively - was humiliating for the claimant.

105. Ms Mbachu then behaved arbitrarily about the claimant's annual leave. The claimant did not affirm the contract after these events but, by putting in a grievance, she registered her dissatisfaction with the way she had been treated and gave the respondent an opportunity to investigate and put matters right. Although an investigation was started and detailed interviews carried out, when I look objectively at the conduct of the investigation from the perspective of the claimant (who is the innocent party), the respondent's conduct of the grievance overall communicated to her lack of interest in and concern for matters which had caused her considerable distress. Although there was some legitimate explanation for part of the delay itself, because it was so difficult to find a manager to hear the grievance and to arrange all the interviews, there was no reasonable and proper cause for the failure to communicate or for the overall lack of urgency in the processing of the grievance.

106. Although the last straw was not as significant as the matters which started this history, it was not innocuous. It was the last in a series of attempts by the claimant to communicate with the respondent about her grievance, in which she was left to take the initiative and was told once again that the matter was not close to resolution. Even though only 2 days before she was still sufficiently positive about the grievance to add 2 more complaints to it, it is in the very nature of a final straw that a fairly minor event may finally (and in this case, suddenly) destroy the relationship of trust and confidence. That is what happened here.

107. Therefore, I find that the respondent was in breach of the implied term of trust and confidence. That was a repudiatory breach. The evidence shows that the claimant did resign in response to that breach and she had not waived it. She did the reverse of affirming the contract: she raised a grievance which made it clear that she did not accept the way she had been treated.

108. Therefore, I find that she was dismissed and the dismissal was unfair.

109. I have not found that the claimant is responsible for contributory fault. The delay in her attending an appointment with occupational health did not cause her resignation or any part of the repudiatory breach of contract. The instruction not to attend work on 21 December was not reasonable given Ms Mbachu's failure to engage with the claimant to discuss her return, so the claimant was not culpable in attending work in any event. The claimant's refusal to enter Ms Mbachu's office was reasonably taken on union advice. Faced with a manager who was demonstrating hostility to her it was reasonable of the claimant to refuse to enter the office.

110. For those reasons there will be no reduction in the claimant's compensation by reason of contributory fault.

Employment Judge Heal

Date: 12 July 2017.....

Sent to the parties on:

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For the Tribunal Office