Case: 1800320/2017

EMPLOYMENT TRIBUNALS

Claimant: **Miss D Goddard**
Respondent: **Yorkshire Ambulance Service NHS Trust**
Heard at: **Leeds** **On: 1st,4th,5th,6th,7th,8th,11th & 12th September and 5th & 6th October 2017**
Before: **Employment Judge Lancaster**
Members: **Mr Q Shah**
Ms J Noble

Representation
Claimant: In person
Respondent: Mr J Boyd, counsel

JUDGMENT

1. The Claimant was not treated unfavourably because she had made an allegation of sex discrimination or because the Respondent believed she may bring proceedings under the Equality Act. The complaint of victimisation does not succeed.

2. The Respondents refusal to award the Claimant Temporary Injury Allowance during her periods of sickness absence is not a non-payment of sums properly payable to her under her contact or otherwise. The complaints of unlawful deduction from wages and/or of breach of contract do not succeed.

3. The Claimant was not constructively dismissed. The complaint of unfair dismissal does not succeed

4. The claim is dismissed.

WRITTEN REASONS

<u>The reserved decision</u>

1. This case was originally listed to be heard over 8 days, to include time for the tribunal to reach a decision. It was, in the event, adjourned part heard on day 8 at the conclusion of the available evidence because there was then insufficient time also to hear submissions. The case was re-listed for 2 further days. On the first of those additional days the Respondent, by consent, called a further witness, Abigail Holmes,

who is on maternity leave and had been unable to attend the earlier hearing. It was agreed at the start of the resumed hearing at 11 am that cross-examination of this witness would be limited to 2 hours and that oral submissions would then have to be, and would be concluded before the usual end of the tribunal day at about 4.30pm. That would have allowed some 2 ½ hour in the afternoon session to hear submissions (a maximum of 1 ¼ hours each if the time were to be equally divided although Mr Boyd had indicated that he was to put in written submission and would not require that long to make oral representations). The second day of the resumed hearing had always been allocated for the tribunal to deliberate, with the parties not being required to attend.

2. In the event Mr Boyd's submissions took approximately 1 hour, a little longer than he had initially estimated. There was then a short adjournment, principally to allow the Claimant time to prepare further in response. The Claimant's oral submissions commenced at 3.35pm. They concluded at 4.45pm even though the Claimant had not by then finished everything that she had wanted to say. This was because it had not been appreciated until late in the day that the rail strike on that day meant that Ms Noble would have to leave by 4.50 pm at the latest in order to catch the last train out of Leeds. The Claimant then put in a written document to supplement her submissions and the tribunal adjourned at 4.50pm. Because the Claimant's submissions up to that point had essentially been a repetition, in summary form, of her evidence it was discussed that there was no obvious prejudice to her because the tribunal had already heard her case on the facts and would be able to review her witness statement and the notes of her answers in cross-examination as necessary.

3. On the final day of the hearing the Claimant did then however send further documents by email. These were acknowledged and copied to the Respondent and the tribunal has read them and taken them into account in the course of the decision making process.

4. The tribunal was able to conclude its deliberations within the remaining time which had been set aside. Written reasons are therefore now required.

<u>The issues</u>

5. The claims are of constructive unfair dismissal, victimisation and unlawful deduction from wages (alternatively breach of contract). All the other claims which the Claimant had originally brought have already been dismissed. The complaint of direct sex discrimination, which had also been brought against a named individual, Neil Beaumont, was dismissed at a preliminary hearing because it was out of time. All the other claims that have already been struck out were dismissed upon their withdrawal by the Claimant.

6. The remaining issues are agreed to be as identified and set out in the relevant parts of the annexe to the Order of Employment Judge Cox made after the preliminary hearing on 2nd June 2017[1].

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[1] **Unfair dismissal**

1. Miss Goddard resigned from her employment with the Trust on 21 December 2016. The principal issues in her unfair dismissal claim will be whether she can establish that she resigned in response to a fundamental breach of her contract of employment and without first affirming her contract. She says that the Trust

conducted itself in a way that breach the implied term in her contract that it would not, without reasonable and proper cause, act in a way that was calculated or likely to destroy the relationship of trust and confidence between itself and her.

2. The actions or omissions that Miss Goddard alleges breached trust and confidence, either individually or cumulatively, run to 140 paragraphs in her claim form. The Tribunal has decided to order the sequential service of witness statements so that the Trust will know the full details of these allegations before it has to serve its own witness statements. The allegations can be divided into four broad areas:

    a. Bullying and discriminatory behaviour towards her by her line manager Mr Neil Beaumont, in the period from January to November 2015 and the Trust's failure properly to address Miss Goddard's complaints about this behaviour.

    b. The Trust's management of Miss Goddard's sickness absence from November 2015 to June 2016 and her return to work thereafter, including its decision not to pay her Temporary Injury Allowance for this period.

    c. Bullying behaviour towards Miss Goddard by Mr Jason Dolby, Head of HR Operations, and Ms Gail Berry, HR Team Leader, in the period from June to August 2016 and the Trust's failure properly to address Miss Goddard's complaints about this behaviour.

    d. The Trust's management of Miss Goddard's sickness absence from August 2016 until her resignation on 21 December 2016, including its decision not to pay her Temporary Injury Allowance for this period

3. The "last straw" for Miss Goddard was an email to her from Mark Millins, Associate Director, dated 20 December 2016 (at paragraph 133 of the details of claim).

4. The Trust points out that this conduct extended over a substantial period, during which time Miss Goddard availed herself of the Trust's grievance procedure and claimed sick pay. It says that Miss Goddard should be viewed as having affirmed her contract of employment. In response, Miss Goddard says that throughout this period she continued to complain about the Trust's behaviour, evidencing that she was not affirming her contract.

Victimisation

5. Miss Goddard alleges that the actions and omissions of the Trust (but not Mr Beaumont) upon which she relies in relation to her unfair constructive dismissal claim also amount to unlawful victimisation by the Trust (contrary to Section 39(4)(c) and (d) read with Section 27 EqA). She says that the Trust acted in the way that it did because she had alleged sex discrimination by Mr Beaumont and/or victimisation by the Trust or because it believed that she might do so.

6. The protected acts upon which Miss Goddard relies are as follows:

    a. On 20 November 2015 she told Abigail Holmes, HR Business Partner, that the new procedures Mr Beaumont had introduced amounted to sex discrimination.

    b. Miss Goddard confirmed the content of that conversation in a letter to Ms Homes on 16 December 2015.

    c. On 25 February 2016, at an investigation meeting, Miss Goddard told the investigating officer, Mr Richard Chilvers, that the new procedures Mr Beaumont had introduced amounted to sex discrimination.

    d. On 12 August 2016, as part of the Early Conciliation procedure, Miss Goddard told ACAS that she was considering bringing a Tribunal complaint of victimisation against the Trust.

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Victimisation

The law

7. The Claimant must show that she had done or that the Respondent believed that she had done or may do a protected act: section 27 Equality Act 2010.

8. If the Claimant has in fact suffered a detriment and there are facts from which the tribunal could conclude, in the absence of any other explanation, that she has been subjected to that unfavourable treatment because of her doing such a protected act the claim of victimisation will succeed unless the Respondent shows that its treatment of the Claimant was on no grounds whatsoever because of the doing of that act: section 136 Equality Act 2010.

The facts

9. The Claimant relied upon four protected acts as identified in Judge Cox's Order.

10. The first of these was:

    On 20 November 2015 she told Abigail Holmes, HR Business Partner, that the new procedures Mr Beaumont had introduced amounted to sex discrimination.

    This did not happen.

11. The Claimant amended her witness statement at the very start of the hearing. She now confirms that she only thinks that she used the word "discrimination" in this conversation with Abigail Holmes. Abigail Holmes has no recollection at all of this being said. In any event it is clear that the phrase "sex discrimination " was never used.

12. The Claimant's case is that it was sex discrimination to treat the team that she was on, which at that time happened to be all women, differently from an all male team doing another job but within the same part of the Respondent's business. Neil Beaumont, the alleged discriminator, managed both teams. We do not have to decide whether this was or was not sex discrimination because that is not a claim that is still before us. On what we have heard however we do however think that it is highly unlikely that this complaint of direct discrimination would have succeeded. That is because there is not a straightforward like-for –like comparison to be made between the two teams and the reason for Neil Beaumont's behaviour, even if it may well be properly open to various criticisms, does not appear to have been because of the difference in the gender make up of the teams.

13. Whether or not this claim would have succeeded however does not matter. The point is that it is not enough for the Claimant simply to have told Abigail Holmes about the introduction of new procedures affecting her team without explaining why she also

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Unauthorised deductions/ breach of contract

7. Miss Goddard alleges that the Trust's failure to pay her Temporary Injury Allowance during her periods of sickness absence amounts to unauthorised deductions from her pay/ breach of contract.

8. The Trust accepts that Temporary Injury Allowance was part of Miss Goddard's terms and conditions of employment, but does not accept that she met the criteria for eligibility.

thought this may have been sex discrimination. There is no reason why Abigail Holmes should have believed at this stage that this was any type of discrimination claim, even if she had registered that the team being spoken about happened to be all women, and we accept her evidence that she did not think this at the time. The Claimant did not say that this was what she was complaining about and there is nothing in the circumstances that makes it at all obvious that this must have been what she was intending to communicate.

14. The Claimant did not therefore, either explicitly or by inference, make any allegation that Mr Beaumont had contravened the Equality Act. Whilst there is no dispute that the Claimant did make a somewhat tearful telephone call to Abigail Holmes on 20th November 2015 what she said in that conversation did not amount to the doing of a protected act for the purposes of section 27.

15. The second alleged protected act is that :

"Miss Goddard confirmed the content of that conversation in a letter to Ms Homes on 16 December 2015".

This too did not happen.

16. The letter did not confirm, nor indeed did it allege for the first time that the new procedures Mr Beaumont had introduced amounted to sex discrimination. It reads:

"This is disappointing as it could be suggested that this is further victimization/ discrimination and harassment by NB, that he is retaliating against anyone who says he is unprofessional, because he had to address his conduct at work to his colleagues. This needs to be addressed as well, please if you could advise me on what needs to happen here?"

It did use the word "discrimination" but specifically in the context of retaliatory conduct against someone on the team who had accused him of being unprofessional.

17. It would, in hindsight, have been preferable had Abigail Holmes, or somebody else on reading this letter, clarified with the Claimant why she used the terms "victimisation, discrimination and harassment" in this context and sought to confirm that she was not in fact alleging a breach of the Equality Act by reference to a protected characteristic. This did not however happen and on the face of it the Claimant is not indeed making any such allegation. What she is saying is only that it *could be suggested* that Neil Beaumont is retaliating against being called unprofessional. It is therefore not at all unreasonable for what is in fact said in the letter to have been taken at face value We once more accept Abigail Holmes' evidence that she did not interpret this letter as an allegation of sex discrimination.

18. Once again the Claimant did not therefore, either explicitly or by inference, make any allegation that Mr Beaumont had contravened the Equality Act.

19. The third alleged protected act is that:

"On 25 February 2016, at an investigation meeting, Miss Goddard told the investigating officer, Mr Richard Chilvers, that the new procedures Mr Beaumont had introduced amounted to sex discrimination."

Again this did not happen.

20. The Claimant did not tell Mr Chilvers that she was alleging sex discrimination. She says that when Mr Chilvers read out her letter of 16th December he himself added the word "sex" before "discrimination, which was not there in the original. The Claimant did not however then say anything to indicate that this was indeed how she had intended her complaint to be read.

21. Even if Mr Chilvers did say this all the evidence indicates beyond doubt that it must have been a slip of the tongue. It was not as the Claimant believes an acknowledgement that he in fact well understood this to be a sex discrimination complaint. In the Respondent's notes of the in fact-finding meting there is no reference at all to the phrase "sex discrimination" ever having been used. Although the Claimant made extensive amendments to these original notes (based, as she admitted for the first time at this hearing, upon a clandestine recording of the meeting which she had made) at no stage did she ever seek to correct the record add an express reference to "sex discrimination". The investigation did not ever deal with this mater as a sex discrimination complaint. On the contrary in his report Mr Chilvers says that he remained unclear as to the precise relevance of the introduction of the new procedures to the Claimant's complaint. That is the clearest indication that Mr Chilvers did not believe that this was in fact the type of allegation that the Claimant was making. Obviously nobody subsequently reading either version of the minutes of the fact-finding meeting (the Claimant's or Mr Chilvers') could have known from that document that the Claimant was asserting that this was a sex discrimination complaint.

21. The Claimant did not therefore, either explicitly or by inference, make any allegation to Mr Chilvers that Neil Beaumont had contravened the Equality Act. We also accept Mr Chilvers' evidence that this was not how he in fact understood the Claimant's case at the time. Therefore, even if the Claimant is correct and he did from her letter read out "discrimination" as if it said "sex discrimination" we find that that does not in any way suggest that he actually believed that the Claimant was making or would make an allegation of a breach of the Equality Act.

22. The fourth alleged protected act is admitted to be properly identified as such.

On 12 August 2016, as part of the Early Conciliation procedure, Miss Goddard told ACAS that she was considering bringing a Tribunal complaint of victimisation against the Trust

23. The Claimant first commenced ACAS early conciliation on 12th August 2016 and a certificate was issued on 12th September 2016. The Claimnt subsequently obtained further early conciliation certificates against both the Respondent and Mr Beaumont personally and it was these which were cited in her claim form.

24. There is solicitors' correspondence following this early conciliation which clearly indicates that complaints of sex discrimination and of victimisation were being made.

The Respondent therefore believed at that time that the Claimant may have been going to bring proceedings under the Equality Act 2010.

25. However in the letter from the Claimant's then solicitors, which is dated 27th October 2016, the alleged act of sex discrimination is not identified. It merely asserted that the initial complaint made in November 2015 had included an allegation of sex discrimination without saying what it was. The principal assertion in the letter was that "continued negative treatment" of the Claimant as a direct consequence of her having made a complaint of sex discrimination against Neil Beaumont; that is an allegation of victimisation because of having done a protected act.

26. The reply from the Respondent's solicitors, dated 4th November 2016, robustly challenged the assertions of sex discrimination and victimisation. It rightly pointed out that the Claimant had not in fact alleged sex discrimination at all until going to ACAS in August 2016. Even though the Claimant's allegations of sex discrimination and victimisation were no doubt made in good faith the Respondent had correctly identified that they lacked proper substance.

Conclusion

27. It follows that the only possible claim of victimisation is in relation to alleged unfavourable treatment after 12th August 2016, when the Claimant began ACAS early conciliation. That means that the detrimental treatment must be within the fourth of the broad areas, in chronological order, which were identified by Judge Cox as forming the basis of the claim. That is;

    The Trust's management of Miss Goddard's sickness absence from August 2016 until her resignation on 21 December 2016, including its decision not to pay her Temporary Injury Allowance for this period

28. The Claimant was off work sick from 1st August 2016 until she resigned. She had therefore already been absent for 11 days before she did a protected act and the allegation will not, in reality, have been brought to the Respondent's attention by ACAS until some little time after that. She made her second Temporary Injury allowance (TIA) application, covering the period from 22nd June 2016 onwards, on 25th October 2016.

29. The Claimant had already raised a second grievance, against Jason Dalby and Gail Berry, on 2nd August 2016 and had received the outcome letter from her first grievance, against Neil Beaumont and Gail Berry, on 10th August 2016. Both these events therefore pre-dated the doing of any protected act.

30. There was therefore an already damaged relationship between the Claimant and the Respondent before the doing of the protected act. The Claimant had had issues which she took up before and she still had those issues , or additional concerns, afterwards. The Respondent had already been dealing, or attempting to deal with these issues, and continued to do so. Throughout the whole period the Claimant's position was that these matters were not, however, being dealt with satisfactorily. There is no evidence whatsoever to suggest that the Respondent's attitude towards the Claimant changed when she approached ACAS. It was not put to any witness that they had acted as they did because of the initiation of early conciliation and we find as a fact that that was not the reason for their behaviours.

31. The Clamant is unhappy about the way in which her second sickness absence was managed. She is entitled to feel unhappy. There was certainly confusion as to who was the Claimant's line manager during this period and she has identified a number of areas where there was miscommunication.

32. However none of these identified concerns were about things that did or did not happen because the Claimant had done a protected act. None of those people who were directly concerned in contact with the Claimant in managing her sickness absence even knew about the referral to ACAS.

33. Similarly we find that Rebecca Robinson who dealt with, and rejected the second TIA application, was not in any way influenced in her decision by the fact that the Claimant had gone to ACAS.

Unauthorised deduction from wages/ Breach of contract

The law

34. Where the total amount of wages paid to an employee is less than the sum properly payable that is an unauthorised deduction: section 13 (3) Employment Rights Act 1996. Properly payable means payable under the contract of employment or some other legal entitlement.

35. Where, as here, the sum claimed is a discretionary additional payment it does not become properly payable until the award has been made. However it is an implied term of the contract that the discretion will not be exercised irrationally or perversely.

The facts

36. It is accepted in the list of issues that:

Temporary Injury Allowance was part of Miss Goddard's terms and conditions of employment,

37. The relevant procedure for assessing eligibility for TIA is to be found in the Respondent's Guidance document published in April 2015. There is also an NHS Staff Council guide for employers published in November 2016 but that does not form part of the Claimant's terms and conditions.

38. Under the Respondent's Guidance the responsibility for supplying the necessary documents to support the application rests squarely with the employee. The NHS Staff Council Guide does suggest that the employer might be more proactive in seeking out supporting material but that is not a term of the contract.

39. It is clear from the policy that not everyone who is signed off work by their doctor with work-related stress will be eligible for TIA. It is payable in respect of psychiatric injury sustained due to a specific incident or series of incidents. It will not be considered in the case of work-related stress unless there is clear evidence that the cause is wholly or mainly attributable to the actions or inactions of the Trust or its employees. The presumption from the manager should always be that an absence is not due to an industrial injury and it is for the employee to provide evidence to the contrary.

40. The Claimant made two TIA applications on 19th March 2016 and 25th October 2016.

41. In the first case she did not initially provide any supporting documentation and the determining officer, Catherine Cox, invited her to give additional information. Similarly in the second case Rebecca Robinson, took the view that there was insufficient information on the application to justify an award being made but there was then further correspondence with a view to a possible reconsideration, which did in fact include Ms Robinson trying, unsuccessfully as it turned out, to find further information herself. The Claimant was clearly, and understandably, frustrated that she did not know what else was required of her.

42. The first TIA application was rejected on 3rd May 2016. The Claimant appealed. The appeal was rejected by Kath Simms on 27th May 2016. The second application having been provisionally rejected on 1st December 2016 was confirmed as refused on 23rd December 2016. The Claimnt had in fact already resigned on 21st December 2016 and no internal appeal against the second refusal of TIA was therefore pursued.

Conclusion

43. The TIA process it must be said is heavily weighted against the employee.

44. We are, however, perfectly satisfied that the proper procedures under the policy were followed in each case.

45. We find as a fact that the decision to refuse TIA in each instance was a proper one, applying the policy, and cannot be said to have been irrational or perverse.

46. The Claimant cannot therefore establish any contractual entitlement to the additional TIA payments.

Constructive unfair dismissal

The law

47. The Claimant must show that she resigned in circumstances where she was entitled to terminate the contract without notice by reason of the employer's conduct: section 95 (1) (c) Employment Rights Act 1996. That is she must establish that she resigned in response to a fundamental breach of contract on the part of the Respondent.

48. As identified in the list of issues the Claimant relies principally upon an alleged breach of the implied term as to trust and confidence. That is that the Respondent must not, without reasonable and proper cause have conducted itself in a manner calculated or likely to destroy or to seriously undermine the relationship of mutual trust and confidence that ought to exist between employer and employee. This is an objective and not a subjective test. It is not sufficient that the Claimant felt there had been a breakdown in trust and confidence. The Respondent n must have done something, viewed objectively, which was in fact likely to have resulted in such a breakdown.

49. The Claimant must not have affirmed the contract by waiting too long in the circumstances before deciding to leave and treat herself as discharged from the contract.

50. The Claimant relies upon a "last straw". That need not itself be breach of contract but must be the final act in a series of acts which cumulatively amount to a breach of the implied term, and must contribute something to that breach.

The factual background

51. In the list of issues Judge Cox identified four broad areas of complaint, in chronological order.

    a. *Bullying and discriminatory behaviour towards her by her line manager Mr Neil Beaumont, in the period from January to November 2015 and the Trust's failure properly to address Miss Goddard's complaints about this behaviour.*

    b. *The Trust's management of Miss Goddard's sickness absence from November 2015 to June 2016 and her return to work thereafter, including its decision not to pay her Temporary Injury Allowance for this period.*

    c. *Bullying behaviour towards Miss Goddard by Mr Jason Dolby, Head of HR Operations, and Ms Gail Berry, HR Team Leader, in the period from June to August 2016 and the Trust's failure properly to address Miss Goddard's complaints about this behaviour.*

    d. *The Trust's management of Miss Goddard's sickness absence from August 2016 until her resignation on 21 December 2016, including its decision not to pay her Temporary Injury Allowance for this period*

52. It is not in the event necessary for us to deal with the first two of those areas or the alleged behaviour of Jason Dolby and Gail Berry in August 2016 in minute detail. It is certainly not necessary for us to address in these Reasons each and every matter that came up in the course of the hearing. That is because any fundamental breaches that may have occurred in these periods are in our judgment too long before the resignation and the Claimant has in the meantime affirmed the contract. The real issue is about the "last straw", that is when the Respondent identified what action or further action it was or was not going to take in respect of the Claimant's various complaints, and not about the actual subject matter of those historic allegations.

53. By way of example: even if Neil Beaumont had bullied the Claimant in the early part of 2015 she chose not to resign in response to that behaviour and in fact remained in employment for some 7 months after Mr Beaumont left the Respondent on 31st May 2106, thereby affirming the contract. The actual conduct had therefore long ceased still to be a live issue which could justify resignation in December 2016.

The summary facts

A. Bullying and discriminatory behaviour towards her by her line manager Mr Neil Beaumont, in the period from January to November 2015 and the Trust's failure properly to address Miss Goddard's complaints about this behaviour.

54. From January to August 2015 the Claimant was acting up in a supervisory role and was directly line-managed by Neil Beaumont. The Claimant makes a number of complaints about his language and behaviour during this period. Because the Claimant seeks to avoid confrontation she did not however ever address these concerns with him directly.

55. At the end of her time acting up, Neil Beaumont at the instigation of Gail Berry signed a joint card to the Claimant commending her on her performance during what she had

found to be a difficult and unpleasant experience and apologising if he had often been distant and a little brash.

56. Neil Beamont did use inappropriate language at work, in particular swearing. He admitted during the disciplinary process that he had spoken to the Claimant, as he would also have done to others “in a snappy, sharp or aggressive manner”. In that context the admission of speaking aggressively does not however mean that this is the type of aggression which is included in the definition of gross misconduct; it is a synonym for snappy or sharp.

57. Had he remained in employment Neil Beaumont would have faced a disciplinary panel. He had “a case to answer”. We are quite satisfied however that the appropriate sanction to have been imposed would have been a warning and not dismissal.

58. Between August and November 2015 there is no further complaint about Neil Beaumont.

59. The Claimant considered that Neil Beaumont “had his aggressive head on” again on 9th and 10th November 2015 and intimated to Gail Berry that this time she may take action to address the issue with him.

60. The Claimant and Gail Berry were at cross purposes in their understandings of how the matter was to be addressed. In part this was because of the way the Claimant interpreted things that were said by others in HR at around this time. The Claimant clearly thought that all she had to do was notify Gail Berry on Monday 16th November and an informal meeting had then to be set up by her with Neil Beaumont. Gail Berry had understood that the Claimant was taking the weekend to consider her next actions and that there would then be further discussion before a final decision was made. She was not a trained mediator and was not comfortable facilitating such a meeting. Gail Berry then requested that the Claimant put he concerns in writing. This was not, contrary to how the Claimant interpreted it, an indication that Gail Berry was intending to force the Claimant to pursue a formal grievance. By 19th November Gail Berry had in fact arranged for Abigail Holmes to facilitate an informal meting between the Claimant and Neil Beaumont and this was to be set up the following week and was at that time precisely what the Claimant wanted to happen.

61. On 18th November 2015 there was a team meeting where part time staff were informed that their holiday entitlement had been incorrectly calculated and that in future the allowance would be less generous than previously. This led to an angry exchange between Neil Beaumont and Emma Litchfield, one of the staff affected, who stormed off accusing Neil Beaumont of being unprofessional.

62. Neil Beaumont then said that he knew Emma would behave like that. The Claimant interprets this literally as meaning that he already knew in advance that that was how she would behave, and therefore that he arranged the meeting intending to provoke this reaction. She then further deduces that the meeting the following day when Neil Beaumont introduced new procedures with respect to logging onto the phones and time recording, allegedly to improve professionalism, was also part of his original intention. The Claimant’s case is that in seeking to provoke Emma into an accusation of un-professionalism, Neil Beaumont was thereby giving him an excuse to retaliate against the whole team. Then because the Claimant understands that some of the new

measures were not in fact followed through the following week when she had gone off sick she further deduces that they must have been targeted specifically at her and were not pursued because she was not there. The Claimant accepts that this sounds far-fetched, but it is genuinely still what she believes happened. We have already explained why we think it highly unlikely that this incident was in fact sex discrimination.

63. The following day, 20th November 2015, the Claimant says that Neil Beaumont gave her a funny look when she logged in at 9.01, one minute late. Nothing was said however and there was no interaction at all that day between the Claimant and Neil Beaumont who was engaged on a task with Gail Berry. There was therefore no obvious reason why the Claimnt should have had any issue wit Neil Beaumont on the at particular day: this was the opinion of Gail Berry and it is perfectly understandable why she should come to that view. The Claimant was nonetheless admittedly very upset during the course of this day.

64. The Claimant then decided to consult the trade union representatives and was absent from her desk without having informed her manager, Gail Berry. The Claimant was understandably reprimanded and reminded that she should consult the union in her own time. Gail Berry did, however, allow the Claimant to work elsewhere after that and did send her a supportive email that afternoon.

65. The Claimant spoke on the Friday afternoon by telephone to Abigail Holmes from HR. We accept Abigail Holmes' evidence that she did not understand the Claimant definitely to be instigating a formal grievance against Neil Beaumont at that stage.

66. The Claimant was then absent from work, on sick leave, from Monday 23rd November 2015.

67. The Claimant commenced the formal grievance process on 16th December 2015 and supplied her last written document in support on 18th December 2015. This was dealt with under the Respondent's bullying and harassment procedure. This meant that that the disciplinary policy immediately applied and that Neil Beaumont and Gail Berry, the alleged harassers, were under investigation with a view to a decision being made as to whether they should then be subject to a disciplinary hearing; that is did they have "a case to answer"? The fact-finding exercise was not to determine that either Neil Beaumont or Gail Berry, if they had a case to answer on any point, were actually guilty or not guilty of that misconduct; that would be a decision for the subsequent disciplinary hearing if and when held.

68. We are satisfied that in all the circumstances the investigation was conducted within a reasonable period.

69. Abigail Holmes acknowledged the grievance on 30th December 2015 and the investigating officer, Richard Chilvers, was appointed shortly afterwards. On 13th January 2016 Richard Chilvers invited the Claimant to an initial fact-finding meeting on 18th January 2016. At the Claimant's instigation this was, in the event, put back to 25th February 2016 after the Claimant had had advance sight of the questions she was to be asked.

70. The original intention was that the Claimant would see the notes of that meeting and agree them after what was described as some “email tennis” before Ricahrd Chilvers then began interviewing witnesses. We accept Richard Chilvers’ evidence that he envisaged that that would be a short and straightforward process. In fact the Claimant mislaid the notes that were sent to her and did not reply promptly. When she did she made substantial amendments, not all of which were agreed to be an accurate reflection of what had actually been said, as opposed to an elaboration by the Claimant of what she would have liked to have said. The amendments, additional comments and further information were not supplied by the Claimant until April 2016. In the event no final version of the minutes was ever agreed but the Claimant’s document was included alongside the original notes.

71. Richard Chilvers began interviewing witnesses on 15th March 2016. He had spoken to 9 people, the last of whom was Neil Beaumont by 24th March 2016. There was one final witness who was not interviewed until 7th April 2016. That time frame is perfectly reasonable.

72. The Claimant takes literally Richard Chilvers’ initial observations that the notes would be finalised before the interviewing process started. She therefore thinks that it was outside of the proper process for him to have started questioning witnesses before she had confirmed her acceptance of the minutes. That is not right. The procedure does not require that and it would have been wrong to delay the commencement of the disciplinary investigation against Neil Beaumont and Gail Berry.

73. Richard Chilvers also then worked through the Claimant’s additional material and acknowledged that he had done this on 3rd May 2016. For some reason that letter was not sent to the Claimant until 9th May 2016, but there is no good reason to think that there is anything suspicious about that.

74. The completed investigation report was submitted on 13th May 2016.

75. On 27th April 2016 the Claimant had raised a satellite grievance about the way the procedure was being followed in respect to her bullying and harassment complaint.

76. There is not a satisfactory reason as to why this was not acknowledged until 3rd June 2016.

77. That matter was dealt with under the Issue Resolution policy. The Claimant met with Jackie Cole on 15th June 2016 and the outcome letter was sent on 20th June 2016. The complaints about a lack of clarity in the information provide to the Claimant were partially upheld. Following on from these conclusions a mediation, which had already been arranged between the Claimnt and Rob Dimsdale, between the Claimant and Megan Dilworth took place, successfully, on 27th June 2016.

78. The Claimant then appealed the Issue Resolution on 1st July 2016. The appeal was heard by Paul Mudd on 12th July 2016 and the outcome letter was sent on 13th July 2016. Whilst concluding that policies had in fact been correctly carried out this acknowledged the impact that the process had had on the Claimant’s mental health and sought to reassure her that her concerns were being taken seriously.

79. In particular Paul Mudd recognised the distress that the Claimant felt about the way that the possible relocation of Neil Beaumont during the investigative process had been dealt with and stated "I am unable to give you an explanation of the reasons for the way this matter was approached". This matter was therefore closed as at 13th July 2016.

80. Neil Beaumont had in fact left the Respondent on 31st May 2016. he will therefore have given his notice at the end of March 2016. It is unclear who knew that he was leaving and when they knew.

81. Because of the ongoing Issue Resolution process the outcome of the Bullying and Harassment complaint was postponed. A feedback meeting was held on 14th July 2106. The outcome letter was then sent on 10th August 2016.

82. The Claimant was told at the feedback meeting that Neil Beaumont would have had a case to answer but that he had left the Respondent's employment. The Outcome letter, quoting Richard Chilvers' conclusion stated "There was some validity in your claims but nowhere near the level or extent which you suggest or believe".

83. Richard Chilvers had concluded that Gail Berry had no disciplinary case to answer. We are quite satisfied that that was the correct decision. If there is any criticism of Gail Berry it is only about the tone in which she said things, or perhaps about how the Claimant perceived her attitude. What she actually did certainly did not warrant any disciplinary sanction whatsoever. It is clear that Gail Berry was told in about early June that she had no case to answer, that was before the Claimant was aware of the outcome of the investigation. There is, however, nothing wrong with that. As the person being investigated under the disciplinary process she is entitled to know the result at the earliest opportunity.

84. Richard Chilvers' investigation was careful and thorough. The Claimant does not agree with his conclusions but It cannot be said that he failed properly to address her complaints about Neil Beaumont's (nor indeed Gail Berry's) behaviour.

B. *The Trust's management of Miss Goddard's sickness absence from November 2015 to June 2016 and her return to work thereafter, including its decision not to pay her Temporary Injury Allowance for this period.*

85. In December 2015 the Claimant was assigned an Employee wellbeing Manager, Rob Dimsdale, who effectively acted as her line manager during her sickness absence. Michelle Woodger also provided welfare support.

86. From their first meeting on 22nd January 2016 Rob Dimsdale sought to facilitate the Claimant's return to work. In the event none of these efforts came to anything. The Claimant was, of course, signed off unfit for any work through out this period although Occupational Health (OH), as at 1st March 2016, pronounced her fit for work but recommended that she not return to her substantive role until the matters under investigation were "resolved". It is also clear that the Claimant was initially prepared to consider alternative work but that in the course of time she increasing began to feel that it was unfair that Neil Beaumont had not been moved so that she might in fact return to her substantive position if and when she had felt up to returning to work.

87. As we have already said Neil Beaumont in fact left on 31st May 2106 and the Claimant's complaints about the way his possible relocation had been addressed were dealt with in the Issue Resolution process which concluded on 13th July 2106.

88. Although the Claimant had a large number of issues which she raised about things which arose during her sickness absence we are satisfied that none of them , singly or cumulatively, constitute a fundamental bread of contract. In any event any such concerns were overtaken by the fact that the Claimant did then return to work and in so doing affirmed the contract.

89. There was a further OH report dated 19th April 2016 which conclude that the Claimant was not currently fit for work but that 20th June 29106 might be a realistic date for her to return.

90. The Claimant did go back to work on 2Oth June 2016 on a phased return, initially sitting in with Michelle Woodger. She returned to her substantive post on 29th June 2016.

91. It is accepted by the Respondent that there was a degree of confusion surrounding the period between her first returning to work and the Claimant actually moving back to her own department. On 22nd June 2106 when the Claimant came into the department before she was actually due to start back she was asked to leave. Mr Boyd in his closing submissions concedes that this was regrettable. It most certainly was, but we agree with the Respondent's further submission that it did not amount to a repudiatory breach of contract.

92. We have already dealt with the first unsuccessful TIA application at paragraphs 36 to 46. The refusal of this request was not a breach of contract at all, let alone a fundamental breach.

C. *Bullying behaviour towards Miss Goddard by Mr Jason Dolby, Head of HR Operations, and Ms Gail Berry, HR Team Leader, in the period from June to August 2016 and the Trust's failure properly to address Miss Goddard's complaints about this behaviour.*

93. When the Claimant returned to her department on 29th June 2016 Jason Dolby had replaced Neil Beaumont as her manager. He was on a temporary contract and left on 9th March 2017.

94. Jason Dalby took a management decision that the Claimant should not sit next to Gail Berry when she returned. That was because he correctly identified that there was still potential tension between them and therefore took immediate action to address that issue. This involved the Claimant's workplace being moved to the end of the bank of desks but still within a small area and still part of the team. This we are satisfied was an entirely reasonable management decision.

95. From the Claimant's subjective perspective it was however understandably upsetting. She then engaged in correspondence with Jason Dolby challenging his decision which he maintained was correct. On 28th July however he agreed that the Claimant could arrange with IT to have her desk moved back. By this stage Gail Berry had left the department.

96. The Claimant was dissatisfied that Gail Berry had declined to enter into mediation. However this was, on Gail Berry's part, an entirely understandable decision. She herself was experiencing personal difficulties at around this time which led to her not being well. She described the Claimant's accusations of bullying as having a devastating effect upon her, leaving her reeling and contributing to her poor mental state. She reasaonbly concluded therefore that she did not wish to engage in the effort of mediation. Gail Berry was also very wary of the Claimnt returning to work and did not consider that she was in a suitable frame of mind to manage her given the history of unsubstantiated bulling accusations against her. However she was required to manage the Claimnt upon he return. We accept her evidence that she undertook this in a professional manner thought there were undeniably tensions between the two women, as acknowledged by Jason Dolby in his decision to move the Claimant's desk.

97. Gail Berry therefore applied for and was granted a secondment away from the department. This meant that any issue which the Claimant perceived there to be between them were no longer current by the time the Claimant went off sick again on 2nd August 2016.

98. There are other issue which the Claimant had with Jason Dolby's management of her but they are secondary to her complaint about the desk move. We accept his evidence that from his perspective there were performance issues that had to be addressed on the Claimant's return. Mr Dolby is a decisive and incisive manager.

99. The Claimant raised a further grievance against both Jason Dolby and Gail berry on 2nd August 2016. She also sought at the same time as raising fresh allegations to resurrect her original bullying and harassment complaint and to challenge the refusal of TIA.

100. In all the circumstances we are satisfied that these further complaints were addressed within an appropriate timeframe. This is especially so because the Claimant raised a number of procedural queries and wanted matters to be dealt with in a particular way. We do not criticise her for that but it contributed to the delay.

101. A meeting was held with Mark Millins on 21st November 2016. This was to consider the appropriate method of dealing with any outstanding complaints. We agree that it was by no means clear that the fresh complaints against Jason Dolby and Gail Berry were in fact most appropriately to be dealt with under the bullying and harassment procedure.

102. The matter was still being progressed within a reasonable timescale at the point the Claimant resigned on 21st December 2016.

D. *The Trust's management of Miss Goddard's sickness absence from August 2016 until her resignation on 21 December 2016, including its decision not to pay her Temporary Injury Allowance for this period*

103. We have already dealt with the second unsuccessful TIA application at paragraphs 36 to 46. The refusal of this request was not a breach of contract at all, let alone a fundamental breach.

104. We have also already dealt with the sickness management process in the context of the victimisation claim at paragraphs 27 to 33. Although there was, as we have observed, imprecise communication at times that is not a fundamental breach of contract. The main emphasis throughout this period was the attempt to engage with the Claimant in respect of her continuing grievance and that, from an objective stance, was being reasonably conducted.

The “Last straw”

105. Although, even in summary from, a recital of the material facts has been fairly lengthy as we have said this case really turns upon a consideration of the so-called “last straw”.

The “last straw” for Miss Goddard was an email to her from Mark Millins, Associate Director, dated 20 December 2016 (at paragraph 133 of the details of claim).

106. The trigger for the Claimant’s resignation was the letter from Mr Millins.

107 At the conclusion of the meeting on 21st November 2016 Mark Millins undertook to seek clarification from the Deputy Director of HR (Tracy Hodgkiss) on four procedural points. This information was provided on 20th December 2016. The Claimant resigned in response on 21st December 2016.

108. The letter confirmed that the complaint of 2nd August 2016 would continue to be discussed under the Issue Resolution process, that alternative duties or reasonable adjustments would be addressed under the attendance management procedure, that the issue of the first TIA application was closed and that the second was still with Rebecca Robinson. We d not consider that there is anything wrong with any of those propositions.

109. Mark Millins also confirmed in response to the question of whether the Claimant had any grounds for appealing the outcome of the original investigation that “*this issue has reached the end of the process”.*

110. Tracy Hodgkiss had initially informed the Claimant’s trade union representative that there would be a right to appeal the outcome of the bullying and harassment complaint.

111. Under the ACAS code of practice there should be a right to appeal against the outcome of a grievance.

112. The Respondent’s Bullying and Harassment procedure does not provide for an appeal against the outcome. It does however allow for a procedural grievance to be raised in the course of the investigation and this is what the Claimant did.

113. Under the Respondent’s Bullying and Harassment policy it states that “*Following the completion of the investigation a detailed written response will be given to both parties outlining the findings of the investigation and what action, if any, is being proposed in respect of the complaint.”*

114. The policy also stresses the importance of confidentiality. As we have observed a Bullying and harassment allegation is concurrently both an investigation into the complaint and the commencement of possible disciplinary proceedings against the alleged harasser, which is governed by the disciplinary process.

115. The Claimant was not provided with a copy of Richard Chilvers' report or the records of interview with witnesses which were annexed to it..

116. The outcome letter of 10th August 2016 is not a detailed written response provided to the Claimant. Whilst it does identify what further action will (or more accurately will not be taken against the alleged harassers) it dos not set out any detail whatsoever as to how those decisions were arrived at. Although the letter stated "*There was some validity in your claims but nowhere near the level or extent which you suggest or believe*" no specific findings were disclosed as to what case Neil Beaumont would in fact have had to answer had he remained in employment.

Conclusion

117. The failure to provide a detailed response enabling the Claimnt to understand to what extent her complaints have been investigated and corroborated, or not, is a breach of contract. In the circumstances of this case it is not, however, a fundamental breach of contract. It is not something which shows a intention on the part of the Respondent no longer to be bound by the terms of the contract.

118. Ordinarily we consider that the presumption should be in favour of disclosing an investigation report where there has been an allegation of bullying. Certainly where the complaint leads to a disciplinary sanction we would also consider that the complaint should be told which of their allegations have been found proved and what sanction has been imposed. However this is not an absolute rule.

119. In this case the Claimant was informed in general terms what the outcome was. It is not for her to control the disciplinary process. It would not, therefore, be appropriate for instance to allow her to "appeal" the decision that Gail Berry had no case to answer. As Neil Beaumont could not be subject to a disciplinary hearing the decision not to sanction him is unappealable. It is always difficult therefore to identify precisely on what grounds an appeal might be in fact be brought in a case like this.

120. The intention of the Respondent was clearly not to repudiate the Claimant's contract but to draw a line under the matter so as to facilitate her return to work alongside the same people who had been involved in the investigation.

122. The Claimant was fully engaged in the investigation process. All her information was considered and she was permitted to challenge the process, where her concerns were partially upheld. This is not objectively conduct which breaches the implied term as to trust and confidence. That is a relevant factor to be taken into account in considering whether the subsequent failure to provide full detailed reasons or to permit an appeal is a repudiation. In context it is not.

123. Whilst no one doubts the genuineness of the Claimant in bringing this claim she has not therefore established that she resigned in response to what is, objectively, a fundamental breach of her contract of employment.

EMPLOYMENT JUDGE LANCASTER

DATE 27th October 2017