EMPLOYMENT TRIBUNALS

Claimant: **Mrs Karen Faulkner**

Respondent: **NHS Business Services Authority**

Heard at: **Nottingham**

On: **4, 5, 6 and 7 December 2017**

Before: **Employment Judge Ahmed (sitting alone)**

Representation
Claimant: **Mr Edmund Beever of Counsel**
Respondent: **Mr James Boyd of Counsel**

JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant was constructively and unfairly dismissed in respect of an express term of her contract of employment and by reason of a breach of the implied term of trust and confidence.

2. The Claimant's complaint that she was constructively and unfairly dismissed by reason of making a protected disclosure is dismissed.

3. The issue of remedy shall be determined on 15 and 16 February 2018 at 10:00 am at the Nottingham Hearing Centre.

REASONS

1. In these proceedings the Claimant brings complaints of constructive unfair dismissal in relation to alleged breaches of express and implied terms of her employment. She also claims in the alternative that she was constructively and unfairly dismissed by reason of having made a protected disclosure.

2. At this hearing I heard evidence from the Claimant on her own behalf and on behalf of the Respondent I heard evidence from Mr Myles Timson and Mrs Karen Warren, both of them at the relevant time Senior HR Business Partners with the Commissioning Support Unit ('CSU') of East Midlands. Mrs Warren is no longer employed by the Respondent. In coming to my decision I have taken into consideration the oral evidence of the witnesses, their statements, the documents in the agreed bundle and the submissions made by Counsel on both

sides to whom I am grateful.

3. The facts of the matter unless otherwise indicated are not in dispute. The Claimant originally brought her proceedings against Arden and Greater East Midlands Commissioning Support Unit (Arden and GEM CSU) but at an earlier Preliminary Hearing it was accepted that the correct Respondent should be the NHS Business Services Authority. Arden and GEM is in fact a CSU which provides support to Clinical Commissioning Groups ('CCG') to NHS England, local authorities and a range of care providers. The CSU does not directly employ any staff. The day to day management of the NHS Business Services Authority staff, or at least those within this relevant group, are managed by Arden and GEM CSU on behalf of the NHS Business Service Authority.

4. There are a number of CCGs throughout the country. The relevant CCG in this case was the Southern Derbyshire CCG which provides clinical commissioning support for emergency ambulance services and non-emergency patient transport services (NEPTS) to four Derbyshire CCG's, namely Erewash, Hardwick, Southern Derbyshire and North Derbyshire. The Claimant was an 'embedded' employee within a CCG, that is to say she worked within the CCGs whilst not being employed by them.

5. The Claimant's role consisted of three main elements:-

5.1 To act as Commissioning Manager for NEPTS on behalf of the four Derbyshire CCGs;

5.2 To act as the Derbyshire representative for the Collaborative Commissioning and Quality Assurance meetings of the East Midlands Ambulance Service (EMAS);

5.3 To be the Derbyshire representative for the Collaborative East Midlands Home Oxygen Service Contract.

6. The Claimant was in a senior leadership role. She worked full time which included working at home 2 days a week. There is no dispute that at all times the Claimant undertook her performance and duties well and was a highly valued employee.

7. In November 2015 the Claimant's employment was transferred under TUPE to the Southern Derbyshire CCG. She remained in an embedded role which meant that to all intents and purposes line management and day to day matters were undertaken by the CCG as opposed to the CSU.

8. In February 2015, the Claimant made a protected disclosure in relation to tender irregularities for the procurement of a new NEPTS contract for the provision of ambulance services for the Derbyshire region. The Claimant claimed that she had been placed under pressure by a Mr Rakesh Marwaha, then Chief Officer of Erewash CCG, to improve the tender prospects of Mr Marwaha's preferred bidder, EMAS, by deleting scores and entering revised scores in the tender offer on two occasions. The first occasion was in October 2014. At one of those meetings Ms Jackie Jones, whom the Claimant believes was a Director of Commissioning for EMAS was also present. On the second occasion, when Ms Jones was apparently not present, it is alleged by the Claimant that pressure was applied on her at the final evaluation meeting to achieve results in favour of a particular outcome by altering scores. Although Ms Jones was not present at the second of those two meetings, Ms Lynn Willmott-Sheppard, then Director for

Commissioning for Erewash CCG, was. The Claimant declined to alter the scores and instead reported the matter to senior management. It is understood that Mr Marwaha was then subsequently subjected to disciplinary action. There is no evidence any action was taken against Mrs Jones. There has never been any suggestion of any wrongdoing on the part of Ms Willmott-Sheppard. As a result of the disclosures the NEPTS procurement process was cancelled and was put out to re-tender.

9. In May 2015, discussions as to the Claimant's TUPE transfer of her embedded role from Arden and GEM CSU to Southern Derbyshire CCG. The Claimant had no objection in principle. In November 2015 Mr Mike Hammond, Head of Urgent Care at Southern Derbyshire CCG, wrote to Arden and GEM CSU to say that the role which the Claimant occupied was to be TUPE transferred over. On 17 December 2015 Mr Hammond wrote to Mr Timson of Arden and GEM CSU to say, inter alia, that the TUPE transfer involved measures which "do not constitute substantial changes in working conditions [of the Claimant]. "

10. The Claimant was invited to a series of meetings in 2016 in relation to the proposed transfer. The first of those meetings took place on 29 January 2016. There is nothing controversial as to that meeting. The Claimant understood that the change was a "like for like" swap of the roles and up to that point the Claimant had no objections.

11. The second consultation meeting on 4 February 2016 was much more troubling. It is the Claimant's evidence, which I accept, that some two hours prior to that meeting she was informed that she would no longer be permitted to work from home (which she had done for some time) and that the EMAS element of her role, which the Claimant regarded constituted 50% of her job, was to be unilaterally removed from her. There was no indication as to where it was going, who was to do it or the reason for the change.

12. During the course of discussions in relation to the transfer, most of which were conducted via e-mail, there are two e-mails which are central to the Claimant's subsequent grievance. They are both from Mrs Kate Schroeder, Interim Head of Commissioning at Southern Derbyshire CCG.

13. In the first of those e-mails dated 8 February 2016, Ms Schroeder wrote:

> "Thanks for your help Helen.
>
> I just don't know how anyone can do a real role from home one hundred per cent esp one with contract commissioning in leadership – the feedback from Jackie re EMAS is that Karen rarely ever showed to meetings and never contributed – and transformation which is the only 50 per cent role we might find her (EMAS now in my hands at Gary and the collaborations request, and PTS contract is the only remaining part of her current brief)."

14. In the second email, dated 9 February 2016, Ms Schroeder writes:

> "Wondering the date of Gary's talk to all staff explaining the realignment? And given Jackie's reply re Karen's rare attendance at EMAS meetings, what she has been doing during her day."

15. Both e-mails were sent to the Claimant. It is clear from the context that this was an error and they were intended for someone else.

16. On 9 February 2016 there was a meeting between the Claimant, Mr Hammond, Mr Timson and others. It was a pre-arranged TUPE meeting and

was not called specifically in relation to the emails. It was confirmed to the Claimant that there was no objection to the Claimant working from home. It was also agreed that a new job description would need to be prepared though this had not yet been done. However the Claimant drew a link between the emails and the disclosure she had made earlier. It was agreed that the meeting would be adjourned to allow the Claimant to decide what action she wished to take and in particular whether she wished to lodge a grievance.

17. The following day, 10 February 2016, the Claimant confirmed that she did indeed wish to lodge a grievance and that she wished to do so under the whistleblowing policy. Mr Timson appointed Mrs Karen Warren, another Senior HR Manager, to deal with the matter. Mrs Warren investigated and produced a report on 31 March 2016. A copy of this was sent to the Claimant on 6 April. Mrs Warren concluded that there was "no relationship between the whistleblowing raised in the previous year and the events surrounding the change to Mrs Faulkner's role". Mrs Warren accepted that the e-mails were sent in error and that Ms Schroeder was prepared to offer a face to face meeting to apologise and explain the rationale behind the emails.

18. A conference call was planned on 7 April to discuss the grievance outcome but by this stage the Claimant was too distressed to take part having broken down in tears at a meeting the previous week. The conference call was postponed. The following day the Claimant went on sick leave. The absence continued throughout the end of April and May. On 16 June the Claimant was referred to occupational health.

19. On 22 July the Claimant submitted her letter of resignation.

20. On 25 August 2016 the Claimant notified ACAS of early conciliation. The ACAS early conciliation certificate was issued on 9 September 2016.

21. On 20 January 2017 the Claimant presented her claim form to the Tribunal.

THE LAW

22. Section 95 (1) of the Employment Rights Act 1996 ('ERA 1996') states:

> "For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection (2) and Section 96, only if):-
>
> > (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> >
> > (b) he is employed under a contract for a fixed term and term expires without being renewed under the same contract, or
> >
> > (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.

23. Section 95(1)(c) ERA 1996 describes a form of dismissal which is commonly called constructive dismissal.

24. In accordance with the principles established in **Western Excavating v Sharp** [1978] IRLR 27, for an employee to succeed in demonstrating that she has been constructively dismissed, the Tribunal must be satisfied that the employer has either broken a principal term or terms of the contract or has

evinced an intention to be no longer bound by them. The breach must be of such seriousness as to strike at the very root of the contract. The employee must resign in response to a breach.

25. The Claimant in this case relies both on breaches of express term or terms as to job role and a breach of the implied term of trust and confidence. In relation to the latter, the relevant test was set out in **Malik v BCCI** [1997] ICR 606, where Lord Steyn said that the employer must not:-

> "without reasonable and proper cause conduct itself in a manner calculated and [or] likely to destroy or seriously damage the relationship of trust between employer and employee"

26. The Claimant relies on the 'last straw' doctrine. This was explained in **Lewis v Motorworld Garages Ltd**, [1986] ICR 157, as being:

> "…… the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?

27. In **Omilaju v Waltham Forest London Borough Council [**2005] IRLR 35, the Court of Appeal made it clear that the whilst the final act in a series of other acts may not in itself be blameworthy or unreasonable, it had to contribute something to the breach even if relatively insignificant so long as it was not utterly trivial. An entirely innocuous act cannot be a final straw even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is ultimately objective.

28. It is agreed that it is enough that the repudiatory breach was *an* effective cause of the employee's resignation rather than being *the* effective cause – see **Wright v North Ayrshire Council** [2014] ICR 77.

29. **In Yorke & Grant Yorke, Partners of and Trustees in the Firm of Yorkes of Dundee v Patricia Moonlight** [2007] UKEAT/0025/06, a decision of the Scottish EAT and a rare case of constructive dismissal involving the actions of third parties, Lady Smith (at paragraphs 11 and 19) said:

> "It is, however, plain that the focus is on the employer's conduct and that one does not get to the point of considering whether or not the conduct complained of amounts to breach of the implied term of trust and confidence unless it is first established that the conduct complained of is conduct of the employer (or for which he can, in law, be held responsible).
>
> We can see that the conduct of a third party could be relevant in a constructive dismissal case. If, for instance, an employer were to fail without reasonable and proper cause, to take reasonable steps to control the behaviour of a third party who repeatedly causes upset and distress in the workplace, we can see that such failure might be seen as being in breach of the implied term of trust and confidence."

THE ISSUES

30. It is agreed that the issues are as follows:-

30.1. Did the Claimant resign (wholly or partly) because of an act or omission (or a series of acts or omissions) by the Respondent? In that respect the Claimant relies upon:-

30.1.1 A unilateral variation of contract amounting to a breach of

the express term or terms that the Claimant should be able to undertake the role of Clinical Commissioner. It is alleged that this term was breached in respect of the EMAS role, in relation to additional duties and in respect of the NEPTS aspects of the role.

30.1.2 Whether there was a breach of the implied term of trust and confidence in respect of:-

30.1.2.1 The Respondent's acts and omissions leading to the Claimant's reduction in job role, no alternate job description and an absence of any consultation with her in respect of proposed changes for a period of two months leading up to 7 April 2016.

30.1.2.2 The handling of the grievance process and in particular the failure to investigate the underlying reasons why the Claimant lost allegedly 50% of her job role as well as the Claimant's allegation that changes to her job role were connected to whistleblowing.

30.1.2.3 The final straw - being the outcome of the grievance process which the Claimant received on 6 April 2016.

30.1.3 Whether the CCG at all material times acted as agent of the Respondent for the purpose of managing the Claimant's employment and accordingly whether it is liable for the acts and omissions of the CCG.

30.2 Whether any of the above amounted to a fundamental breach of contract?

30.3 Whether the Claimant waived her right to resign by reason of any affirmation?

30.4. Whether the main reason for the constructive dismissal of the Claimant was that she had made a protected disclosure and/or whether the main reason for the dismissal was the unilateral variations of the Claimant's contract because she had made a protected disclosure?

<u>CONCLUSIONS</u>

31. The circumstances in which the Claimant was employed as an embedded employee was a somewhat unusual one. Mr Timson agreed that it was difficult to deal with because not only was it new to the NHS but also because he had not had practical experience of this type of arrangement before. In terms of the degree of control, the day to day functionality was decided by the CSU but all practical management of the Claimant was undertaken by the CCG. It was agreed, and if not agreed I would find, that there was very little consultation or influence exercised by the CSU over the CCG. Although they there was an understanding that the CCG would consult the CSU, this was practically undertaken only as a matter of courtesy rather than because of any sense of obligation. In answer to a question to Mr Timson in evidence as to whether, if the CCG wanted the Claimant to spend all her time on a mundane task (such as processing invoices for example) there was anything to stop the CCG from doing so, Mr Timson's reply was that the CCG could ostensibly impose that and it

would not be seen as requiring advance approval from the CSU. Mr Timson's evidence, given frankly and honestly, was that if the CCG wanted to make any changes to the Claimant's role they would simply go ahead and make them and simply inform the CCG later rather than seeking permission first.

32. In those circumstances, the question that naturally arises is whether an agency relationship (by implication) existed - as there is no specific allegation against Mr Timson breaching the Claimant's contract of employment – and if so whether any breaches by the 'agent' can be visited upon the Claimant's actual employer.

The agency Issue

33. It is agreed that an agency arrangement is one that can be evidenced by either express terms or by conduct. It is not disputed that the CCG had full authority to act in the operational and day to day management of the Claimant including line management. The practical effect of the Claimant being embedded in the CCG was that the Respondent had very little influence, let alone control, over day to day working arrangements of the Claimant.

34. In relation to the creation of an agency, I have been taken to passages from Bowstead on Agency, not all of which are necessary to set out here. Relevantly at page 43 ('Creation of Agency'), the learned authors state that:

> "The relationship of principal and agent may be constituted:-
>
> (a) by the conferring of authority by the principle on the agent, which may be express, or implied from the conduct or situation of the parties;
>
> (b) retrospectively, by subsequent ratification by the principal of acts done on his behalf."

35. In commenting upon this the authors go on to state:

> "This general statement seeks only to give an indication of the ways in which the relationship of principal an agent can arise in the full sense, creating internal rights and duties between principal and agent and giving the agent external authority to affect the principal's legal relations with third parties."

36. Mr Boyd for the Respondent submits that the correct legal analysis of the relationship between the Respondent, the Claimant and the CCG is not that the CCG acted at all material times as the Respondent's agent but that the CCG was a 'connected third party' to the Respondent. He submits that in the light of the practical lack of control and influence by the Respondent on the CCG in terms of its dealings with the Claimant, that (leaving the contractual terms to one side) the Respondent must be judged against what it might reasonably be expected to do by way of intervention taking all of the contextual facts into consideration. In the employment context he refers to the case of **Yorke** and in particular to paragraphs 11 and 19 for his submission that the employer can only be responsible for a breach of the implied term of trust and confidence if the conduct complained of is conduct of the employer or for which he can in law be held responsible.

37. I am satisfied that this present arrangement constituted a relationship of principal and agent within the ambit set out in Bowstead on Agency and the passages cited above. What is in issue here is really the *scope* of the authority not the existence of one. I am satisfied that the level of authority devolved to the CCG was such that they were able to not only make wholesale changes to the

Claimant's job description but also to do so without having to seek authority from the CSU. It is unnecessary for me to make findings as to the nature, extent and reach of the agency relationship because those matters as I say go the scope rather than the existence of an agency relationship. Any other conclusion would not only produce a bizarre result in that the CCG could act as they please without recourse but would also remove any employment protection for the Claimant. There is nothing in the passages cited from Bowstead which would militate against a finding of an implied principal/agency relationship. So far as the passages from **Yorke** are concerned, the matter seems to depend heavily on the facts of each case. Whilst the focus must be on the employer's conduct, Lady Smith acknowledges that this may include conduct of the employer *"for which he can, in law, be held responsible"* (my emphasis). This is such a case where it can and should.

Breach of an express term

38. Whilst not formally conceded, I am satisfied that that there was a significant unilateral removal of the Claimant's duties and responsibilities. A very large proportion of the Claimant's role was removed without just cause. The Claimant has repeatedly referred to it as being as much as 50%. Mr Timson acknowledged that large parts of the Claimant's role had been removed and whilst he could not place a percentage upon it he acknowledged that the Claimant's role was significantly reduced.

39. I am satisfied that there was a very substantial and significant reduction of the Claimant's role, duties and responsibilities. The loss was not attributed to any TUPE factor. Whether it was actually 50% or thereabouts, it was clearly significant and substantial. In addition to being excluded from the second procurement of the EMAS role (the first having ended due to inappropriate pressure) the Claimant was not copied in on any communications in relation to the new contract. Mr Kevin Parkinson was brought in by Ms Schroeder to take over the contract negotiations was told not to copy the Claimant in on any communications in relation to the second contract. The EMAS role which was a significant part of the Claimant's job was taken away and given to a more junior and less experienced employee. There can be no doubt that large sections of the Claimant's responsibilities set out in her job description (which is conceded as a contractual document) were taken away without explanation. The Claimant says, which I accept, that she was left with "very little to do other than some admin work".

40. Mr Boyd relies upon a variation clause in the Claimant's contract as justification for the unilateral removal of those duties. Any such clause is of course subject to the principle that it can only apply to "reasonable" changes, on which there is no direct evidence. In any event the contractual provision that the job description "may be reviewed" is not satisfied because there was in fact no review concluded by the time of the resignation and no amended job description had been produced.

41. In those circumstances the removal of duties amounted to a breach of an express term or terms of the contract. There is no doubt having regard to the extent of the reduction in duties that it was a fundamental breach which went to the root of the contract of employment.

42. I am satisfied that the removal of the duties and responsibilities was a reason, and an important reason at that, for the Claimant's resignation. It was an objection that the Claimant had raised after she became aware of the changes.

The Claimant had protested continuously throughout the process as to the changes and the removal of the responsibilities was cited as a reason for leaving within the resignation letter.

Breach of trust and confidence

43. The Claimant relies upon three matters in respect of breach of the implied term of trust and confidence – the Respondent's acts and omissions for two months up to 7 April 2016, the handling of the grievance process and the outcome of the grievance process itself (which is also relied upon as the final straw).

44. It was candidly accepted by Mr Timson that the Claimant was unsupported on her side in the consultation process for the purposes of TUPE. It is factually correct to say that the Claimant did not receive an alternate job description despite the very many and substantial changes. There was an absence of consultation in relation to the changes in the period leading up to 7 April 2016. I am satisfied that whilst was an act in a series of cumulative acts relevant for last straw purposes.

45. The handling of the grievance process was criticised at length by Mr Beaver and rightly so. Mr Boyd submits that one has to take a realistic view as the handling of grievances should not be subjected to excessively detailed analysis which a lawyer might be able to undertake who has much more time to dissect such processes, a luxury not always available to those having to deal with them.

46. However, it seems to me that it does not require a lawyer to recognise that this was by any standards a poorly handled grievance. The grievance policy of Arden and Gem CSU used for this has an 'Informal Resolution' and 'Formal Resolution' process and procedure. The process undertaken by Mrs Warren does not appear to sit comfortably within either of them. There are mixed elements utilised of both. The end result is something which is not envisaged by the policy at all. Despite the fact that the Claimant's complaint was one of whistleblowing (as is clear from the Claimant's e-mail which for good measure was set out in bold and underlined) and thus should have been the focus, Mrs Warren identified her remit as a grievance of 'bullying and harassment'. Mrs Warren identified the six allegations by lifting them word for word from the e-mail itself, she completely omitted the first two paragraphs of the grievance, which clearly explain that the grievance was one of whistleblowing. Indeed the investigation into whistleblowing appears to play second fiddle to less important matters such as why the Claimant erroneously received the e-mails instead of concentrating on their content. Mrs Warren makes 'recommendations' and comes to 'conclusions' despite the fact that she believed she was in the 'informal stage' when no conclusions are envisaged. At no point does she make it clear to Mrs Faulkner that this is only intended to be indication of her views rather than a final outcome so that Mrs Faulkner can press the matter further to a hearing. Mrs Warren's report has all the hallmarks of finality with an intention to conclude the matter subject to any appeal. In fact, Mrs Warren does not even refer to any right of appeal thus giving the impression that this was it.

47. In addition the manner in which the information was gathered was regrettable. There appear to have been no face to face meetings with any of the interviewees. The conversation between Mrs Warren and Mrs Faulkner was brief and on a poor mobile telephone connection. Mrs Faulkner told her that the signal was not very clear (she was apparently in a car at the time) and it was not

possible to have any detailed conversation then. There was no attempt to have a conversation later, to have a face to face meeting or to invite the Claimant to come to the office to discuss the matter directly despite the serious nature of the complaints and allegations. The conversation with Mrs Faulkner came at the end of Mrs Warren's investigation rather than at the beginning. Mrs Warren appeared to take at face value what she was told by Ms Jones as to her belief that Mrs Faulkner contributed very little at meetings 'based on minutes of the meeting'. Mrs Warren did not actually look at the minutes themselves. Mrs Warren went on to say that she "accepts that the details may have been paraphrased or taken out of context when passed on to a third party" but it is not clear what the basis of that conclusion was. Her recommendation that there should be a face to face meeting with an offer of an apology failed to address the complaint. Either Mrs Faulkner had suffered a detriment because of whistleblowing or she had not. A face to face meeting to offer an apology was neither here nor there.

48. I recognise that Mrs Faulkner did not refer to the failings in the grievance process within her resignation letter at a time when she was receiving legal advice and I did consider carefully whether all of these criticisms were a factor in her decision. On balance, I am prepared to conclude that they were for two reasons. Firstly, the Claimant was extremely upset the day after she received the grievance outcome report and was unable to proceed with a conference call planned. Secondly, the Claimant gave compelling evidence at this hearing that it was the report which "tipped her over the edge" and thus had an effect on her overall decision to resign.

49. In the circumstances I am satisfied that the handling of the grievance and the delivery of the grievance outcome amounted to a 'last straw'. Neither of them can be said to be amount to innocuous acts as they certainly contributed something to the breach or series of breaches. Accordingly the allegation as to a breach of the implied term succeeds.

Affirmation

50. Mr Boyd argues that the Claimant has by her conduct waived any breaches and affirmed the contract. In particular he relies upon two matters. Firstly, the acceptance by the Claimant of sick pay from 6 April 2016 (the date of the alleged last straw) and her resignation on 22 July. Secondly, the Claimant's engagement with the sickness absence process and in particular her request at an occupational health meeting on 8 June 2016 for her to remain on full pay, instead of half pay, which would have commenced in July.

51. The leading case on affirmation is **WE Cox Toner (International) Limited v Crook** [1981] IRLR 443. That case was recently considered in **Colomar Mari v Reuters Limited** [2015] UKEAT/0539/13. In particular I am referred to paragraph 14 of **Cox Toner** where the EAT said, inter alia:

> "An employee faced with a repudiation by his employer is in a very difficult position. If he goes to work the next day, he will be doing an act, which in one sense, is only consistent with the continued existence of the contract, he might be said to be affirming the contract. Certainly, when he accepts his next pay packet (ie, further performance of the contract by the guilty party) the risk of being held to affirm the contract is very great."

52. In **Colomar**, HH Judge Richardson referred to that passage as well as the earlier EAT decision of **Fereday v South Staffordshire NHS Primary Care Trust** (UKEAT/05/13/10). In the latter case the employee was dissatisfied with a response to a grievance and appealed. At the same time she asked the Respondent to exercise its discretion to continue her pay on full pay as sick pay

rather than the contractual provision of 6 months full pay followed by 6 months half pay. The EAT found that the Claimant had affirmed the contract.

53. In the **Fereday** case there were apparently other factors in addition to the acceptance of sick pay which went towards the finding of affirmation. In any event the Claimant's request for full pay was subsequently denied. Moreover, it would in my view be deeply unjust to defeat an otherwise successful claim of constructive dismissal simply because the Claimant had asked for contractual pay which request was in any event denied.

Whistleblowing issue

54. Whilst it is not formally conceded, I am satisfied that the Claimant made a protected disclosure in February 2015. It was treated as such. It bears all the hallmarks of a disclosure concerning the failure to comply with the legal obligation. In those circumstances it would easily the definition of a qualifying disclosure under section 43B ERA 1996. There is no dispute that the disclosure was a disclosure of 'information' or that the Claimant had a reasonable belief in making the disclosure. The only issue is one of causation.

55. This has been an unusual case is that there has been no direct evidence from those involved in the CCG, not least perhaps because they are not the Respondent in these proceedings. In particular has been no evidence from Ms Jones whose testimony might have been relevant.

56. The question at the end of the day is whether the main reason for the (constructive) dismissal was that the Claimant had made a protected disclosure. That leads to the question of why Ms Jones said what she did about the Claimant.

57. Mr Beaver accepts that this part of the claim is not about the actions of Mrs Warren or Mr Timson and that their conduct so far as the whistleblowing is concerned is irrelevant. Mr Beaver points to the sudden and unexplained loss of a significant part of the Claimant's job role shortly after the receipt of the two e-mails from Ms Schroeder which were comments or reports emanating from Ms Jones.

58. In the absence of evidence from Ms Jones, I cannot be certain as to her motivation in providing the information to Ms Schroeder. Equally, I cannot be certain as to the motivation, thought process or reasoning behind the remarks made that the Claimant rarely showed at EMAS meetings, contributed within them or in asking what the Claimant was doing during the day implying that the Claimant was not working at full capacity. It would be wrong for me to speculate upon Ms Jones' reasons for saying what she did. In the absence of any primary facts I am unable to draw any inference that the reasons were in any way connected to or caused by reason of the protected disclosure.

59. On the other hand there are good reasons why it is unlikely that there is any causal connection between the protected disclosure and the resignation:-

59.1 The conduct in question which led to the protected disclosure was that of Mr Marwaha who was subsequently disciplined. There is no evidence that Ms Jones was ever disciplined in relation to the disclosure. That would suggest an absence of any motive on the part of Ms Jones.

59.2 It is quite possible that Ms Jones may have honestly held her

beliefs about the Claimant's performance and work irrespective of any protected disclosure.

59.3 Some of the comments which the Claimant found upsetting appear to be (on at least one reasonable interpretation of the e-mails) the views of Ms Schroeder and not those of Ms Jones. There is no suggestion that Ms Schroeder was motivated by any protected disclosure.

59.4 The protected disclosure had occurred a long time ago and nothing had happened in the interim to prompt recrimination or reprisal.

59.5 There is nothing to suggest that Ms Jones would have the necessary influence for the CCG to suddenly change its plans from a transfer with no material changes to one where significant elements of the Claimant's job role were to be removed.

60. I do not find any causal link between the protected disclosure and the treatment of the Claimant. Accordingly the complaint of constructive dismissal by reason of whistleblowing is dismissed.

61. The issue of remedy is adjourned.

Employment Judge Ahmed

Date: 15 January 2018

JUDGMENT SENT TO THE PARTIES ON

16 January 2018

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FOR THE TRIBUNAL OFFICE