EMPLOYMENT TRIBUNALS

Claimant:	**Mrs S Lavell**
Respondent:	**Derbyshire Healthcare NHS Foundation Trust**
Heard at:	**Nottingham**
On:	**8, 9, 10 and 11 January 2018**
Before:	**Employment Judge Vernon (sitting alone)**
Representation	
Claimant:	**In person**
Respondent:	**Ms Patterson (Counsel)**

JUDGMENT

The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Background

1. By an ET1 Claim Form presented on 25 January 2017, the Claimant made a claim of constructive unfair dismissal. The details of her claim were set out in a separate document attached to the ET1 Claim Form. The Respondent presented its ET3 on 24 February 2017 in which liability for the Claimant's claim was denied.

2. The claim came before the Tribunal on 5 April 2017 for a Preliminary Hearing conducted by Employment Judge Milgate. At that Preliminary Hearing, the factual basis of the Claimant's claim, in summary, was clarified as follows:

2.1 The Claimant worked for the Respondent as a secretary in the Medical Education Department;

2.2 In 2012, it was agreed that she could work most of her hours from home. That agreement coincided approximately with the birth of her child. The agreement was that she could work at home, save for a minimum of 2 and a maximum of 4 hours per week which had to be worked on site. She was also required to be present for other meetings on an ad hoc basis. The Claimant says that that arrangement continued until late May 2015;

2.3 In a series of events beginning in late May 2015, the Claimant complains that the Respondent told her that she could no longer continue to work most of her hours at home but must instead work more hours on Trust premises. She objected to the change;

2.4 Thereafter, the Claimant raised a grievance which was the subject of an investigation, a grievance hearing and an appeal. The Claimant complains that that process, as well as the process of handling the proposed contract change, was handled poorly by the Respondent;

2.5 The Claimant was then given an amendment to contract form on 17 November which prompted her to resign from her employment on 21 November. She says that her resignation amounts to a dismissal.

3. At the Preliminary Hearing before Judge Milgate, the Claimant clarified that her constructive unfair dismissal claim was based on two alleged breaches of her contract of employment, namely:

3.1 an anticipatory breach of the home working clause in her contract; and/or

3.2 an actual breach of the implied term of trust and confidence, namely the Respondent's treatment of her in connection with the proposed change to her contract of employment.

4. The Claimant was directed to provide additional information in relation to the alleged breach of the implied term. She did so in a document dated 9 May 2017 which appears at pages 70 to 73 of the bundle. The allegation was broken down into 4 broad areas of complaint as follows, each of which were further sub-divided into specific allegations:

4.1 the proposal to change her contract of employment;

4.2 the procedure adopted by the Respondent to effect the change to her contract;

4.3 the Respondent's handling of the formal grievance process; and

4.4 the impact of departmental management on the Claimant's working environment.

5. On 26 May 2017, the Respondent filed an Amended Response. Liability for the Claimant's claim remained denied. In summary, the Respondent's case is as follows. The Respondent did not breach any term or terms of the Claimant's contract of employment, express or implied. If there was any breach, it was not sufficiently fundamental to entitle the Claimant to resign in response to it and, in any event, the Claimant delayed too long after any such breach so as to be taken to have affirmed the contract of employment.

Evidence

6. The Tribunal was provided with a bundle of documents which ran from page 1 to page 547.

7. In addition, the Tribunal was provided with 10 witness statements. On behalf of the Claimant, witness statements were provided by the Claimant, the

Claimant's husband (Mr. Stephen Lavell) and Dr Jawahar, an employee of the Respondent.

8. On behalf of the Respondent, seven witness statements were provided from a) Sharon Starkey, the Respondent's Medical Education Manager, b) Gary Southall, the Respondent's Principal Workforce and Organisational Development Manager, c) Dr Gopal, the Respondent's Director of Medical Education, d) Rachel Kempster, the Respondent's Trust and Risk and Assurance Manager, e) Dr Sykes, the Respondent's Medical Director, f) Dr Brown, a Consultant Psychiatrist employed by the Respondent and g) Karina Gaunt, the Respondent's Health and Safety, Fire and Security Manager.

9. In addition to the written statements, I also heard oral evidence from all of the witnesses. All witnesses were cross examined by the other party.

Issues

10. At the outset of the hearing, and following discussion with both parties, it was agreed that the issues to be resolved were as follows:

    10.1 Do the facts established by the Claimant show that the Respondent committed a fundamental breach of her contract of employment? The breaches relied upon by the Claimant are those that I have referred to above;

    10.2 Did the Claimant resign in response to any such breach or breaches?

    10.3 Did the Claimant delay too long in resigning so as to have affirmed the contract?

Findings of Fact

11. The Claimant was born on 29 October 1980 and is now aged 37. She commenced employment for the Respondent in September 2011. She was employed as Postgraduate Secretary. That role involved her providing administrative support to junior doctors and supervisors along with the

Associate Director for Medical Education ("ADME") in the south of the Respondent's region.

12. The Respondent's organisation covers a very large geographical area. It has northern and southern areas within it. The main centre in the north is Chesterfield. As set out in the evidence from Dr Gopal, the arrangement in the north is a simple arrangement comprising a central hub at the Hartington Unit, together with one other hospital and other community buildings. The situation in the south is somewhat different. The main geographical focus in the south is in Derby, but there are several different units including the City Hospital site, the Ashbourne Centre, the Radbourne Centre, St James's House, a unit at London Road in addition to other community units.

13. The Claimant was contracted to work 30 hours per week. She was initially required to work those hours entirely on Trust premises. At the beginning of May 2012, the Claimant applied for a change to her terms and conditions. She asked to be allowed to work the majority of her hours from home. In doing so, she indicated that the rationale behind that request was to allow her to combine her work with her child care commitments.

14. The change was supported by the then ADME, Dr Kumar. He agreed that the Claimant should work from Trust premises for 2 sessions per week (i.e. a minimum of 2 hours and a maximum of 4 hours) with the remainder of her time spent working at home. It was indicated that she should also attend other meetings on an ad hoc basis as required. An amendment to contract form was completed which appears at page 143 of the bundle. That was signed by the Claimant and Dr Kumar in late June 2012. Thereafter, the Claimant worked subject to that arrangement for approximately 2 ½ years.

15. Notwithstanding the terms agreed in 2012, the working hours which the Claimant spent on site increased progressively. In her evidence, the Claimant said that by 2015 at the latest, and on average, she was working in excess of 11 hours per week on site. Upon further questioning, she said that every week without fail, she worked at least 9 ½ hours and up to 11 ½ hours

spread over 2 days (i.e. a Tuesday and a Friday). In addition, she would attend other sessions on site including ad hoc meetings and induction training.

16. During the early stages of the Claimant's employment, she worked closely with the then ADME in the south, Dr Kumar. At that time, Dr Gopal was the ADME in the north. Dr Gopal then became Acting Director of Medical Education in 2012 and was appointed formally to the role in September 2013.

17. In September 2014, the Respondent received a visit from Health Education England ("HEE"). A report was produced in October 2014. Amongst the conclusions of that report was a recommendation that the Respondent should ensure that there were robust plans in place to ensure adequate clinical and educational supervision for trainees when more senior staff members were absent. On the evidence I received, I find that that conclusion was prompted by a clinical issue which arose within the Respondent's organisation.

18. However, the report prompted a review of the medical education training structure led by Dr Gopal in his role as Director of Medical Education.

19. In early 2015, it appeared that that review may lead to some change in the administrative provision. The Claimant was told of that possibility in a meeting in February 2015, although the detail of exactly what was envisaged was unknown at that time. No specific details were given to the Claimant as to what changes there might be for her personally.

20. On 27 May 2015, a meeting took place between Sharon Starkey, Kathy Roberts and the Claimant. The meeting took place in a café. Although that was a regular meeting place for them, the Respondent now accepts that the meeting should not have taken place in a public place. The purpose of the meeting, at least in part, was to discuss plans for the department and to propose changes to the Claimant's working pattern.

21. There is a dispute of fact between the parties as to exactly what was said in that meeting. The Claimant says that she was told that she could no longer work from home and that a 3 month notice period would begin on 1 June. She says she was told that she could provide a response but that her notice period would begin irrespective. Ms Starkey's evidence was that the Claimant was asked to consider what had been discussed over the subsequent few days and that no emphasis was put on the need for her to respond.

22. In her oral evidence, the Claimant accepted that no emphasis had been placed on any need to respond. However, she maintained that that was because her notice period would begin in any event.

23. The day following the meeting, in a detailed response, the Claimant recorded that she had been told that the notice period would begin on 1 June. On 1 June, Ms Roberts asserted in a reply to the Claimant that the Claimant had not been told at the meeting that she must respond within 2 days.

24. I am satisfied that something was clearly said during the meeting which led the Claimant to believe that she had to respond to the proposal by 1 June. I note that she recorded that in writing very shortly after the meeting. It is also clear that she acted in accordance with those thoughts following the meeting. However, it is equally clear in light of events that I will come onto, that the position was clarified within a relatively short space of time and that no formal notice was in fact given to the claimant on 1 June or at any other time.

25. The Claimant requested details of the discussion in writing. Those were provided the following day by Kathy Roberts in an email which appears at page 146. In her email, Ms Roberts set out that the change proposed was not led by HR but was to improve face to face accessibility between administrative employees and trainers, and trainees and the ADME's. Further, that it would be useful for those individuals to know where the Claimant would be and for the Claimant to be directly available to assist in

troubleshooting. The stated aim was to provide an integrated medical education function.

26. It was recognised that the Claimant had been working from home, but the email said that the Respondent could no longer support that arrangement. The email clarified that Dr Ranji, one of the ADME's in the south, had not specifically requested the Claimant's presence on site, but it did say that the Respondent needed the Claimant to be at a Trust base for regular periods of time each week to support the new structure and service. It also said that the Respondent was able to support occasional home working and hoped to find a mutual agreement with the Claimant.

27. Almost immediately thereafter, Kathy Roberts sent a further email to the Claimant saying that the Claimant could give her a call if she wished or they could catch up the following week.

28. There was then an exchange of correspondence over the next two days. Later on 28 May, the Claimant emailed Kathy Roberts saying that she was working on a response and planned to speak to Dr Ranji. The claimant said she struggled to see how her being in the office more would meet the aims set out in Ms Roberts' email, but she was happy to discuss the issue further.

29. Ms Roberts replied. She said that the feeling was that the Claimant should be present on Trust premises for at least 15 hours over 3 or 4 days each week and that the Respondent could not support less but was open to reach an agreement.

30. The Claimant further responded early on 29 May. She said that she would need to review the response that she had prepared in light of the suggestion of 15 hours, but that the suggestion "seemed reasonable". She said that she still had concerns over how the matter had been handled.

31. The Claimant formulated a detailed response to the discussion and the details that had been given to her. The initial part of her response was drafted before the Claimant received the suggestion of 15 hours per week as being the appropriate number of hours for her to be on site. In her response the Claimant said the following:

    31.1 She was already working on site for about 11 hours per week on average and she was usually on site for 3 days every week;

    31.2 She questioned the rationale behind the proposed change and again indicated that she did not see how the change would meet the objectives suggested by the Respondent;

    31.3 She had taken advice and understood that any such proposed change must be presented in writing and, if not agreed by her, must be followed by a period of consultation.

    31.4 Only once that consultation had taken place could she be given formal notice of the change and so the Claimant said any such notice period could not commence on 1 June.

    31.5 Further, there needed to be a genuine business reason for the change.

    31.6 She was already working on site on a Tuesday and Friday as well as working on site when needed on Wednesdays and Thursdays;

    31.7 She needed to understand what regular and occasional meant in terms of her working before she could suggest anything concrete;

    31.8 She was upset that the issue had not been raised with her before 27 May and that she was not aware that anyone thought her incapable of doing her job.

32. Her response was then amended on 29 May before it was sent. She added an addendum at the end of the letter. The Claimant indicated that she was willing to accept the idea of working 15 hours over 3 or 4 days in principle but was unsure how that arrangement worked within the agile working framework that had been referred to in the meeting on 27 May which said that home working could only be "occasional". She said that working over 3 days would be preferable for her, and that working over 4 days would be possible, but would provide less flexibility. She asked that matters be dealt with formally by a contract amendment and said that she looked forward to working out the specifics upon her return to work.

33. On 3 June, Kathy Roberts sent an email to the Claimant with an attached letter. The email said that the base for the Claimant had been identified as the library at the Kingsway site. It said that the ADME's in the south thought that the proposal was sensible and that Dr Gopal was also happy with the arrangement. In the letter, Kathy Roberts sought to correct certain things that had been set out in the Claimant's response, including the suggestions that the Claimant had been told that she must respond within 2 days and that she had been told that it could wait until the following week. Ms Roberts expressed that she was pleased that the Claimant felt able to be on site for at least 15 hours per week and that she would be happy to discuss further detail once the Claimant returned to work following her period of sickness absence.

34. The Claimant disagreed with some of the issues set out in the letter from Kathy Roberts and requested discussion involving someone impartial. On two occasions when doing so, the Claimant referred to mediation in emails which she sent.

35. The matter was then referred to Mr. Southall and a meeting was arranged with him for 19 June. That meeting took place. The Claimant attended. There is again a dispute of fact about what was said during that meeting. Mr Southall and Ms Starkey (who were both present at the meeting) recall that an agreement was reached that the Claimant could work 15 hours per week

over 3 days. The Claimant says that no such agreement was reached in that meeting.

36. I am satisfied that all three were doing their best to recall the events of 19 June, but clearly have different recollections of that meeting. On balance, considering all of the evidence about that meeting, I find that the Claimant did indicate in that meeting that she could work 15 hours per week on Trust premises. In coming to that conclusion, I have taken into account the following matters:

36.1 the evidence of Mr. Southall and Ms Starkey is clear that such agreement was reached in the meeting and I consider that it is difficult to understand how they could both be wrong or mistaken;

36.2 In addition, Mr. Southall recorded the agreement that had been reached in writing soon afterwards. His letter was detailed. It indicated the following:

36.2.1 that agreed proposals represented a change in the claimant's contract;

36.2.2 that it was necessary to amend the claimant's contract for 2 reasons: i) that no policy allowing home working on a permanent basis existed and ii) that the revised education structure required an administrative presence on site to provide consistency of approach between the north and the south and to enhance support provided to the ADME's and junior doctors;

36.2.3 Mr. Southall reminded the Claimant that her ability to work from home was not a substitute for child care or similar carer responsibilities;

36.2.4 it had been agreed by all at the meeting that 15 hours per week over 3 days, 10am to 3pm based in the library at the Ashbourne Centre, would enable the revised education strategy to be delivered and provide support to all parties;

36.2.5 the claimant had said during the meeting that that was the limit of what she could accommodate.

36.3 The letter went on to propose giving the Claimant 12 weeks' notice of the change once a form of words had been agreed to reflect what had been agreed at the meeting.

37. In any event, and at the very least, I am satisfied that Mr Southall and Ms Starkey clearly left the meeting on 19 June believing that agreement had been reached.

38. Almost immediately following the meeting the Claimant emailed Mr Southall to ask how a grievance should be raised. There was an exchange of emails between them over the course of the following few days. The conclusion reached was that, because the Claimant's proposed grievance would be against her immediate managers, any grievance would probably need to be raised with Dr Sykes, the Respondent's Medical Director.

39. On the same day the Claimant sent a formal written grievance to Dr Sykes. It raised 3 issues. Firstly, the change to her contract; the Claimant said that she could not afford what was being proposed. Secondly, the way in which the process of change had been handled. Thirdly, the Claimant's concerns about the running of the Medical Education Department.

40. On 3 July 2015, the Claimant was sent a letter inviting her to a formal consultation meeting to begin the formal process of proposing changes to her contract. That letter enclosed a draft consultation document. Paragraph 2.6 of that document set out a number of reasons underlying the proposed

change to the Claimant's working pattern. There were ten such reasons set out.

41. The proposal set out within the document was to amend the Claimant's working pattern so that she would work 15 hours per week over 3 days at the Kingsway site. The document set out details of the proposed consultation process, starting with an initial meeting with the claimant on 10 July, through to a proposed implementation date in late November 2015. It was clear from that document that the proposals originated from Dr Gopal.

42. It is clear that, by this time, the Claimant knew that no notice period was running and that a formal consultation exercise was to commence. The Claimant accepted the same in cross examination.

43. The Claimant responded that day. She challenged the assertion that 15 hours on site had been agreed in the meeting on 19 June. She said it had not. She also said that she had raised a grievance and so questioned whether it was appropriate to continue with the consultation process. She said that she had received advice from ACAS that if the contract did not allow change then she would have to be dismissed with a view to re-engagement on any new terms. She asked for a copy of the new contract but was told that she would receive such a document at the end of any consultation process.

44. On 6 July 2015, Dr Sykes formally acknowledged the Claimant's grievance. He told her that an investigation would commence, and that Rachel Kempster and Susan Purser had been appointed to investigate her grievance.

45. On 10 July 2015, a meeting took place between the Claimant and Dr Gopal. Ms Starkey and Kathy Roberts were also present. This was the first meeting envisaged by the draft consultation document. At the outset of the meeting, the Claimant indicated that she would like to use the meeting to discuss the proposed changes with Dr Gopal. A discussion took place. Dr Gopal set out

his thinking behind the changes and said that the two ADME's in the south had also accepted that there was a need for a greater on-site presence on the part of the Claimant. He said that there was a need to agree something with the Claimant if possible. The claimant said that that was difficult because of her child care issues and she could not afford child care on 3 days every week. The Claimant was asked what she would be comfortable with. She offered some suggestions, but also said that she felt pressurised into accepting something. She said she did not agree with the rationale for the change. She also said that she was not against working increased hours on site but that she was still pursuing her grievance. The meeting ended with a suggestion of a further meeting on 23 July.

46. Following that meeting the Claimant suggested that the consultation process should be placed on hold, pending her having a meeting regarding her grievance. That suggestion was agreed to by the Respondent in mid-July 2015 and the consultation process was therefore placed on hold.

47. The Claimant was then invited to a meeting regarding her grievance with Ms Purser and Ms Kempster. That meeting took place on 18 August. The points raised in the Claimant's grievance were clarified. There were three issues. Firstly, the contract change. Secondly, the process followed to change her contract. Thirdly, the concerns she raised in relation to the Department.

48. A suggestion was made to deal with the third issue separately in order to give Dr Sykes time to consider it and respond to it. The Claimant agreed to that course of action although she now indicates that she subsequently regretted doing so.

49. On 25 August 2015, Dr Sykes met with the Claimant to discuss part three of her grievance. He obtained details of the nature of her complaints and recorded them in an email which was sent to the Claimant on 1 September. The complaints were summarised at the end of the email. The email appears at page 211. The Claimant agreed that the summary was accurate.

50. At a meeting on 16 October 2015, the Claimant also raised concerns regarding the way in which forms were being filled in on behalf of trainees. The concerns were raised by the Claimant, but she felt that her concerns were not reflected in the notes of the meeting. She asked for them to be included and they were. By 21 October, five days later, the concerns that were raised by the Claimant had been accepted by the Respondent and a decision had been made that the Claimant would not have to follow the new proposed process with which she was unhappy.

51. On the same day, the Claimant chased up what was happening with the investigation being carried out by Dr Sykes. Dr Sykes responded saying that a report from Ms Purser and Ms Kempster should be available shortly. The Claimant responded asking about the other part of her grievance which Dr Sykes was looking at. Dr Sykes said he was planning to look at that side by side. After a request for further clarification, Dr Sykes said that part three of the grievance would not be considered as part of the forthcoming grievance hearing.

52. On 13 November 2015, the Claimant sent further information to Dr Sykes raising further concerns that she had regarding the management of the Postgraduate Education Department. Her concerns were set out in an email which appears at page 225 of the bundle.

53. Ms Kempster and Ms Purser finalised their grievance report. It appears at pages 233 to 241. It contained lengthy appendices which run from page 242 to page 301. The appendices included records of interviews which they had carried out with Dr Gopal, Kathy Roberts and Ms Starkey on 24 September 2015. The conclusions of the grievance report included the following:

    53.1 that any change to the Claimant's working pattern amounted to a change to her contract and had to be dealt with lawfully;

53.2 that there were conflicting views about what had been said during the meeting on 27 May, but that there was no evidence that the contract change had been formally imposed on the Claimant;

53.3 that Dr Gopal's witness statement provided business reasons for the proposed change to the Claimant's working pattern;

53.4 that the meeting on 27 May should not have taken place in a public place and that the consultation document should not have been shared with other members of the Department;

53.5 finally, given the reasons provided by Dr Gopal, the proposed contract change seemed reasonable.

54. Amongst the recommendations made in the report was a recommendation that Dr Gopal should lead engagement with the Claimant in order to agree a way forward in order to meet the aims and objectives identified by Dr Gopal.

55. The Claimant was then invited to a grievance hearing which was to take place on 15 January 2016 before a panel made up of Dr Sykes and Ms Liz Corcoran with Dr Sykes acting as Chair. The hearing took place. As part of that hearing, evidence was received from Dr Gopal.

56. The outcome of the grievance was sent to the Claimant in a letter dated 22 January 2016. The conclusions of the grievance panel included the following:

56.1 the Respondent had made an attempt to consult with the Claimant including at the meeting on 27 May and in subsequently providing a consultation document;

56.2 the panel concluded that there were business reasons for the change providing a reasonable basis for the proposed changes and came to

that conclusion after questioning Dr Gopal and Ms Kempster. I am satisfied that that is borne out by the notes of the meeting at page 383. Although the Claimant questions the accuracy of those notes in large part, there are no suggested amendments to the top section of page 383. It is clear from that section of the notes that Dr Sykes wanted to explore whether the Claimant had to be convinced of the evidence underlying the proposed changes before any changes could be made. He was told that there needed to be a good business case. In addition to that however, I also accept the evidence that I received from Dr Sykes who I found to be a very impressive witness. He was clearly careful to ensure that he did not just accept the word of Dr Gopal. He explained to me that changes can sometimes be supported by research and by underlying evidence, but often times (in the NHS particularly) they were not. He told me that sometimes changes are based on a change of strategy or on a vision for the future. He explained that that was in reality what the NHS was based upon. He summarised it using these words: “Innovation, evaluation and standardization”;

56.3 that Dr Gopal’s vision requiring the claimant to be present more on site was plausible;

56.4 the meeting on 27 May should not have been held in public and that the consultation document should not have been shared;

56.5 there had been an attempt at mediation in the meeting with Mr Southall on 19 June, but the meeting had been ineffective;

56.6 changes should not have been discussed within the Department before there had been discussion with the Claimant.

57. The recommendations of the grievance hearing panel included the following:

57.1 that the change to the Claimant's contract hours was reasonable and should be formalised in a job plan;

57.2 that Ms Starkey was to develop supportive line management for the Claimant including face to face supervision;

57.3 that Dr Gopal was to take a lead in order to agree a way forward with the Claimant; and

57.4 that the consultation process should recommence.

58. The grievance outcome letter also included an apology to the Claimant for the areas where things had not been handled correctly as identified in the letter.

59. The claimant was then sent minutes of that meeting on 22 February. She was asked to agree them. The Claimant suggested a number of amendments. However, she also said that she was unable to sign the notes even with her suggested amendments as they were not of sufficient quality. She complained that a number of main points that she had made appeared to have been missed from the notes. It is clear to me on a review of the notes that the Respondent had attempted to take notes. It had provided a note taker. The notes taken are relatively extensive. They run to 18 pages. They indicate that they are not intended to be verbatim. I would not expect them to be verbatim. They also seem to me to be the note taker's best attempt to capture what was said within the meeting. Further, the notes were provided to the Claimant. She was given an opportunity to amend the notes and she took advantage of that opportunity.

60. The Claimant appealed against the conclusion of the grievance panel in writing on 3 February. She challenged the accuracy of some of the points set out in the letter she had received from Dr Sykes. She maintained her version of events about the meeting on 27 May. She said that, subjectively she felt that management was trying to force her into accepting changes to her

contract. She continued to question the reasons given for why change was necessary. She said that she felt it unreasonable to expect her to work with Dr Gopal in order to reach a compromise. In particular, she said it was not appropriate given the concerns she had raised about Dr Gopal which were to be separately considered by Dr Sykes. She said that she felt there was no prospect that those concerns would be considered until an agreement was reached in relation to her contract. The claimant also referred to the grievance panel's conclusion that working at home did not equate to her being able to act as the primary care giver to her son during that time. She said that that meant she would have to secure child care for all of her working hours, not simply the hours that she was working on site and that that made her continued employment completely impossible. She said again that there had been no criticism of her work when done from home and that she was being forced into a position without any good or logical reasons for the proposed changes.

61. The Claimant then wrote again on 11 April querying when she might hear something in response to her appeal. It is clear that she had not heard anything by that time. It appears that the reason for that was that the person to whom the Claimant had been asked to send her appeal was at that time absent from work.

62. A letter was sent to the Claimant on 20 April apologising for the delay. Two days later a further letter was sent to her inviting her to an appeal hearing. She was given two potential dates and she chose the first of those dates, namely 12 May.

63. The Claimant attended the appeal hearing on 12 May. The appeal hearing was chaired by Dr Wendy Brown. Dr Sykes attended and presented a response to the Claimant's appeal which was set out in a full and detailed document which is included in the bundle. The Claimant attended. Dr Gopal also again attended as a witness.

64. The appeal panel considered the Claimant's appeal and did so specifically by reference to the points identified in her appeal letter. The conclusion reached by the appeal panel included the following:

    64.1 The Claimant should have been given a copy of the agile working framework in the initial meeting with Kathy Roberts;

    64.2 The consultation process regarding any changes had not been completed and needed to re-commence;

    64.3 The meeting with Mr Southall on 19 June had been at least in the spirit of mediation;

    64.4 It was felt difficult to resolve the conflict that existed in the evidence regarding what had been said in the meeting on 27 May and the panel felt the best way forward was to re-commence the consultation process;

    64.5 The appeal panel felt that sufficient detail was provided in the consultation document and in the information provided during the hearing by Dr Gopal to support a conclusion that there was a reasonable basis for the proposed changes.

65. Consequent upon those conclusions, the panel recommended further details be provided in a further consultation document or that there should be further dialogue as part of a consultation process. It also said that the investigation into the third part of the Claimant's grievance should be initiated as quickly as possible. It also recommended that further thought be given to the suggestion that the Claimant was not able to be a care giver for her son when working at home.

66. On 23 May 2016, Dr Sykes wrote to the Claimant seeking to agree the terms of reference for an investigation of the third part of her grievance. The

Claimant responded on 27 May, saying she felt Dr Sykes' summary was inadequate. She also said that she had asked for her concerns to be investigated externally and said that, in her view, it was therefore inappropriate to have two concurrent investigations. As a result, she said that she felt unable to discuss the matter further with Dr Sykes.

67. On 12 July 2016, the Claimant wrote to Karina Gaunt asking to raise matters under the Respondent's whistleblowing procedure. The Claimant met with Ms Gaunt on 13 July and a summary of her concerns was taken. The notes of that meeting reveal that the concerns raised were the same concerns which the Claimant had raised as part of her grievance. It is my conclusion that the Claimant was effectively seeking to raise those concerns again but using a different policy. In her evidence, I understood the claimant to explain that in doing so, she was effectively seeking to exhaust all internal processes before taking matters any further and was doing so as advised by ACAS.

68. The claimant's concerns were then further recorded in writing as appears at pages 473 to 478 of the bundle. As a result, a meeting was set up between the Claimant and Mr Dickson which was scheduled to take place on 12 August. Regrettably, Mr Dickson failed to attend that meeting and then on a subsequent occasion was unable to spend much time with the Claimant.

69. The Claimant was then asked to attend a further meeting on 8 September. She was told at that meeting that the consultation period would recommence on 19 September. She was sent a letter. That letter enclosed a revised formal consultation document setting out that the consultation period would run from 19 September to 16 October. The consultation document set out again the need for the Claimant to be present on site for 15 hours but said that it might be agreeable to the Respondent for her to work 12 hours on site. It then set out 2 options as to how 15 hours could be worked, possibly over 3 or even 2 days per week.

70. The claimant responded. She maintained the same position as she had done throughout the process. She said that she did her job well. She was

already available on site when needed. She did not agree with the reasons for the change and said that the change would detrimentally affect her.

71. Dr Gopal responded to the Claimant maintaining that the change was needed. He said that he had agreed that 15 hours could be worked remotely with 15 hours to be worked on site and that that arrangement would be reviewed in 18 months.

72. On either 16 or 17 November, the Claimant was then given a form entitled "Amendment to Contract" that recorded the proposed change to her terms of employment. The wording of the proposed change was as follows:

"contracted to work 15 hours remotely and 15 hours from a Trust base, this to be reviewed in 18 months".

73. On 21 November, the Claimant resigned from her employment. The reasons given in her letter of resignation for her decision were that she was forced into a contract change without any credible evidence that the change was needed, she was working with people who she knew had lied as part of the process and that she was not willing to agree to any such change without being giving evidence of the benefit to be derived from such changes.

Applicable Law

74. Employees with the requisite period of qualifying service have the right not to be unfairly dismissed as set out in section 94 of the Employment Rights Act 1996. There is no dispute that the Claimant had the necessary period of qualifying service.

75. For the purposes of a claim of unfair dismissal an employee is dismissed in the circumstances set out in section 95 of the Employment Rights Act. In this case the Claimant relies on section 95(1)(c) which reads as follows:

"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."

76. That test is colloquially known as constructive dismissal. In the case of **Western Excavating (ECC) Ltd v Sharp [1978] 2WLR 344, CA** it was held that in order to establish a dismissal in such circumstances the Claimant bears the burden of proving the following things: a) that there was a breach of a fundamental term of the contract of employment committed by the Respondent; b) that the Claimant resigned in response to that breach; and c) that the Claimant did not delay too long in doing so, in order that it could be said that he had waived the breach or affirmed the contract.

77. The Claimant's case includes an allegation of a breach of the implied term of trust and confidence. That term has been described by the courts in various ways over the years, but the generally accepted formulation is that set out in the case of **Malik v BCCI [1998] AC 20, HL** as follows:

"an employer will not, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously damage the relationship of trust and confidence that exists between employer and employee."

78. Any breach of that implied term is almost inevitably a breach of a fundamental term of a contract of employment (see **Morrow v Safeway Stores Plc [2002] IRLR 9**).

79. A breach of the implied term can be committed by an isolated incident or by an accumulation of incidents which taken together amount to a breach of the implied term.

80. When assessing whether there has been a breach of the implied term, the tribunal must consider what the Respondent did and not the Claimant's reaction to it. Further, the question of whether the term has been breached is to be considered objectively.

81. I have also considered the case of **Kerry Foods Ltd v Lynch [2005] IRLR 680**, a copy of which was provided to me by Miss Patterson. That is a case in which the employer gave notice of dismissal to an employee in combination with a proposal of new terms and conditions upon which the employee would be re-engaged. In that case, the claimant alleged that such action amounted to a breach of the implied term of trust and confidence. The Employment Tribunal at first instance agreed, but the Employment Appeal Tribunal overruled the decision of the Employment Tribunal. In giving judgment, His Honor Judge Peter Clark said that such facts cannot give rise to a breach of the implied term of trust and confidence because the giving of lawful notice cannot of itself constitute a breach of the implied term.

82. Further on in the judgment, at paragraph 21, Judge Clark said the following:

"*An employer's service of a lawful notice of termination coupled with an offer of continuous employment on different terms cannot of itself amount to a repudiatory breach of contract. There is no present breach of the existing terms, nor an anticipatory breach in indicating lawful termination of the contract on proper notice.*"

83. Even if the Claimant proves that there has been a dismissal within the meaning of section 95(1)(c), the dismissal can still be fair.

84. If that stage is reached, it is for the Respondent to show a potentially fair reason for the actions taken. The Respondent says that the requirement to change the Claimant's contract is that reason and that that amounts to some other substantial reason within the meaning of section 98(1) of the Employment Rights Act.

85. If that falls to be considered, the Tribunal also has to consider the reasonableness of any dismissal in such circumstances.

Analysis and conclusions

86. In order to succeed in her claim of unfair dismissal, the Claimant must prove that she has been dismissed. It is not admitted by the Respondent that she has been dismissed.

87. In order to do so, the Claimant must prove that the Respondent committed a fundamental breach of her contract of employment (either actual or anticipatory), that she resigned in response to that breach or those breaches, and that there was no delay constituting a waiver of the breach or an affirmation of the contract.

Anticipatory breach

88. The Claimant's case has two aspects to it as set out above. I turn first to the allegation of an anticipatory breach of the term of her contract which relates to her working pattern. The anticipatory breach relied on by the Claimant is the proposed change to her contract of employment i.e. that she could no longer continue to work at home in accordance with the contract change which had been agreed in 2012.

89. It was not in dispute that the Claimant's contract was changed in 2012 in order to allow her to work from home for the majority of the time. The Respondent accepts that a change to that term required a change to the Claimant's contract of employment.

90. It is common ground that at the time the Claimant resigned no change had actually been made to that term of her contract and so there was no actual breach of the term. That is why the Claimant's case is formulated as an anticipatory breach.

91. In my judgment, proposing a change to the Claimant's contract of employment is not a breach of her contract of employment. Whilst a unilateral variation of it would be, that is not what happened here. What happened in this case is that the Respondent proposed a change to her

terms and conditions. It was open to the Claimant to accept that change or reject it.

92. It is clear to me that all parties were working on the basis that if no agreement could be reached, the Claimant would have to be given notice of dismissal and be offered re-engagement on the new proposed terms. It seems clear that that was in fact the Claimant's own understanding. She had recorded as much in writing early in the process as described above.

93. In addition, applying the principles established in **Kerry Foods Ltd v Lynch**, there is no anticipatory breach of contract if the action anticipated is a lawful action. It is unquestionably lawful to terminate an employee's contract on notice and to offer re-engagement on new terms. Whilst those actions may in due course give rise to an unfair dismissal claim on the basis that there was an express dismissal, the action of terminating on notice is not an anticipatory breach of the contract.

94. For those reasons, and insofar as it relies on the allegation of an anticipatory breach of the express terms of her contract of employment, the Claimant's claim is not well founded and fails.

95. I must turn next to the allegation of the breach of the implied term of trust and confidence.

Breach of the implied term of trust and confidence

96. I start by reminding myself of the general principles set out above. The behaviour that I have to look at is the behaviour of the Respondent and not the Claimant's reaction to that behaviour. I have to take an objective view and not be swayed by the subjective view of others. Further, the behaviour of the Respondent has to be serious; in order to breach the implied term, there has to be behaviour which destroys or seriously damages the relationship of trust and confidence. Those words should not be taken lightly and should not be down played; behaviour that is simply unreasonable will not suffice.

97. I turn then to look at the broad areas of complaint set out in the Claimant's additional information (at page 70 of the bundle).

98. The first area of complaint is the proposal to change the Claimant's terms of employment. As I have already indicated, in my judgment it is entirely open to the Respondent to propose changes to an employee's contract of employment. What it cannot do is to unilaterally vary those terms and conditions but, as I have already found, that is not what the Respondent did. Further, the authority of **Kerry Foods v Lynch** indicates clearly that acting lawfully, as I have found the Respondent did, is not a breach of the implied term of trust and confidence. I come to that view whatever the effect may be upon the Claimant.

99. Turning to point 1.1 and 1.3 set out on page 70, the Claimant sets out her complaints that a) no evidence was provided to support the need for the proposed change to her terms and conditions and that b) the Trust has no policy on home working so has no remit to enforce a change without providing a valid business reason.

100. In my judgment, these complaints are really at the heart of the Claimant's complaint in this case. Her complaint is that there no documentary evidence was provided to support the vision of Dr Gopal. It is not in dispute that no such documentary evidence was provided.

101. However, in my judgment, the fact that no documentary evidence was provided is not the same as saying that there is no evidence upon which the Respondent could proceed or on which a grievance hearing panel or an appeal panel could make the decisions that they made.

102. Dr Gopal provided evidence throughout the process and has provided evidence to me as to how he felt the changes would benefit the south of the region. I consider it significant that his evidence was sufficient to persuade

both Dr Sykes and Dr Brown and their colleagues on the grievance hearing panel and the appeal panel of his views.

103. Further, in my view it is entirely understandable that considerable weight was given to the views of the Director of Medical Education, whose job it was to formulate strategy on behalf of the Respondent.

104. Although the Claimant is correct to say that there needs to be good reason for a change to her contract of employment, that does not mean that the Respondent has to prove to the Claimant's satisfaction that the changes proposed will result in the benefit suggested. The Respondent does not have to demonstrate the extent to which any benefit will be obtained.

105. The Respondent must identify a good reason. I am satisfied on the evidence that Dr Gopal had good reasons for the proposed change. The fact that the Claimant does not agree with his reasons does not mean that they are not good reasons. He clearly had reasons; there is no doubt about that. They are set out in various documents within the bundle. This is not a case where Dr Gopal has simply decided on a policy with no rationale at all. In my judgment, for me to find that no good reason existed would effectively require me to place myself into the shoes of the Respondent and to decide what I would have done in the same circumstances. In my assessment it is not appropriate for me to do that.

106. Further, as I have already said, it is not necessary in any event for the Respondent to prove that the benefits suggested would definitely result or to show the extent to which any benefits may result as a result of any changes.

107. In those circumstances, I find that the Claimant has not established that the Respondent's proposal to change her contract amounted to a breach of the implied term of trust and confidence whether viewed in isolation or in conjunction with other aspects of her complaints.

108. For the same reasons, I also conclude that it was entirely reasonable for both the grievance and appeal panels to come to the conclusions that they did on the evidence that was available to them.

109. To the extent that complaint about those decisions is included in the other broad areas of complaint put forward by the Claimant, I consider that those complaints are not well founded and do not amount either in isolation or in conjunction with other issues to a breach of the implied term of trust and confidence.

110. I then turn to the remainder of the Claimant's complaints and my conclusions are as follows.

111. I find that several aspects of the Claimant's further complaints are not made out:

111.1 The Claimant complained that there was no consultation about the change to her contract. In my judgment, when the facts are considered as a whole, that is clearly not the case. The Claimant was consulted about the changes in 2015. That process was aborted because the Claimant raised her grievance. She was then again consulted in 2016. Even if no consultation period was initially offered to the Claimant at the meeting on 27 May, I am satisfied that the appropriate approach is to look at the complete picture, rather than a snapshot in time. When that approach is taken, the Claimant was clearly consulted about the proposed changes.

111.2 The Claimant complained that nobody took ownership in relation to the proposals. Again, looking at the facts of the case as a whole, at least by the time of the original consultation document it is clear that the ideas originated from Dr Gopal. I find that there is no foundation to the Claimant's complaint.

111.3 I do not accept the assertion that any of the Claimant's colleagues lied about what had been said during any part of the process. It is clear to me that, on a number of occasions, parties to various meetings have had different recollections of events. I consider that to be entirely natural. Further, there is a fundamental difference between individuals having different recollections and genuinely and honestly recounting them when asked to do so (on the one hand) and an individual lying by giving a false account of events (on the other hand). By way of example, I have found above that the events of the 19 June meeting were as recalled by Mr Southall and Ms Starkey. In coming to that conclusion, I am not in the least suggesting that the Claimant was lying when she gave a different account of those events. I am simply reflecting that there is a difference in their recollection and that one account seems more likely than the other.

111.4 The Claimant complained about the fact that her grievance was separated into three parts. I see no foundation in that complaint at all because the Claimant agreed to that course of action. Even if she subsequently regrets doing so, I struggle to see how the Respondent's actions in doing something the Claimant agreed to could be a breach of her contract of employment.

111.5 The Claimant's complaint about the notes of the grievance hearing is a clear expression of her subjective view about those notes. However, viewed objectively, it is clear that notes were taken. They are quite detailed, and I am satisfied that they reflect an attempt to obtain an accurate note of the meeting. In any event, the Claimant was given an opportunity to amend the notes and she was able to take advantage of that opportunity. That is exactly what I would expect from a process such as the one undertaken.

111.6 Section 4 of the Claimant's document at page 73 includes a complaint of unethical practices that she was forced to adopt. As I understand her case, that rather vague allegation relates to the requirement to fill

in forms on behalf of trainees. In relation to that complaint, I have found that the Claimant's concerns, once raised, were heeded and that she was told that she no longer had to comply with the altered process. All of that took place within a period of one week.

112. The remaining allegations in points 4.2 and 4.3 of the Claimant's additional information seem to me to be criticisms of the way in which Dr Gopal and the senior management managed the department. In my judgment, management decisions about the structure, recruitment and utilisation of resources are a matter for the prerogative of management and do not amount to any breach of the Claimant's contract of employment, including the implied term of trust and confidence.

113. Notwithstanding those conclusions, the Respondent admits that there were failings in relation to some of the Claimant's complaints. Specifically:

113.1 It is accepted that the meeting on 27 May 2015 should not have been held in a public place.

113.2 It is accepted that documents were shared within the Department when they should not have been shared.

113.3 The appeal panel agreed that the Claimant should have been given a copy of the agile working framework much earlier than she was.

114. In addition, there are other issues which, in my judgment, could clearly have been handled better that they were by the Respondent:

114.1 The Claimant clearly referred to mediation in two emails she sent to Mr Southall. The meetings which followed did not comply strictly with the Respondent's mediation policy.

114.2 There were considerable delays in the processes undertaken, particularly at the appeal stage of the grievance. However, I note that the full grievance process was completed, providing the Claimant with an opportunity to raise her grievance, and to have it investigated and considered at a hearing and an appeal hearing.

114.3 There was a long delay in the investigation into part three of the Claimant's grievance. However, I note that Dr Sykes did seek to restart it following the outcome of the grievance appeal, but the Claimant said that she did not wish to proceed at that stage, indicating that it would not be appropriate to have external and internal processes running concurrently.

114.4 After seeking to initiate the whistleblowing procedure, the meeting with Mr Dickson did not take place because Mr. Dickson failed to turn up and then, on the next occasion when he did turn up, he didn't have sufficient time to go through things satisfactorily with the Claimant. The process envisaged was not completed, although I find (in large part) that is because the Claimant resigned before it could be completed.

114.5 Finally, meetings which took place between the Claimant and Ms Starkey and Ms Roberts did not amount to proper one-to-one supervision of the Claimant. That issue was identified as part of the grievance process and I note that changes were made to the way in which the Claimant was supervised thereafter.

115. Having concluded in paragraphs 113 and 114 above that some of the Claimant's factual complaints are established, the next question which I must therefore go on to consider is whether those matters amount to a breach of the implied term of trust and confidence.

116. Whilst I am prepared to accept that those issues are highly significant to the Claimant, I have to remember that it is not the Claimant's reaction that is

important; it is what the Respondent did. In viewing matters in that way, I find that those matters, viewed objectively, are not sufficiently serious to amount to a breach of the implied term of trust and confidence.

117. For all of the reasons set out above, I find that the Claimant has not established that the Respondent committed a breach of her contract of employment.

118. As the Claimant has not established that the Respondent committed any fundamental breach of her contract of employment she cannot prove that she was dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996. Without proving that she was dismissed, she cannot establish that she was unfairly dismissed.

119. In those circumstances, her claim fails.

_____

Employment Judge Vernon

_____

Date 6 April 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

09 April 2018

.....

.....
FOR THE TRIBUNAL OFFICE