Case Number: 3201572/2017

JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Bakasa**

Respondent: **Barking, Having and Redbridge University Hospitals NHS Trust**

Heard at: **East London Hearing Centre**

On: **28 & 29 June (in Chambers) 9 July 2018**

Before: **Employment Judge A Ross**

Representation

Claimant: **In Person**

Respondent: **Ms S Ramadan, solicitor**

JUDGMENT

The judgment of the Tribunal is that:-

1. **The complaint of constructive unfair dismissal is not upheld.**
2. **The claim is dismissed.**

REASONS

1. The Claimant was continuously employed by the Respondent as a nurse from 21 July 2008 until she resigned on 5 July 2017.

2. By a claim presented on 21 November 2017, the Claimant complained of constructive unfair dismissal. The Claimant had complied with the early conciliation provisions and was issued with an ACAS certificate dated 26 October 2017.

The Issues

3. I drafted a list of issues which the parties agreed after amendments to it were made. This is the appendix to this set of reasons.

4. On the first morning of the hearing, the Claimant applied to amend the claim to include complaints of direct race discrimination. This application was prompted by Ms Ramadan because the Claimant's witness statement referred to discrimination and victimisation.

5. This application was refused for the reasons given orally at the time.

6. The Claimant explained that her witness statement for the hearing was different from that in the witness statement bundle because she had been represented by solicitors until shortly before the hearing and had then had to complete it herself. I took into account the fact that she was no longer represented and had had a limited opportunity to prepare as a litigant in person. I permitted her to amend her witness statement further to a further version produced on 29 June 2018 containing all the page references that she wished to refer to.

The Evidence

7. There were two lever arch files in the bundle of documents which clearly was too many for a case given the two day listing. I understood that this bundle was agreed. There was no objection to its contents. Page references in this set of reasons refer to pages in that bundle. On the second day of the hearing, the Claimant produced a small bundle of documents which I was asked to read and take account of, which I did. I marked these 'C2'. 'C1' was a Unison case form which the Claimant had relied on in the amendment application.

8. I read and heard all evidence from the following witnesses:

    (i) the Claimant
    (ii) Richard Brakasa, her husband
    (iii) Dovejah McLean, Clinical Educator
    (iv) Fay Deasy, Ward Manager
    (v) Linda Hassell, Divisional Nurse for Child Health

    Also, I read a witness statement of Martin Lambat (the Claimant's uncle) which I took as read. There was no challenge to it and it was of very limited relevance.

9. The Claimant was an unreliable witness demonstrated by a number of pieces of evidence which I shall come to. Whether there was any conflict of fact, I preferred the evidence of the Respondent's witnesses and matters stated in their documents to which they have referred.

10. I find that the Claimant's recollection of events was adversely affected by the stress that she felt over the illness and subsequent death of her mother. The Claimant had however, an entirely misplaced sense of grievance, believing other nursing staff had acted against her and that the disciplinary investigation was only made on the basis on rumours. Rather than accept the evidence as showing a genuine matter for the Respondent to investigate, the Claimant tried to fill gaps in her evidence with what she believed to be the case, rather than standing back and seeing what picture had been presented to the Respondent by the documents that were collected and the witness evidence.

11. The Claimant was emotional on the second day of the hearing and at one point said that she wanted to ask no further questions of any witness. I proposed an adjournment and after this adjournment the Claimant was able to continue with her questioning.

The Facts

12. The Claimant worked as a staff nurse in the neo-natal intensive care unit. The babies in this unit are extremely vulnerable, and have been born prematurely. The first few hours and days of their life are crucial. They require constant and careful monitoring, such as temperature checks.

13. The very premature babies in the unit may receive Total Parental Nutrition ("TPN") which is received intravenously and which contains all the daily nutrients required by the baby.

14. Unsurprisingly, there are strict guidelines for handling and administering TPN. The Respondent's neo-natal parental policy (page 60-87) includes the requirement to keep TPN bags sterile. This is very important for babies in NICU because they are prone to infection. From the evidence I heard, the significance of these facts cannot be overestimated in the context of this case.

15. There are three types of TPN as set out in Ms McLean's witness statement. One is high sodium and phosphates (HSP TPN).

16. On about 22 December 2017, Sister Garcia informed Ms McLean that a medication error had occurred. Ms Mclean advised that an incident report be completed which was done on 22 February 2017 (page 361). This referred to an incident on 13 February 2017 and states:

> "**Incident Description**
>
> During the handover time, I have noted that baby was getting standard TPN (stock bag) instead of high sodium phosphate TPN. The nurse who is looking after this baby told me that she could not find the correct bag. The nurse informed the sister in charge on day shift but she found the correct TPN bag after some time and she changed the bag before her shift end".

17. It appears from the documents that Nurse Quimpa first raised her concerns to Sister Garcia. Her email to Sister Garcia of 20 February 2017 states as follows:

> "… I would like to brought in your attention about what happened in the Clinical area last Feb 13, 2017.
> I checked the TPN of baby O prescribed as TPN HSP and both of us signed the prescriptions charts. But when the night staff took over from her, (who was SN Babu), what she received hanging on the pump was TPN Standard.
>
> Then, next day, one of the SSN phoned me about it, that what was hooked on nurses took over was Standard bag and apparently changed back to TPN HSP, and somebody had seen SN Bakasa took the TPN HSP from the big yellow sharps bin next to bed space 10.
>
> Last night, I worked with SN Bakasa, and told her about the incident, and she told me that it is not a big deal and its been sorted.

I pointed to her that my license is at stake as well, as it is me who checked with her, and this kind of practice is completely unacceptable.

But then last night she told me that "I am witch hunting "and that I am accusing her.

What I know we nurses are patients advocate, we have to protect our patent. Even myself made mistake in clinical area, its just a matter of knowing how to accept out mistakes.

Please I just hope this matter should be investigated."

18. Staff nurse Maguisma provided evidence by email to Ms McLean on 3 March 2017. This stated that she had told the Claimant that there was a TPN bag in the name of baby O in a sharps bin near the relevant cot (see page 373).

19. Ms McLean met with the Claimant on 23 March 2017 as part of the Trust Medication Error Policy in line with the Drug Error Management flow chart (page 181-183 and 183a-c). This meeting was not part of any disciplinary investigation.

Meeting 23 March 2017

20. At the meeting, the Claimant provided a statement of events (see page 375-377). At the meeting the Claimant stated that she found the missing HSP TPN in the fridge. The notes of this meeting are at page 378-379 which I find are accurate but not verbatim.

21. I preferred Ms Mclean's measured evidence as to the length of and the content of this meeting, corroborated as it was by documentary evidence. I found that the meeting involved no 'interrogation'; Again, Ms McLean's evidence was corroborated by the evidence.

22. The meeting began shortly after 2:00pm and lasted for between 1 hour and 1 hour 20 minutes. My reasons for preferring Ms Mclean's evidence as to the length of this meeting are as follows:

    22.1. The observation chart at page 370a satisfies me that Ms McLean rang the Claimant because she had been running late and the meeting could not start at the scheduled time of 1:00pm. Ms McLean rang the Claimant when she was free to start.

    22.2. The Cotside Expressed Milk Admin form (page 361a) shows the Claimant completed a patient's observation and prepared and checked expressed breast milk at around 2:00pm. The expressed milk was countersigned by another member of staff.

    22.3. The NICU Respiratory Care sheet (page 361b) does show that the Claimant completed a blood gas analysis at 15:33pm. She accepted that she signed for this entry which must be correct because this baby was in intensive care (according to Ms McLean's evidence) and needed close monitoring.

    22.4. The breast milk admin form shows the Claimant checked and prepared expressed breast milk at 4:00pm.

    22.5. I accepted the Claimant's evidence that she was a competent nurse. This

led me to reject her evidence that she completed and signed for activities hours after the event because this would be inconsistent with the purpose of such a strictly controlled environment for vulnerable babies.

22.6. The Claimant's evidence was totally inconsistent with the documents and with previous statements of her own about the length of this meeting.

22.6.1. In her ET1 (paragraph 23) the Claimant claims that the meetings with Ms Mclean lasted or up to 4 hours "*on each occasion*";

22.6.2. In her witness statement (paragraph 59) the Claimant stated that the meeting lasted from 3-4 hours;

22.6.3. In her oral evidence the Claimant admitted in cross examination that the meeting on 23 March 2017 lasted a maximum of 2.5 hours;

22.6.4. The Claimant's unsupported assertion that the document at page 307a had been in some way fabricated by the addition of her initials for the entry of 14:00 and 16:00 caused me to treat her oral evidence with caution. After all, this was a very serious allegation and from what I can see, there was no basis in the evidence to support it. This was an example of the Claimant persuading herself that something that could possibly have occurred did in fact occur.

23. I rejected the Claimant's evidence that the meeting on 23 March 2017 was part of the disciplinary procedure because:

23.1. This is obvious from the invitation memos at page 372 and 372a headed 'Clinical Incident – TPN Preparation and Administration';

23.2. The Claimant accepted the flow chart at page 183 which discussed at the meeting, this is headed 'Drug Error Management Flow Chart' and is clearly not part of the disciplinary process (the disciplinary procedure is obviously separate demonstrated by the last box to the bottom right);

23.3. I accept Ms McLean's evidence brimming with explanation of what occurred in the meetings. She recalled telling the Claimant that, as it was not her first error, she would be dealt with under box 2.

24. I accepted all Ms McLean's evidence that there was no interrogation for the reasons that she gave. I found her evidence, as a whole, was corroborated by documents such as her notes of the meeting at page 378-379. All Ms McLean did was brought the evidence that she had received to the Claimant as she went through the medical error procedure. The Claimant's claim that Ms McLean was not entitled to ask her about the statements of others lacked insight and understanding.

25. I rejected the Claimant's evidence on this point for several reasons.

25.1. The coherence of Ms McLean's evidence can be contrasted with the inconsistencies within the Claimant's evidence as a whole;

25.2. The Claimant did not mention in her witness statement that this meeting was an interrogation;

25.3. The Claimant's explanation in cross-examination as to why it was alleged to be an interrogation was incomprehensible; she complained that Ms McLean had brought email statements to her, but this seemed a reasonable thing to do;

25.4. The Claimant made no complaint in the meeting that she was unable to put her case.

26. After the meeting, the Claimant went to speak to the Divisional Employee Relations Advisor, Ms Clarisse Ofosu-Appiah, because she was concerned at the risk of losing her PIN (that is her license to practice).

27. This was not because Ms McLean threatened the Claimant that she would lose her PIN if she failed to tell the truth. From all the facts, in the situation where the Claimant was admitting a medication error, the Claimant was afraid to admit what she had done because it was so serious and she was scared of the consequences of not admitting what she had done, which she knew could end up in the loss of her PIN. This is obvious from the Claimant's admission that she raised the issue of her PIN (page 428 investigatory meeting).

28. Ms McLean's notes show that after attending Ms Ofosu-Appiah's office, the Claimant returned to see Ms McLean and was concerned she would lose her pin. The Claimant insisted the TPN was found in the fridge and that she was being accused by colleagues. This further conversation lasted some 15 minutes.

29. On the advice of employee relations, Ms McLean collected further statements from two staff members mentioned by the Claimant as being relevant, being Sister Salapere and Sister Kilkan. These statements are at page 380-381 and 390. Ms McLean also had an email from Ms Asuncion.

30. It is clear from the statement of Sister Salapere that the Claimant was told she must complete an incident form. This would be such an obvious instruction to give in the circumstances where it is admitted that a baby was given the wrong type of TPN, that it is quite understandable that Ms McLean leaned to accepting nurse Salapere's evidence over that of the Claimant.

Meeting 29 March 2017

31. Again I preferred Ms McLean's evidence in every respect about this meeting. The documents all show this meeting was not part of any disciplinary process but was still part of the drug error procedure. Moreover, the Claimant's evidence lacked conviction. In cross examination, she withdrew the allegation that at this meeting she was threatened with the loss of her pin.

32. By the time of this meeting, Ms Mclean had received information from Sister Brighton the Claimant's supervisor. This concerned a ring that the Claimant claimed to have lost on the day of the incident but which was found in the sharps bin and that nurse Asuncion had used forceps to retrieve it. Nurse Asuncion was called to a meeting and denied this.

33. The Claimant's case throughout the meeting was that she took the TPN from the fridge, not the sharps bin and that staff were ganging up on her and lying about the incident. The Claimant was concerned about losing her pin and the consequences of a drug error.

34. At the end of the meeting however, as the Claimant was about to leave, Ms Mclean asked her again whether the TPN came from the sharps bin. The Claimant admitted that it did and began to cry. The Clamant admitted that she took it from the bin herself. This admission is recorded in the notes of Ms McLean at page 384 which I find to be accurate but not a verbatim record of that meeting and which were typed up from contemporaneous handwritten notes. Ms Mclean stated that she would have to inform employee relations. She proposed that the Claimant go for a break and that Ms McLean would take over care of her babies during this time.

35. Quite apart from seeing Ms McLean in the witness box and deciding that she was an honest witness, the documents corroborated her evidence. For example I find the meeting lasted between 1 hour 30 minutes and 1 hour 45 minutes for the following reasons:

    35.1. The Claimant's original allegation was that this meeting lasted 6 hours (see the investigatory meeting notes of 4 May 2017). This is absurd and not supported by any documentary evidence. This is also wholly inconsistent with the Claimant's witness statement which alleges that it lasted 3-4 hours.

    35.2. The Claimant completed the observation chart at 2:00pm (see page 366 which shows she initialled this entry). The Claimant's initials in the same form and appearance are present for each hour from 08:00 to 14:00. Then Ms McLean completed an observation at 4:00pm for a baby assigned to the Claimant's care, shown on the chart by Ms McLean's signature.

36. After the Claimant returned from her break, Ms McLean handed over her patients but again, the Claimant asked her what would happen to her because she was concerned about the disclosure that she had taken TPN from the sharps bin. Wisely, Ms McLean took the Claimant into her office to discuss this further. In this meeting the Claimant informed Ms McLean that her mother was in hospital having a surgical procedure. Ms McLean offered to take over the rest of the Claimant's shift so she could visit her mother and proposed that the Claimant take one week of annual leave. The Claimant was grateful for these and accepted.

37. Both meetings between the Claimant and Ms McLean on 29 March 2017 are captured in the notes of Ms McLean at page 384-385. Again, I preferred Ms McLean's evidence that there was no interrogation of the Claimant on that day.

The meeting provided the Claimant with a fair opportunity to explain what had really happened on 13 February 2017 which the Claimant took by admitting what she did.

38. In respect of the meetings of 23 March 2017 and 29 March 2017, the Claimant did not request rest breaks and was not refused any. There was no need for any; the meetings were not long meetings.

39. When the Claimant was asked about this in cross-examination, her evidence was inconsistent eventually saying that she may have asked for a break but she did not remember.

40. After the meeting of 29 March 2017, Ms McLean carried out the further investigations mentioned from paragraphs 30-35 of her witness statement.

The Decision to Suspend – 12 April 2017

41. I found Ms Hassell to be an extremely experienced and senior nurse. She was an excellent witness who gave wholly reliable and clearly recalled evidence in contrast to that of the Claimant. Her evidence was consistent with the documents.

42. Given the information received from Ms McLean from her investigation under the Medication Error Policy and her concern about the potential seriousness of the incident and the lack of documentation of it, it was inevitable that Ms Hassell would require a formal disciplinary investigation.

43. Ms Hassell decided that such a formal investigation was required on 5 April 2017. She appointed Fay Deasey to investigate. She selected her because she was not part of the neo natal team and was someone who would know best practice in that area. This ensured the investigation would be independent.

44. Ms Hassell was aware the Claimant had been on sick leave from 1 April 2017. There was no evidence that the investigation could not proceed in her absence for any procedural or other reason. The investigation included asking the Claimant to write a fresh statement given the inaccuracies in her first one. It is notable that Clarisse Ofosu-Appiah explained that the purpose of this was that it was in the Claimant's best interest to put her side of the case in writing. The Claimant was told this before the meeting to suspend so it is incorrect for the Claimant to state that she was suspended without an opportunity to put her side of the story (see the email of 5 April 2017 at page 397).

45. On or about 5 April 2017, Ms Hassell tried to call the Claimant to tell her that she needed to meet her to suspend her. Ms Hassell asked the Claimant to call her back in the voice message left. On about 10 April 2017, the Claimant's husband phoned Ms Hassell back and she explained why she needed to meet the Claimant. Ms Hassell could not suspend the Claimant through her husband.

46. Ms Hassell tried to meet the Claimant on 11 April 2017 but the Claimant had no trade union representative on that day. Therefore, Ms Hassell re-arranged the meeting for 12 April 2017. At that meeting, the Claimant stated that she wanted to get the matter over as quick as possible even though she was absent sick. Ms Hassell met the Claimant on 12 April and informed her that she was suspended on full pay pending investigation.

47. The Claimant did not object to the investigation notwithstanding her sickness absence. There was no challenge to the suspension. Ms Hassell informed the Claimant that she would have the opportunity to put forward her full and complete account of events during the investigation process. There was no real need for Ms Hassell to say this; the Claimant had already been advised that it was in her best interest to put her account in writing and she had already been interviewed twice by Ms McLean in which she had the opportunity to explain exactly what happened albeit not as part of any disciplinary process. The Claimant was satisfied by the suspension believing this was the correct procedure (see the note of her investigation meeting with Fay Deasey).

48. As Ms Hassell explained, the Claimant was suspended to protect herself and others from the risk of harm that the stress of an investigation might cause and to protect the trust from allegations of wrongdoing whilst she was under investigation.

49. After the meeting, Ms Hassell sent the Claimant a letter dated 19 April 2017 confirming why the Claimant had been suspended. There was no challenge by the Claimant to the contents of that letter as to why she was suspended.

50. For all the reasons that Ms Hassell gave, there was reasonable and probable cause for the suspension of the Claimant. Moreover, Ms. Hassell explained why the meeting of 12 April 2017 was not the time for the Claimant to state her case. This opportunity was afforded to her by Ms Deasey in the disciplinary investigation.

The Disciplinary Investigation

51. Fay Deasey was appointed to investigate the incident involving the Claimant on 13 February 2017. The allegations included

    (i) that the Claimant administered the incorrect TPN to the bay;

    (ii) the Claimant extracted the HSP TPN from a sharps bin and administered that non-sterile TPN to the same baby.

52. The Claimant was informed of the investigation by letter dated 10 April 2017 setting out all the allegations.

53. Ms Deasey interviewed all relevant witnesses including the Claimant and all relevant documents as explained in paragraph 4 of her witness statement.

54. The investigation meeting with the Claimant took place on 4 May 2017. The notes (page 425-432) clearly demonstrate that the Claimant had every opportunity to give her side of events. This is demonstrated most obviously by the following:

    (i) The Claimant was able to state she found the correct HSP TPN bag in the fridge and denied taking it from the sharps bin (which she had admitted during the meeting with Ms McLean on 29 March 2017).

    (ii) In interview, the Claimant stated she was "*glad the procedure is now being done correctly. I want to clear my name*". She did not at any point allege that she was not able to state her case during that investigatory

meeting.

55. At the end of the meeting, the Claimant stated that she would be handing in her notice and moving to Belfast for her husband's work. The Claimant was advised to put her resignation in writing.

56. From the evidence, I find it is likely that the Claimant resigned partly in an attempt to avoid the disciplinary consequences of what had occurred on 13 February 2017 and partly because of her husband's move to Belfast. It was not because of her suspension or for any of the alleged breaches. This is evidenced by

    (i) the lack of any blame attributed to the Respondent in her resignation letter (see page 433).

    (ii) in her resignation letter, she speaks of a long-planned move to Belfast.

57. Subsequently, Ms Deasey interviewed Ms Jane Brighton. Sister Brighton was sceptical about the Claimant's account especially that the new HSP TPN bag was found in the fridge; see page 519.

58. Ms Deasey prepared a full and professional investigation report at page 443-458. The summary of her findings is at paragraph 13 of her witness statement which I find is accurate. Ms Deasey recommended that the case proceed to a disciplinary hearing Ms Hassell received the investigation report and decided that the mater should proceed to a disciplinary hearing. From what I have seen and heard in the evidence, I can understand why Ms Hassell decided that all the allegations including that the Claimant had retrieved the HSP TPN bag from the sharps bin, should proceed to a disciplinary hearing. There was evidence to merit such a course of action.

The Relevant Law

Constructive Dismissal

59. Ms. Ramadan set out the law in her Skeleton Argument, which assisted me. I directed myself as follows.

60. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

61. The burden was on the employee to prove the following:

    (i) That there was a fundamental breach of contract on the part of the employer;
    (ii) That the employer's breach caused the employee to resign;
    (iii) The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.
    See *Western Excavation v Sharp* [1978] ICR 221.

60. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

60.1 The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

60.2 It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International [1998] AC20* 34h-35d and 45c-46e.

60.3 Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, *Browne-Wilkinson J in Woods v Wm Car services (Peterborough) Limited [1981] ICR 666* at 672a; *Morrow v Safeway Stores* [2002] IRLR 9. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

60.4 The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

60.5 A breach occurs when the proscribed conduct takes place: see *Malik*.

60.6 Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

60.7 A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at paragraph 480 in Harvey on Industrial Relations on Employment Law:
"(480) Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action but when viewed against a background of such incidents it maybe considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship".

60.8 The "last straw" need not be unreasonable or blameworthy conduct. All it must do is contribute, however slightly, to the breach of the implied term of trust and confidence: *Waltham Forest LBC v Omilaju* [2005] IRLR 35.

60.9 In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

61. I have taken this guidance into account when determining the Claimant's claim of constructive dismissal.

62. I note that a breach of trust and confidence has two limbs:

    a. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and

    b. that there be no reasonable or proper cause for the conduct.

The significance of suspension

63. In Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, Elias LJ gave the following guidance, by way of footnote (with my emphasis added):

> "*71 This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in Gogay v Herfordshire County Council [2000] IRLR 703,* ***even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is****. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. It would be an interesting piece of social research to discover to what extent those conducting disciplinary hearings subconsciously start from the assumption that the employee suspended in this way is guilty and look for evidence to confirm it. It was partly to correct that danger that the courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him.*
>
> *72. I am not suggesting that the decision to suspend in this case was a knee jerk reaction. The evidence about it, such as we have, suggests that there was some consideration given to that issue. I do, however, find it difficult to believe that the relevant body could have thought that there was any real risk of treatment of this kind being repeated, given that it had resulted in these charges. Moreover, I would expect the committee to have paid close attention to the unblemished service of the relevant staff when assessing future risk; and perhaps they did*."

Submissions

64. I heard all submissions from both parties. The fact I do not refer to each submission is not evidence that I have not taken everything into account. I

considered all the evidence and submissions.

Conclusions

65. It would be appropriate to begin with my conclusions in respect of issue 2.

Issue 2

66. The interviews on 23 March 2017 and 29 March 2017 did not amount to a breach to the implied term of trust and confidence. They did not destroy nor were they likely to destroy the relationship of trust and confidence. For the reasons I have given, the interviews on 23 and 29 March 2017 did not last for 4 hours as alleged. They were much shorter meetings, which were reasonable in the circumstances.

67. As I have explained, the meetings with Ms McLean were appropriately conducted and not at all interrogations. The Claimant had a fair opportunity to put her case, which she did by admitting what she did at the end of the meeting on 29 March 2017. There was no element of duress or pressure.

68. The Claimant did not ask for rest breaks, none were refused, and none were needed.

69. Ms McLean did not threaten the Claimant with losing her PIN at any stage. Indeed the Claimant abandoned that allegation in respect of the meeting of 29 March 2017 during her cross-examination.

70. The interviews of 23 March and 29 March 2017 were not part of any disciplinary process.

71. The Respondent did call the Claimant in for a suspension meeting which took place on 12 April 2017. This was a proper step to take and not contrary to any procedural policy. It was necessary to suspend the Claimant to manage risk of harm as Ms Hassell explained.

72. When the Claimant was suspended on 12 April 2017, the Claimant already had the opportunity to put her side of the story in writing and to Ms McLean in meetings as part of the error procedure. There was no breach of the implied term in failing to hold an investigatory interview at the same time as the suspension meeting. This would have been an unusual step for this Respondent where the case manager who was commissioning the investigation was not the investigating manager and in the circumstances, where a full investigation interview would take place in the near future.

73. The decision to suspend was not calculated or likely to damage the relationship of trust and confidence. As explained to the Claimant by Ms. Hassell, it was designed to protect her, patients and the Trust. Given the gravity of the allegations, the severity of which did not emerge at first, it is understandable that the Respondent decided to suspend the Claimant.

74. For all the above reasons, there was no breach of the implied term of trust and confidence contained within the Claimant's contract of employment.

Issue 1

75. In any event, the Claimant did not resign because of the alleged breaches. The Claimant resigned for the two reasons that I have given above, namely her husband's move to Belfast and her desire to avoid the consequences of disciplinary action, if possible, probably because of her desire to avoid the loss of her PIN.

76. Given the above conclusions, I have no need to consider issues 4 and 5.

77. For all the above reasons, the complaint of unfair dismissal is not upheld.

Employment Judge A Ross

18 July 2018

IN THE EMPLOYMENT TRIBUNAL

LONDON EAST

BETWEEN

Mrs. S. BAKASA

Claimant

and

BARKING, HAVERING AND REDBRIDGE UNIVERSITY HOSPITALSNHS TRUST

Respondent

LIST OF ISSUES

AGREED 28 JUNE 2018

---

1. Was the act or omission (or series of acts or omissions) committed by the Respondent a cause of the Claimant's resignation? The Respondent contends that the Claimant resigned for purely domestic reasons, which are set out in her resignation letter.

2. Did the acts or omissions by the Respondent amount to a fundamental breach of the contract of employment, or threatened such a breach? The Claimant asserts that the Respondent acted in breach of the implied term of mutual trust and confidence by the following:

   2.1. The interviews on 23 and 29 March 2017, and, in particular:

      (a) their length and nature (alleged to be an interrogation and alleged to last four hours);

      (b) the lack of rest breaks;

      (c) the threat of losing her PIN for practice (licence to practice) if she fails to tell the truth, made at each meeting.

   2.2. Failing to make the Claimant aware that the interviews were part of a disciplinary process;

   2.3. Calling the Claimant in on 12 April 2017 whilst on sick leave; and

   2.4. Suspending the Claimant on 12 April 2017, without giving her the opportunity to put her side of the story.

The Claimant's case is that there was no reasonable or probable cause for the Respondent to act as above. Suspension was the last straw in a series of incidents which amounted to a breach of the implied term and entitled her to resign, and/or was in itself a breach of the said implied term. The Respondent admitted 2.3, admitted suspending on 12 April 2017, but denied the remainder of the alleged acts.

3. It is conceded that the Claimant did not affirm the contract following the alleged breach.

4. If there was a breach of the implied term of trust and confidence entitling the Claimant to resign, was the Claimant's dismissal unfair under section 98 Employment Rights Act 1996? In particular:

   4.1. Has the Respondent shown the reason for dismissal?

   4.2. Was the reason for dismissal a potentially fair one? The Respondent contends that the reason for dismissal was some other substantial reason justifying dismissal.

   4.3. Did the Respondent act reasonably by treating that reason as sufficient reason for dismissal, i.e. was the decision to dismiss within the band of reasonable responses open to the employer?

   4.4. If procedurally unfair, what was the chance that the Claimant would have been dismissed in any event had a fair procedure been adopted?

   4.5. Did either party unreasonably fail to comply with the ACAS code? The Respondent contends that the Claimant unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.

   4.6. Did the Claimant contribute to her dismissal? If so what percentage deduction is just and equitable?

Remedy

5. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.