EMPLOYMENT TRIBUNALS

Claimant: Mr S Taylor

Respondent: Greater Manchester Mental Health NHS Foundation Trust

HELD AT: Manchester **ON:** 11-15 December 2017

BEFORE: Employment Judge Langridge

REPRESENTATION:

Claimant: Mr S Flynn, Counsel
Respondent: Mr J Boyd, Counsel

JUDGMENT having been sent to the parties on 4 January 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues and relevant law

1. This was a claim for unfair dismissal and breach of contract relating to events in the latter part of the claimant's employment, between 2015 and his resignation with immediate effect on 5 February 2017.

2. It was for the claimant to show that he had been dismissed within the meaning of section 95(1)(c) Employment Rights Act 1996 (ERA), in that he was entitled to resign with or without notice by reason of his employer's conduct.

3. The Tribunal took into account the key authorities relating to constructive unfair dismissal cases, including the decision of the Court of Appeal in London Borough of Waltham Forest v Omilaju [2005] IRLR 35, which helpfully summarises the long-established principles in Western Excavating v Sharp [1978] 1 QBD 761, Malik v BCCI [1998] AC 20 and Woods v WM Car Services [1981] ICR 666. In essence, an employer must not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Conduct which is merely

unreasonable does not meet the required threshold. The conduct has to be a fundamental breach of the contract going to the root of the relationship.

4. While it is necessary to examine the respondent's conduct leading up to the claimant's resignation, it is also appropriate for the Tribunal to consider the claimant's response. The test to be applied when considering the claimant's reaction to the conduct is an objective one; in other words, the question is whether it was reasonable for the claimant to regard the respondent's actions as a fundamental breach of his contract.

5. A breach of the implied duty of trust and confidence will be regarded as a repudiatory breach going to the root of the employment relationship: Morrow v Safeway Stores [2002] IRLR 9.

6. This case required consideration of a series of events spanning a period of some 16-18 months, during which period the claimant was aggrieved about management's conduct in general and some particular issues which fed into his decision to resign. This was a case which turned not on breaches of express terms of the contract, but rather a breach of the implied duty of trust and confidence. On the facts of this case, the alleged breach was the result of a cumulative series of decisions and actions on the part of the respondent.

7. Such a series of breaches, viewed cumulatively, could amount to a repudiatory breach of contract. It is appropriate to examine the employer's conduct as a whole, as well as its individual actions, and consider the relevance of the last straw where that is relied on. If it is, the act in question does not have to be of the same character as the earlier acts in the series, provided that "when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." – Omilaju.

8. The Tribunal had also to determine whether the claimant resigned in response to the breach, and whether he had waived any alleged breaches and affirmed his employment contract. Following Lewis v Motorworld Garages Ltd 1986 ICR 157, an employee does not lose his right to treat himself as constructively dismissed by not resigning in response to an earlier repudiatory breach, but instead relying on a later less serious breach.

9. If the claimant persuaded the Tribunal that he was dismissed, it was then for the respondent to show the reason or principal reason for dismissal. The respondent relied on some other substantial reason under s.98(1)(b) ERA as the underlying reason.

10. The next stage would be to consider whether any dismissal was fair or unfair in all the circumstances of the case, pursuant to section 98(4) ERA. In keeping with the guidance in Iceland Frozen Foods and other authorities, the Tribunal should not substitute its own view of the case but rather consider whether the dismissal fell within or outside a range of reasonable responses.

11. The breach of contract claim related to the claimant's entitlement to notice pay, and required the Tribunal to determine whether on the balance of probabilities

the respondent was in fact in breach of its contractual duty to pay the claimant his 12 week notice entitlement.

12. The Tribunal also took into account the submissions and case law which was presented by both sides with great clarity and detail.

Findings of fact

13. Having heard the evidence of both parties over the course of this hearing, the Tribunal makes the findings of fact set out below. This is not a comprehensive recital of all aspects of the evidence, but these are the facts which are most directly relevant to the issues.

<u>Background & context</u>

14. The claimant is a psychodynamic psychotherapist and had a long period of service with the respondent Trust and its predecessors. His employment began on 7 January 1989, and latterly he was employed as an Adult Psychotherapist at Bolton Hospital, working from the respondent's Silverhill premises. Recent reorganisations in the NHS had led to staff being transferred into the Trust, including a Community Mental Health team (CMHT). There were some issues about integrating this team with the team working at Silverhill.

15. Throughout the relevant period, starting in early 2015, all parties were working in very difficult circumstances amid significant organisational change and, to use the claimant's expression, "a fair degree of chaos in the Trust". A lack of resources was the cause of significant pressures on both management and individuals, as was the setting of some overly optimistic timescales.

16. In about February/March 2015 Mr Taylor and his colleague, Hayley Bailey as she then was (now Hayley Saunders) were tasked with developing a therapeutic programme to deliver Mentalisation Based Therapy (the 'MBT programme'). The service users of that programme would be adults with serious mental health issues, such as borderline personality disorder. Throughout the events relevant to this claim, Ms Bailey and the claimant stood shoulder to shoulder, both in relation to their clinical work on the MBT programme and also by pursuing their later collective grievance.

17. The claimant's line manager in early 2015 had been Stephanie Kennedy but in May 2015 this changed and Dr Rivers took over that role. Both were involved in the subsequent events relating to the MBT programme. A PDR was carried out at the time of the change in line management, in which the claimant recorded the fact that his "frustrations were manifold". His dissatisfaction with the Trust generally was already evident by May 2015 and his concerns were progressively heightened between then and October that year. In addition to the later issues which arose with the delivery of the MBT programme, the claimant was unhappy about the time it had taken the respondent to deal with a re-banding issue. He was also aware of the divisions between CMHT colleagues and his team at Silverhill.

18. The relationship between the claimant and his line managers was fair but not good in this period. The trust between him and Dr Rivers had yet to build, due to the

newness of the relationship. As for Mrs Kennedy, there had been professional differences of opinion between them, but no particular incidents of concern.

19. Despite these organisational problems, the claimant and Ms Bailey had devoted a great deal of time and commitment to the MBT programme, and were very keen to have it start and to have it work well. By the end of July 2015 it was ready for signing off by management, subject to discussions about governance and quality standards. This was in the hope of delivering the programme from about the end of August, from the respondent's Silverhill premises. However, an intervening event caused considerable disruption to that plan, when the landlord of Silverhill served notice in August 2015 to quit the premises. On 13 August Mrs Kennedy emailed the claimant about the need to vacate, suggesting Bentley House might be an alternative.

20. At a line management meeting on 28 September Dr Rivers noted that some organisational issues were causing the claimant concern. One of these was his being the sole psychodynamic psychotherapist employed in the Trust, following changes in staffing levels.

21. On 7 October 2015 the respondent's Property Strategy Group agreed to start the MBT programme at Silverhill, at least until April 2016. The following day Mrs Kennedy emailed the claimant saying that the programme should start at Silverhill, and that she had obtained Directorate assurances that they would be supported not to vacate the premises before April 2016. She added: "Let's therefore get started with the programme".

22. On 12 October a secondary care psychology meeting took place, at which the claimant was present, and there was a discussion about premises. The preferred option was expressed to be at Barnett, and on the question of Silverhill there had been no formal response from the Estates team in Bolton. It was again conveyed that assurances had been obtained from the Directorate about remaining at Silverhill until the beginning of April to enable the MBT programme to establish.

23. In a written response to this on 14 October, the claimant acknowledged that management was under pressure to get the programme up and running. During this hearing he has acknowledged that some of the pressure derived from the impact on service users who, although not formally identified or assessed to join the programme, did have in some cases an expectation of it starting. In his written response, the claimant said he shared management's concerns and asked to meet as soon as possible as it would be helpful for them to "collect their thoughts" about governance and quality standards. On 15 October he requested a meeting to discuss the programme and asked that it be minuted, which would not be usual. In the event, neither party took any notes of the meeting.

24. A meeting then took place on Wednesday 21 October, and this became a key element of the claimant's later grievances, and this claim. The meeting was the first time that all four people involved in the MBT programme, namely the claimant, Ms Bailey, Mrs Kennedy and Dr Rivers were able to meet together. Prior to that around 16 meetings had taken place, never with all four individuals, and often they were cut short by the intrusion of other professional commitments. The claimant and Ms

Bailey were very unhappy about that, though the constraints were imposed not by a lack of management interest as by extreme pressures on diaries.

25. The purpose of the meeting was to discuss whether or not it was feasible to start delivering the MBT programme at Silverhill, given the short time now available at those premises. Time to make a decision one way or the other was running out. The programme needed to be settled in with a degree of consistency and stability for service users, an important clinical consideration. A difference of opinion arose, as to whether a period of around three months was sufficient to start delivering the programme safely, having regard to professional guidance and considerations.

26. Prior to the meeting, management had obtained an informal opinion (by email) from a Professor Anthony Bateman. He expressed the view that the programme could be started so long as service users were made aware of the need to relocate after a few months. The claimant acknowledged that Professor Bateman was well qualified, in principle, to provide an opinion, but he was very unhappy that management sought that view without involving him, and that they, as he saw it, misled Professor Bateman because they made no mention of the uncertainty about where the programme would relocate to. Dr Rivers felt it was an option simply to be transparent with service users about that difficulty.

27. An external clinical supervisor who had been appointed to supervise the claimant and Ms Bailey, Adam Deirckx, had also been contacted by Dr Rivers before the 21 October meeting, but for reasons of confidentiality in his supervisory role, he felt it would be inappropriate to step into that discussion.

28. On the claimant's part there was doubt about whether three months was sufficient to make a start, without knowing what would happen at the end of that period. The question was whether the claimant was right to insist on adhering to his genuinely held professional view that this would be unsafe. He relied partly on the views of a respected author in the field, Sigmund Karterud, who suggested that a period of "around six months" be observed, in order to create the necessary consistency and stability for service users which the claimant felt was necessary.

29. Management accepted that the question of premises was an important part of the need for consistency, but equally this was applicable to the relationship with the therapists. If, for example, a therapist were taking maternity leave then that might be a considerable disruption to the consistency and stability of the programme, because that relationship is of primary importance. The claimant confirmed in his evidence that the main emphasis, in terms of consistency, is on the relationship with the therapist.

30. The claimant's expectation was that it would have been helpful to have had a series of meetings before this stage, and to have involved a third party in seeking to resolve the difference of professional opinion. He wanted to iron out what he saw as a misunderstanding, and even if that resulted in the project not going ahead, at least, he said, "Our opinions would have been validated".

Meeting of 21 October 2015

31. The claimant came into the meeting of 21 October with already heightened emotions about his employment, and also a somewhat negative mindset, including a negative view of the individual managers. His request that the meeting be minuted was made because feelings were running high. He felt that management came to the meeting with their minds made up. He inferred a certain attitude on the part of management who "insinuated" he was being precious about the MBT programme. He felt they implicitly raised an issue about his competence by referring to his confidence in his ability to proceed with the project. The claimant was anxious about the prospect of his job plan changing, because his confidence and trust in the managerial relationship was diminishing and he felt his role would be a less satisfactory one. The claimant's confidence in anything, he said, was diminishing in the run up to this meeting. He claimant said in evidence that by the time the meeting took place the atmosphere had become "toxic". He said there had been a "prolonged period of dissonance", and that things were clearly "disturbed" at around this time. By this time his trust in Mrs Kennedy had "evaporated" and the relationship was "pretty awful".

32. No written notes were prepared by any of the attendees, but in any event much of the dispute turned not on the words used but on the tone of voice and the manner in which they were said. It was described by Ms Bailey as a "hostile and bullying meeting", a view shared by the claimant. Aside from the overall tone of the meeting, five particular issues were raised by the claimant about it. These were:

a. Not involving them in obtaining a professional view from Professor Bateman;

b. Being given an instruction to go ahead with the MBT programme, in an aggressive manner;

c. The claimant being "shut down" and unable to say all that he wanted to;

d. Being given a deadline of two days to respond to the instruction given;

e. The "threat" to change the claimant's job plan.

33. I shall deal with each of these in turn.

34. As mentioned above, Professor Anthony Bateman's views on the clinical issue were sought by management in advance of the meeting and then discussed, although his email was not provided to the claimant. Management had taken this step in a good faith attempt to obtain quickly a professional opinion to help inform the discussion.

35. This was given as an example of the hostility the claimant and Ms Bailey said they experienced. Ms Bailey said in evidence that the way this was done was "appalling". She also felt that Professor Bateman's views were used as an attempt to coerce her and the claimant into going forward with the MBT programme. It was said to be an exercise in sweeping away their concerns, and added to the claimant's sense that he was being undermined. Both he and Ms Bailey agreed in evidence that all that was needed for that to be put right, was to have told them in advance that

Professor Bateman was to be approached, to let them have some input into that and to treat this as part of a continuing series of discussions. The claimant felt management were heavy-handed and undermining his expertise, though he was willing to accept the views of a suitably qualified third party, to the point of going ahead with the programme if that person had recommended that.

36. The claimant alleged that Mrs Kennedy aggressively told him: "I'm the consulting lead and I'm instructing you to go ahead" [with the MBT programme]. This was denied by Mrs Kennedy. I accept that in her handling of this meeting Mrs Kennedy was passing on some of the pressure that management were under, due to the ongoing delays to the programme. This was already a cause for concern because of the impact of the delay on service users, two of whom had expressed their unhappiness. They had expectations of joining the programme, even though not yet formally assessed to join it.

37. It is likely that Mrs Kennedy was direct or firm in her tone and manner, but I do not accept that she instructed the claimant to proceed. The limited contemporaneous records, and the actions of both parties after this meeting, are wholly inconsistent with such an instruction being given, aggressively or otherwise. The key point being conveyed (quite possibly with some force) was that a decision needed to be made one way or the other. The claimant and Ms Bailey were given time to respond to the question whether the MBT programme should begin at Silverhill – or not – and so in reality they were given an opportunity to participate in the decision.

38. The claimant alleged that Dr Rivers shut him down during the meeting and stopped him speaking. Dr Rivers accepted that she did this but not in the hostile manner in which it was alleged. Dr Rivers did interrupt the claimant and may have done so in a direct manner. She stopped him from continuing with what he was saying, but this was in recognition of the fact that there was a very limited time available to everybody at this meeting, and he had already been able to speak for around 20 minutes. It was important for management to give their input, including feeding back Professor Bateman's views.

39. The claimant alleged that an inappropriate deadline of two days was imposed on him and Ms Bailey, to say whether or not they felt able to go ahead with the MBT programme. This deadline was initially expressed as being a response "by the end of the week", meaning Friday 23 October. A provisional agreement to this effect was reached by the end of the meeting. On 22 October Ms Bailey then emailed asking for an extended deadline of 10 November to give a considered response. This was agreed, but in the event she and the claimant were able to provide their detailed response by 4 November, in a document entitled "Concerns". In the same email Ms Bailey referred to the "provisional agreement reached" and said she appreciated that management may have to suspend the MBT programme.

40. The fifth particular point arising from the 21 October meeting was what the claimant saw as a "threat" to change his job plan. He viewed this as unacceptable conduct by Mrs Kennedy. It was common ground between the parties that his job plan needed to be discussed and agreed with line management so as to reflect his workload and responsibilities, and to ensure it was proportionate to the time that would be spent on different areas of his practice.

41. A change to the job plan was mentioned to the claimant as a potential consequence of the MBT programme not proceeding, but it was a statement of fact and not a threat. The claimant's current job plan, and ultimately Ms Bailey's once it was agreed, reflected the large amount of time dedicated to the setting up and delivery of the MBT programme. If that programme was not proceeding for the time being, it would be necessary for the job plan to be reviewed.

42. On 4 November the claimant and Ms Bailey produced their detailed "Concerns" document. On 10 November Mrs Kennedy responded by email saying she was giving it further consideration. She added:

> "With respect to the decision whether you can proceed as things stand and as requested […] it is clear that your decision is 'no'."

43. Mrs Kennedy noted the need to consider alternative provision for the service users and, with the programme not going ahead currently, the need to review the job plan.

44. On 10 November Ms Bailey emailed saying she and the claimant were concerned about attending allocation meetings for the time being, and they felt the need to work on a joined up and cohesive explanation of what was happening. In a reply of the same day, Dr Rivers acknowledged the claimant's feelings. She referred to the last couple of meetings, reflecting that it was difficult and an emotional process, and acknowledged that attending meetings might feel uncomfortable. She noted it was important to try and stay cohesive as a team and to keep talking.

45. On 13 November Mrs Kennedy sent a substantive written response to the claimant's "Concerns" document. She noted that the meeting of 21 October had been pivotal, in that she "indicated that a final decision had to be made as to whether you felt able to proceed" with the programme. In his evidence to the Tribunal, the claimant said his trust and confidence in Mrs Kennedy had evaporated by the time she wrote this response.

46. On 4 December Mrs Kennedy then emailed the claimant to say that it was now going to be possible to stay at Silverhill for several months longer, until July 2016. That email was not dealt with in any detail during the course of this hearing, and it seems not to have affected anybody's decision about what should happen next. It might have offered an opportunity for the MBT programme to begin after all, there being a longer period of stability at the premises. However, by this time the parties were entrenched, the MBT programme was on hold, and it was quickly superseded by the claimant's grievance.

47. Another option for resolution was given consideration by the respondent, and this was the possibility of a facilitated meeting conducted by Mrs Hodgetts, an assistant director in the respondent's mental health services team. She was intended to be a neutral third party. However, by agreement that was put on hold pending the outcome of the formal grievance. It was the claimant's preference (and right) to pursue the issues formally; in effect to seek an adjudication of the professional difference of opinion as well as seeking an outcome in relation to the manner in which his line managers had behaved.

The grievance

48. Having held steadfastly to his clinical views on the implementation of the MBT programme, the issue was by now affecting the claimant's health and wellbeing. He and Ms Bailey decided to raise a collective grievance to take their concerns forward. This was submitted on 9 December 2015. It was heard under stage 2 of the respondent's Grievance Procedure, in accordance with that policy, which did not permit an appeal where the grievance was a collective one.

49. The claimant hoped that his grievance would not only resolve the immediate issues relating to the MBT programme and his managers' handling of that, but also that it might bring about significant changes in the wider culture of the Trust. For example, the lack of representation of adult psychotherapists was contributing indirectly to the erosion of trust in his employer. The claimant had a general sense of being treated detrimentally, and not being recognised for his knowledge and expertise. He was increasingly feeling that "in order to be heard, [he] had to shout".

50. On 25 January 2016 the claimant began a period of sickness absence. A proposal to hear the grievance on 24 February was put back at the request of his union. On 27 January the claimant submitted a formal bullying and harassment complaint covering broadly the same subject-matter as the grievance. Although both he and Ms Bailey were concerned about their manager's conduct, they were also both of the view that bullying and harassment could include an absence of resources to do the role.

51. There were delays hearing the grievance, caused by a number of factors outside the respondent's control. Firstly, the diaries of seven individuals had to be coordinated, and the date had to be on a Tuesday or Wednesday to accommodate the claimant's and Ms Bailey's working hours. In early February 2016 a CQC inspection took place, something which the claimant fairly acknowledged was an honest difficulty the Trust was facing.

52. A further cause of the delay was the need for a decision to be made about the handling of the bullying and harassment complaint, given the existence of a live grievance. A view was taken in February that the two were inextricably linked; that two investigations were not justified; and that if evidence of bullying were to materialise then a separate investigation could be initiated. The claimant's views on that position were sought and he went along with this approach.

53. The Trust sought to fix the grievance meeting on 7 March but in a letter of 1 March the claimant wrote to HR expressing the concern that that date was too short notice. He was also unhappy at the Trust's choice of Mr Aiden Bucknall as professional adviser, on the grounds that he did not have the correct professional expertise.

54. All of these events contributed to the length of time that it took for the grievance to be heard. It finally took place on 20 April 2016, when the claimant attended with his union representative, and with the benefit of having prepared a detailed Statement of Case.

55. The grievance panel was chaired by an independent manager, Gillian Green, Director of Nursing and Governance. The panel heard the issues conscientiously. They rejected the grievance and also concluded that there was no evidence of bullying and harassment such as to warrant an independent investigation into that. It was open to the claimant to ask his union to pursue that on his behalf but, as he indicated in evidence, that was perhaps an invidious position to be put in and it was not pursued.

56. The grievance outcome letter was issued on 25 April. On 13 May Mrs Hodgetts wrote offering the facilitated meeting which had until then been put on hold. On 16 May, before any decision was made about that, the claimant sought to appeal against the grievance outcome, notwithstanding that the procedure did not permit such an appeal. On 17 May he replied to Mrs Hodgetts querying whether it was appropriate to go ahead with a facilitated meeting given that the process remained unresolved. The meeting was therefore put on hold by agreement.

57. There followed correspondence with the claimant's union about whether he would be permitted to pursue an appeal, and by 11 July the respondent confirmed it would entertain an appeal despite the absence of any such stage in the procedure.

58. In the interim, on 12 June, emails were exchanged between Mrs Hodgetts and the HR department about the claimant's return to work in July. They referred to a possible meeting to "lay down what is reasonable", and queried whether the claimant would be in breach of contract if he did not follow management instructions. Those messages were later seen by the claimant (prior to his grievance appeal hearing) as a result of a Data Protection Act request for access to his data. He was concerned about the reference to breach of contract, fearing that action might be taken against him.

59. On 22 June the claimant indicated that he wished to return to work. He had been on full sick pay throughout his absence but that was due to expire on 25 July. On that date a meeting took place to facilitate his return, and a letter of the same date confirmed the arrangements. Those arrangements included a return on 26 July to a different office. At the claimant's request not to work in Bolton, a new place of work in Salford was temporarily agreed. The return to work between July and September operated satisfactorily and no particular issues arose.

60. On 26 September 2016 the claimant again had a period of sick leave. Part of the reason for the absence were the ongoing stress symptoms he had been experiencing, but there was also an injury following a cycling accident.

<u>The grievance appeal</u>

61. On 27 September the respondent offered a date for the appeal hearing on 17 October, but unfortunately that was a Monday when Ms Bailey was not at work, and so on 4 October the claimant requested a new date. He again took issue with the identity of the professional adviser, this time Caroline Logan. As previously, this was to do with the suitability of her qualifications (being a psychologist), and also because she was understood to be subordinate to Mrs Kennedy. The claimant's concerns were addressed and another advisor, Rachel Jukes, with whom the claimant was happy in principle, attended the appeal.

62. On 10 October the respondent replied to say that the hearing should go ahead on 17 October; that the panel had been put forward to the trade union in July and no objections had been raised then. It went on to offer some assurances about the suitability of the panel and invited the claimant to bring Professor Bateman to the appeal hearing if he wished. In the event the claimant was unable to secure Professor Bateman's agreement to come.

63. On 18 October the claimant wrote to HR with what he saw as significant concerns. He felt that the professional adviser should essentially fill the criteria for his own post as an adult psychotherapist. He was concerned by the failure to deal with things in a timely way, which he said "will add to my feeling that I'm being subjected to a process of unfair and constructive dismissal". In his evidence at the Tribunal the claimant said that his trust and confidence in his employer had eroded almost completely by this stage and he was exasperated.

64. That is undoubtedly how the claimant felt, and the time it was taking for the appeal to be heard understandably had a negative impact on his health and wellbeing. This was not entirely due to the respondent's actions because there were some inherent difficulties in going through the process, and in dealing with detailed correspondence received from the claimant. The time taken to complete the process was contributed to by a number of factors on both sides.

65. This correspondence culminated in an invitation dated 29 November 2016 to an appeal hearing on 25 January 2017. Before then, a further issue arose which contributed to the claimant's unhappiness with his employer.

<u>Sick pay</u>

66. On 4 January 2017 the claimant met Occupational Health and a report was produced. The claimant was aware from his discussion with the Occupational Health adviser of the gist of the recommendations, and he was expecting to return to work on the expiry of his sick note on 6 February. The OH report indicated that there was no obstacle to the claimant returning to work. Acting on this, on 11 January Mrs Hodgetts wrote to the claimant to say the Trust was unable to continue the discretionary full sick pay which it had previously been paying. The claimant would therefore go onto half pay until his return to work or the appeal outcome was known.

67. This letter went on to invite the claimant to contact her to discuss his return to work, whether before or after the hearing of the appeal. The claimant did not reply on this latter point because he was focussed on the pay issue.

68. The claimant wrote to Mrs Hodgetts on 18 January about his sick pay. He made no mention of an agreement which he said in evidence had been reached with another manager, to maintain full sick pay until the conclusion of the internal procedures. No other evidence was produced then or in this hearing to show that such an agreement was reached. The claimant said in evidence that he was grateful for the fact that he had had some discretionary full pay though he was "a bit flabbergasted" at the timing of this decision to reduce it. In his letter to Mrs Hodgetts he said that until he got a rationale for the decision he would have to contest it, and expressed the hope that Mrs Hodgetts would reconsider. Mrs Hodgetts took steps to

email HR to follow up the claimant's request to reconsider, albeit the claimant was not told this.

69. Prior to the appeal hearing on 25 January a number of email exchanges took place between management and the claimant’s trade union. On the day of the hearing, the union contacted Mrs Hodgetts asking about the claimant’s return to work, saying he was asking what he would need to organise, who would be managing this and whom he should contact. Mrs Hodgetts had already provided some of that information in her 11 January letter, when she said the claimant should contact her.

70. The appeal was heard by an independent panel chaired by Kathy Doran, a non-executive director of the Trust. The panel’s approach was to look at the decision of the original grievance panel, and decide whether it should endorse or overturn those conclusions. Having given the issues proper consideration, the panel decided to endorse the previous decision, and rejected the grievance. Although not stated in the outcome letter, the panel also agreed with the view that there was no evidence of bullying and harassment such as to warrant a separate investigation into that.

Return to work

71. On 26 January Mrs Hodgetts contacted HR for advice in order to move forward the discussion about the claimant’s return to work. She did not contact the claimant to say what was happening, though the advice was received promptly on the following day. The intention was that two other managers should meet with the claimant to discuss his return to work.

72. On 26 January the claimant emailed Mrs Hodgetts again. The main focus of the letter was the sick pay issue, about which he said, “I have reservations about your rationale”. On the question of returning to work he said, “I will look forward to receiving your thoughts” and added, “My position will be shaped by the outcome of the appeal”. This suggested he understood there would need to be further discussions once the outcome letter had been distributed. Mrs Hodgetts noted that point and did not send an immediate reply to the letter (or indeed any reply as it was overtaken by events). The subject of the claimant’s return to work was therefore left there, without any expression of urgency on either side.

73. On Friday 27 January the appeal outcome letter was sent out. Its findings were not particularly explicit, but nevertheless the claimant understood what was being said. The respondent was very mindful of the fact that the employment was continuing and seeking through the subtle language of the letter to achieve a tone and balance reflecting the need to seek a positive way forward.

74. Mrs Hodgetts was copied into the appeal outcome letter and received it some time in the week beginning 30 January.

75. By Thursday 2 February the union brought some urgency into the need for a discussion about the return to work, emailing the respondent’s Director of Human Resources, Andrew Maloney, rather than Mrs Hodgetts. The email was sent at 4.08pm asking for urgent clarification about line management. One working day

later, on Sunday 5 February, without taking any steps to contact Mrs Hodgetts or wait for the respondent to contact him, the claimant decided he had had enough and he resigned.

76. In his evidence the claimant said he had been ready and willing to return to work on 6 February, on the expiry of his sick note, had the contact about those arrangements been made. This lack of contact was the final straw for the claimant.

Conclusions

77. In order for the claimant to succeed in his claims, he would have to satisfy the Tribunal that he resigned in response to a repudiatory breach on the part of the respondent. If so, and provided any such breach had not been waived, the claimant could treat himself as dismissed within the meaning of section 95(1)(c) Employment Rights Act 1996, a prerequisite for any unfair dismissal claim to succeed. A repudiatory breach by the respondent would also entitle the claimant to succeed in his claim for notice pay.

78. In this case it has been necessary to examine the events which took place between around the middle of 2015 and early 2017, and to consider whether, taken individually or as a whole, they amounted to a breach of the implied duty of trust and confidence. The individual events at the heart of the allegations relate to the respondent's handling of the following:

a. The meeting of 21 October 2015;

b. The decisions not to uphold the grievance or appeal;

c. The decision in January 2017 to reduce discretionary sick pay to half pay;

d. The return to work arrangements in January/February 2017.

79. The question for the Tribunal was whether the respondent acted in such a way as to destroy trust and confidence in the relationship, whether intentionally or not. This has to be assessed objectively.

80. I have placed some emphasis in the findings of fact on the wider context in which the parties were working. It was not an easy environment, with serious challenges facing both the claimant and his managers in the face of a recent reorganisation with the NHS and a lack of resources. One of those resources was a severe lack of time, which had a significant impact in the case. Managers did not have the luxury of time to make themselves available for meetings, or for issues to be discussed in the detail the claimant would have liked (quite reasonably) to be given to them.

81. The context also required me to take into account the claimant's pre-existing disenchantment with the respondent Trust, before the events of May to October 2015 led to an escalation in his sense of grievance. The claimant was already very unhappy with his working life, for reasons which were touched on briefly in this hearing but which formed no part of the alleged breaches. These included the re-banding issue and the post-restructuring difficulties between the CMHT and the team working at Silverhill. It was striking that the claimant in his evidence used such

strong language to describe his relationship with managers even before the 21 October meeting took place. He said that by then his “confidence in anything” was diminishing; the atmosphere had become “toxic”; there had already been a “prolonged period of dissonance”; things were “disturbed”; his trust in Mrs Kennedy had “evaporated”; and that the relationship was “pretty awful”.

82. There was little if any evidence to explain why those views were so strongly held. I have no reason to believe that the claimant genuinely felt that way, or that he was sincere in his conscientious adherence to his clinical opinions about starting the MBT programme. However, the respondent’s conduct has to be viewed through an objective lens, and an assessment made as to whether it was reasonable for the claimant to regard the respondent’s actions as a fundamental breach of his contract.

Meeting of 21 October 2015

83. Turning now to the particular areas about which the claimant was aggrieved, I have considered carefully the oral evidence about the meeting of 21 October 2015 and do not accept the claimant’s depiction of this as bullying and harassing. This meeting was the culmination of steps which had been taken over a period of time towards implementing the MBT programme. Given the enormity of the impact of the landlord’s notice to quit the Silverhill premises, there was an imperative to make a decision one way or another.

84. It is not difficult to accept that the meeting was brisk, perhaps tense, and that the two managers were assertive to the point of being direct or even forceful in their manner. Dr Rivers conceded that she interrupted the claimant and stopped him talking, but this was after he had been speaking for 20 minutes and management needed time to speak too. Undoubtedly, more time for the parties to discuss these important issues would have been preferable, but that time was not available.

85. The difficulty for the claimant’s argument is that the respondent did have reasonable and proper cause to conduct the meeting in such a way as to manage the limited time available, and to seek a firm outcome from the discussion. The MBT programme was already delayed and those delays were causing problems for service users, two of whom had expressed their unhappiness. A decision either to go ahead or to suspend the programme had to be made, but it could not reasonably be left in limbo.

86. Another factor affecting the tone of the meeting was the lack of availability of the four participants in the meeting to get together as a group in order to debate the issues over a longer period of time. While this would undoubtedly have been desirable, it was not realistic. The series of meetings which the claimant would have liked to have, whether before or after 21 October, would only delay the decision-making further. The claimant’s aspiration to engage in a fuller debate, and have ample time for an exchange of views, was a reasonable one, but in the challenging circumstances facing the respondent’s managers, their insistence on making a decision at or shortly after this meeting was not unreasonable either.

87. This lack of time and management resource also affected the respondent’s handling of the communication with Professor Bateman. Again, the claimant’s expectation to have been involved in that contact was a reasonable one in principle,

but his aspiration to have held a series of meetings to discuss the clinical issue was not realistic in the circumstances in which he and his managers were having to work. A reasonable employer in this situation might be expected to copy the claimant into the email exchange with Professor Bateman. Regrettably that was not done, but that fell far short of an action calculated or likely to destroy trust and confidence. Ms Bailey's categorisation of that omission as "appalling" is an overstatement of conduct which can at best be described as unreasonable.

88. Had Mrs Kennedy given the claimant an instruction to start delivering the MBT programme amid uncertainty about the premises, given that she did not share his area of clinical expertise, and in the face of his professional objections, that would have been capable of amounting to a breach of the implied term. However, on the evidence the Tribunal was not satisfied that such an instruction was given. That interpretation of what was said is entirely inconsistent with the conduct of the parties after the meeting. Firstly, a provisional agreement was reached by the end of the meeting (as recorded by Ms Bailey in her email of the following day) that she and the claimant would have time to respond on the question whether to go ahead. In her email Ms Bailey said she appreciated that management may have to suspend the MBT programme. This further indicated that there was no instruction to press ahead with it. That decision was under consideration, and both Ms Bailey and the claimant had a say in the matter.

89. Initially a very short deadline of two days was put forward, but this was provisionally agreed to and almost immediately relaxed on request. The claimant and Ms Bailey were able to provide a detailed note of their concerns on 4 November. This sort of time frame was necessary if there was to be any chance of starting the programme in time to utilise the few months available at Silverhill.

90. Mrs Kennedy's email of 10 November also made clear that she was receptive to the claimant saying 'no' to the suggestion that the programme proceed. Having received the "Concerns" document she noted that the claimant had in effect made the decision that he could not proceed, saying "it is clear that your decision is 'no'." She was therefore recognising and accepting his decision.

91. Throughout the internal grievance procedures, and at this hearing, the deadline for a response was referred to with an emphasis on the "two days", despite the fact that more time was asked for and allowed. Even if the respondent's initial deadline of two days was unreasonable, as the appeal panel later determined it was, the key point is that more time was asked for and given.

92. On these facts, the Tribunal is satisfied that the respondent had reasonable and proper cause to require the claimant to make a decision and to do so quickly.

93. In her email of 10 November Mrs Kennedy also noted the need to review the claimant's job plan. If the MBT programme was not to take place in the near future, then not only would it be reasonable to revisit the job plan but it might be said to be essential, given the importance of managing resources in the Trust. The claimant's reaction to this comment was perhaps influenced by his fear that his job would become less satisfying, but that did not make management's actions unreasonable, nor less a breach of the implied term.

The grievance

94. In his grievance the claimant hoped not only to address the immediate concerns flowing from the discussion on 21 October, but also to bring about significant changes in the organisation. Some of the outcomes he sought included changes going to the wider culture in the Trust and the way things were managed. In general terms he felt he was not being recognised for his knowledge and expertise, and his being the only adult psychotherapist in the team added to his sense of isolation.

95. The claimant's diminishing trust in his employer was a feature even by May 2015, at a point when Dr Rivers became his line manager. The gradually increasing strength of his feeling towards management was informed by the broader areas of discontent with the Trust as a whole. These matters were not the subject of the allegations of breach of contract, though it can fairly be said that they influenced the claimant's attitude to his employment, and later fed into his decision to resign.

96. By the time the issues went forward through the formal collective grievance, the claimant and Ms Bailey were of the view that their managers had been guilty of bullying and harassing behaviour. They had already identified their concerns about aggressive behaviour on 21 October, but were also of the view that bullying and harassment could include an absence of resources to do the role; a view that the claimant endorsed in his evidence to the Tribunal.

97. The claimant's general dissatisfaction with his employment contributed to his views of the conduct of the 21 October meeting. Through his grievance he expressed that he and his managers were in a situation of conflict, a word which he used consciously as defined in the Trust's bullying and harassment policy. Indeed, he said in evidence that Mrs Kennedy's denial afterwards that this was a situation of conflict, was provocative. Another interpretation is that they were simply in a position of disagreeing with each other on a matter of professional judgement.

98. An important question was how that disagreement might have been resolved. The claimant felt it would have been helpful to have a series of meetings before reaching the point of the 21 October meeting, and to have involved a third party with suitable expertise in those discussions. He still hoped and expected for that to happen after 21 October, notwithstanding the impact such delay would have had on the limited period available to start the programme at Silverhill. The claimant felt that management, in their handling of this particular feature of the dispute, were heavy-handed and undermining the expertise he was bringing to the conversation, but if a third party had been involved, the claimant said he would have accepted their views if they had overridden his opinion and recommended proceeding. However, the time to take this course, and still deliver the programme by the end of March 2016, was simply not available.

99. The claimant acknowledged in his evidence that by the time he submitted his grievance, both sides were entrenched in their positions. It was therefore inevitable that they would have to see out the formal grievance and appeal process in an attempt to find a resolution. By agreement, a meeting facilitated by Mrs Hodgetts was put on hold. The lengthy period of time over which the formal procedures took place was regrettable. However, the respondent faced a number of difficulties not of

its own making which meant the time scales were very protracted. Those difficulties included coordinating seven diaries with only two working days available, dealing with a CQC inspection, and pausing to reflect on how best to deal with the bullying and harassment complaint which ran in parallel with the grievance. An appeal mechanism was provided, despite there being no such provision for collective grievances.

100. As for the substantive handling of the grievance and appeal stages, both panels dealt with their decisions conscientiously and in good faith. They reached legitimate decisions which took account of all the information available to them, and in the case of the initial grievance, set out a carefully reasoned decision in writing. The decision of the appeal panel took a different approach, but this was done in recognition of the sensitivity of the ongoing working relationship. Importantly, the claimant did understand the reasoning. The appeal panel's decision had also been informed by an appropriate professional adviser, whose identity had been changed at the claimant's request.

101. On these facts, it cannot be said that the respondent's decisions on the grievance and appeal were unreasonable, and certainty not a breach of the implied term.

102. Two further matters arose alongside the grievance appeal, about which the claimant was also very aggrieved.

<u>Sick pay</u>

103. The claimant appreciated the respondent's decision to pay him full pay throughout his sick leave, and knew it was an exercise of a discretion. By January 2017 the claimant's contractual entitlement was limited to half pay. That said, the respondent's decision to withdraw the discretion, and the manner in which this was done, could in principle damage the implied duty of trust and confidence. An employer might be expected to have a proper rationale for the decision, and to communicate with the employee about it.

104. Looking at the circumstances of this case, the Tribunal is satisfied that the respondent did have a reasonable and proper cause to withdraw the discretionary full pay. It was not a breach of the implied duty not to continue the discretionary sick pay at full rate. The respondent had received an Occupational Health opinion that there was no obstacle to the claimant's return to work. He was due to return on the expiry of his sick note, on 6 February 2017. Mrs Hodgetts communicated the decision promptly when she wrote to the claimant on 11 January, and she explained the rationale. Her letter was written at a time when the appeal hearing was fixed for 25 January and the arrangements for the claimant's return to work were being initiated. Mrs Hodgetts' letter asked the claimant to contact her to take that forward. He did not do so, being understandably upset about the pay issue. He had hoped or expected that his full pay would be maintained pending the appeal outcome.

105. The claimant asked Mrs Hodgetts to reconsider the decision, but time did not permit that to be taken forward. The claimant may well have had a good argument for extending the discretion, but he did not allow the respondent time to reconsider his request before resigning. It is worth noting that the claimant's letter in response

to Mrs Hodgetts was not couched in terms of wholly unacceptable conduct; indeed he said in his evidence that he was grateful for the full pay he had had.

106. Bearing in mind that the period in question would be a matter only of a few weeks until his return to work, I do not consider this action to be a breach of contract. A balance has to be struck by an employer, particularly an NHS Trust which has a duty to manage its limited resources, and when an Occupational Health recommendation suggests a person is fit to work, it is difficult to take issue with a decision not to maintain full pay.

Return to work arrangements

107. The claimant's evidence was that he had been ready and willing to return to work on 6 February. This was in spite of his ongoing dissatisfaction and the undoubted impact on his health of dealing with the internal procedures over a period of many months. The arrangements had been paused on both sides until the appeal outcome letter was sent out. This was done on Friday 27 January, which left only a working week (if that, allowing for the time it took for the relevant individuals to see the letter), for those arrangements to be made. The union had raised the subject on 25 January, but they were asking who the claimant should contact, when he had already been told to contact Mrs Hodgetts. The claimant's own email to Mrs Hodgetts was expressed in non-urgent terms: "I will look forward to receiving your thoughts" is a gentle way of inviting an ongoing dialogue.

108. The union sent a second email on 2 February to the Director of HR, but the claimant's resignation on Sunday 5 February was sent only one working day later. It might be said that the resignation was premature, as it did not allow time for the respondent to put right the need to firm up the return to work arrangements.

109. Working relationships were still at a stage where they might have been repaired, for example by adopting the approach that had been taken in July 2016 to have the claimant return to work with either a new base or new line management, but those conversations did not take place. The claimant acknowledged in his evidence that he gave no thought at all to contacting Mrs Hodgetts before he resigned. He had felt that Mrs Hodgetts would be "true to her word", until he saw the internal emails between her and HR referring to the possibility of a breach of contract issue if the claimant did not follow instructions on his return. Those were legitimate management concerns, planning ahead in anticipation of how they might need to handle the return to work if it became difficult. Unfortunately the fact that the claimant saw those internal emails is a risk that comes with making a subject access request under the Data Protection Act. They were clearly not written with the intention that the claimant would see them. I accepted Mrs Hodgetts' explanation that these were questions she was asking, in the event that the claimant felt unwilling or unable to return on the terms offered. She was not saying there was a problem, but rather taking advice to help her if a problem were to arise.

110. The theme of trust and confidence being damaged, if not destroyed, arose consistently during the last 18 months of the claimant's employment, starting with his heightened feelings even before attending the meeting of 21 October 2015. He had reached the view that trust and confidence in line management had been destroyed even as long ago as that point, but remained hopeful of vindication through the

grievance and continued to have an expectation of his employment continuing. By the time of his letter to HR a year later, on 18 October 2016, when the appeal arrangements were under discussion, he referred to his "feeling that I'm being subjected to a process of unfair and constructive dismissal". By then his trust and confidence in his employer had eroded almost completely, but still the claimant did not resign.

111. By the time of his resignation, the claimant was anxious about being in breach of contract if he did not return to work. He felt that going back in the circumstances was unbearable. The circumstances included the unsuccessful grievance and appeal outcomes, his feelings towards line management, and the decision not to maintain full sick pay. The final straw which triggered his resignation on 5 February 2017 was the lack of contact from the respondent about his return to work.

112. It is important to consider the timing of the resignation. Both the claimant and the respondent were focussed on the appeal hearing scheduled for 25 January. Other matters were to some extent on hold pending that outcome. Mrs Hodgetts had anticipated the claimant's return to work in her prior letter of 11 January and invited the claimant to contact her to discuss that. He did not, because the pay issue was occupying his mind. This was understandable because it added to his anxiety and his general sense of dissatisfaction with his employer, whom he viewed as responsible for his long sick leave, and for the delays in fixing dates for the two the hearings.

113. In this context the claimant's expectations were unrealistic about the speed with which the respondent would be able to contact him about returning to work. At the time of the union's email of 26 January, the appeal outcome was still being distributed and considered. The letter took a few days to reach Mrs Hodgetts, who had written to the claimant as recently as 11 January to invite contact with her. It did not occur to the claimant to do so. The union's second email asking for urgent clarification about line management, was sent late in the day on Thursday 2 February, allowing only one working day before the claimant resigned on Sunday 5 February. The respondent's failure to reply to these messages was neither unreasonable in all the circumstances, nor a breach of contract.

114. The fact that the claimant did not resign earlier, for example in response to the meeting of 21 October 2015 or the outcome of the original grievance, does not mean he affirmed the contract and lost the right to rely on those events. They could in principle contribute to a course of conduct which cumulatively amounted to a fundamental breach of contract, entitling him to resign in response to the last straw: Omilaju. The last straw itself need not be a fundamental breach in its own right, so long as it contributes something to the to the breach of the implied duty. An innocuous act cannot be a final straw, even where the employee subjectively views it as destructive of trust and confidence.

115. Viewed subjectively, it is not difficult to understand the claimant's decision to resign, as he had reached the end of a long and difficult road pending a final appeal outcome. However, the law requires an objective test to be applied in addressing the question whether the respondent's actions amounted to a repudiatory breach of contract. Taking these actions cumulatively or individually, the Tribunal's conclusion is that the respondent's conduct cannot objectively be categorised as a breach of the

implied duty of trust and confidence. This applies to the individual points of grievance and also to the course of conduct as a whole. The final straw was not sufficient to contribute to a loss of trust and confidence. The respondent had made recent efforts to initiate a conversation about the return to work, but in his anxiety and preoccupation with the sick pay and appeal hearing, the claimant lost sight of that.

116. Some of the respondent's actions might have been handled better, notwithstanding the difficult environment that management were working in. For example, it was unfortunate that the claimant was not involved in the approach to Professor Bateman before the 21 October meeting, or that more time could not have been found to give the issues proper consideration. Later on, the respondent's internal steps to initiate a review of the sick pay decision, and to arrange a return to work meeting, were not visible to the claimant. It would have been helpful for him to have known what was happening, but in the circumstances it is difficult to say that this lack of communication was unreasonable. Even if it was, that would fall below the legal threshold required to found a constructive dismissal claim.

117. For these reasons the claim for unfair dismissal fails and is dismissed.

118. Relying on the same findings of fact and conclusions, the Tribunal also concludes that the respondent did not breach the claimant's contract so as to entitle him to damages in respect of his notice period. That claim also fails and is dismissed.

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Employment Judge Langridge

13 April 2018

REASONS SENT TO THE PARTIES ON

17 April 2018

FOR THE TRIBUNAL OFFICE

[AF]