EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss C Mead	**v**	**Central North West London NHS Trust**

Heard at: Huntingdon **On:** 1, 2 May 2018
15, 16 August 2018

Before: Employment Judge GP Sigsworth

Appearances
For the Claimant: In person
For the Respondent: Mr M Uberoi, of Counsel

RESERVED JUDGMENT

1. The Judgement of the Tribunal is that the Claimant was not constructively unfairly dismissed by the Respondent.

RESERVED REASONS

Preliminaries

1. This decision is based on the outcome of two hearings. On 1 and 2 May 2018, the original merits hearing took place. At its conclusion, having heard and read the evidence and the parties having made their submissions, I gave a judgment. I found that the Claimant had not been constructively unfairly dismissed by the Respondent. However, in coming to that decision I had heard and read evidence relating only to what took place after the Claimant's dismissal – her successful appeal and the process leading up to that, and the re-engagement process (as far as it went) after the outcome of her appeal. I did not receive evidence from the parties about the events leading up to and including the original dismissal. I took the view at the hearing that, as the Claimant's contract of employment had revived retrospectively on her successful appeal and

there was thus no dismissal in law (see Roberts v West Coast Trains – below), then the claimant could not rely on that dismissal and the other matters complained of prior to it as a breach of the implied term of mutual trust and confidence and a reason for her resignation. I concluded that the Claimant had affirmed her contract of employment when she decided to appeal the decision to dismiss her and waived any breach of it by the Respondent that occurred before the appeal.

2. However, following the delivery of an oral decision, and before the written reasons were sent to the parties (requested by the Respondent), I self-referred to the unreported case of Thomson v Barnet Primary Care Trust, UK EAT/0247/12/SM – which I found on Bailii and Westlaw. In that case, an employee of a primary care trust, who had been re-instated on her successful appeal following her dismissal because of complaints made against her, was found to have been constructively dismissed when she resigned after the appeal outcome. EAT held that she was entitled to treat a requirement that she undertake a training programme on her return to work as the *'last straw'* in a series of repudiatory breaches by the Trust, on the basis of events from before the original dismissal to events post appeal. The EAT held that, on a successful appeal against dismissal and a re-instatement or re-engagement, the old contract of employment revived and the employee did not waive her rights to add earlier breaches of contract to her claim for constructive unfair dismissal by reason of her participation in the appeal and events thereafter. Therefore, an issue arose as to whether Miss Mead, in this case, was entitled to rely on events before her dismissal as part of her constructive dismissal case, contrary to my original finding that she could not. In the circumstances, and pursuant to rule 70 of the Employment Tribunal Rules of Procedure 2013, I decided on my own initiative to reconsider the judgment in the interests of justice. The reconsideration hearing took place on 15 and 16 August 2018.

3. At the original hearing, the issues identified to be determined in deciding whether there had been a fundamental breach of contract were:

    3.1 The Respondent's alleged intention to re-engage the Claimant at HMP Woodhill.

    3.2 The Respondent's alleged failure to adequately engage in discussion with the Claimant concerning her re-engagement.

    3.3 The protracted appeal process, before the appeal hearing.

    Other issues identified by the parties were the dismissal and events pre-dating the dismissal, as follows:

    3.4 An inadequate investigation, which was clarified by the Claimant as being essentially an allegation that a prison officer falsified documents to show the Claimant's attendance at a meeting that she says she did not attend.

3.5 The fact that the Claimant was the only member of the Respondent's staff to be disciplined for the incident in question, and that management took no blame.

3.6 The fact that the Claimant was working alone on 3 March 2016, without support.

3.7 The dismissal was not a fair sanction.

These latter issues (3.4 – 3.7) where not considered at the original hearing, but were looked at and determined at the re-consideration hearing.

4. At the original merits / liability hearing, I heard oral evidence from the Claimant. There were two witnesses for the Respondent – Mr Hardev Virdee, Chief Finance Officer, who heard the appeal; and Mr Richard White, HR Business Partner, who was tasked with organising the Claimant's re-engagement after her successful appeal. Selected documents from an agreed bundle of documents were read. At the re-consideration hearing, I first heard the submissions of the parties as to whether or not there should be a re-consideration in any event. However, I decided that in the interests of justice there should be, having regard to my error of law in the original oral decision. I then heard from two further witnesses for the Respondent – Ms Deborah Simons, Head of Healthcare at HMP Woodhill; and Mr Padraig Brady, HR Business Partner. I read some further documents in the bundle, but I did not hear further evidence from the Claimant, having read her witness statement, as the Respondent's counsel did not wish to cross examine her further. At the end of the evidence, the parties provided written submissions and also made oral submissions. I reserve the decision. This written decision sets out the findings of fact I make in respect of both hearings, and the conclusions I reach after having heard and read all the evidence from both hearings. Thus, there is only one decision being sent to the parties in this case, which reflects the content of both hearings. It would have been a waste of time and resources, and thus not in accordance with the overriding objective, to have provided written reasons from the first decision, only effectively to withdraw them by reason of the re-consideration hearing.

Findings of Fact

5. I made the following relevant findings of fact:

5.1 The Claimant was employed by the Respondent, following a TUPE transfer of her employment to them on 1 June 2013, as a senior HCA (healthcare assistant), at HMP Woodhill where she had worked since 31 May 2005. Her job was to focus and support prisoners to be healthy – monitoring long term conditions, health promotion and security, and responding to emergencies. HMP Woodhill is a category A male prison in Milton Keynes.

5.2 On 5 March 2016, a prisoner in custody at Woodhill died (apparently having committed suicide). There was an internal review. The prisoner had in fact attempted suicide two days earlier, on 3 March 2016. There were concerns as to whether the Claimant had failed to adhere to relevant processes for inputting information on the data base, and this led to a full disciplinary investigation conducted by an independent manager. The Claimant was suspended on 7 March 2016, pending an investigation. She was suspended on full pay, but that did not include her non-contractual 'bank' pay. The Respondent's investigation was substantially delayed, in part because of the separate police and prison and probation ombudsman investigations proceeding at the same time.

5.3 The upshot was that the disciplinary hearing did not take place until 4 October 2016 and then 16 October 2016. It was chaired by the deputy director of the trust, Ms Lesley Halford. There were six disciplinary allegations. Allegations one (as amended – see below), two, four and five were substantiated. Allegation three was disregarded, and allegation six was not substantiated. The panel found gross misconduct and concluded that summary dismissal was the appropriate sanction, which meant the termination of the Claimant's employment on 1 November 2016.

5.4 In the Claimant's resignation letter of 5 April 2017 (see below), the Claimant claimed that a senior prison officer falsified a document to make it look as if she had attend the ACCT review, immediately after the prisoner's death, which she says she did not. The prison officer, of course, was not an employee of the Trust but of the prison service, and his role in the matter could not be investigated by the Respondent. At the disciplinary hearing, allegation three - that the Claimant failed to record on SystemOne her attendance at an ACCT review – was deleted from the list of allegations by the panel, presumably on the basis of her submission about that prison officer. However, it seems that, although the reference to an ACCT review was removed from allegation one, the allegation remained – that the Claimant failed to read the medical record of the prisoner concerned prior to undertaking a review (now not clear what review is being referred to here). The prison officer concerned was the subject of an investigation by the prison, but the Respondent had no jurisdiction over him. The Respondent could not therefore investigate the allegation of falsification of a document, as alleged by the Claimant – as Ms Simons and Mr Brady pointed out at the re-consideration hearing.

5.5 The Claimant was the only employee of the Trust who was subjected to an internal investigation in relation to the prisoner's death. Mr Brady told the Tribunal that this was because no other employees visited the prisoner's cell on 3 March 2016 after the failed suicide attempt (save for the junior trainee accompanying the

Claimant, who was investigated and made a statement), and so any alleged failure to adhere to documentary requirements relating to the data base was down to the Claimant. Ms Simons told the Tribunal that she did not interview any other members of staff in relation to the matter, as there were no concerns raised about their conduct in relation to the treatment of the prisoner.

5.6 The allegation by the Claimant that she should not have been working alone on 3 March 2016. This appears not to have been an issue in the disciplinary process. Working alone is standard working practice for someone with the Claimant's responsibilities, as an HCA band 4. However, it does not mean the Claimant was unsupported. She was accompanied by a trainee, and so was not alone in that sense. More than that, however, she had access to registered nurses who were always on duty – either in person, by radio or by telephone. Further, the Claimant had not previously raised any concerns, either formally or informally, about alleged lone working or lack of support from registered nurses – from April 2013, when she was appointed to be an HCA band 4.

5.7 The Claimant alleges that the sanction of dismissal was not fair, given the outcome of the appeal. Of the six allegations, two were struck out or not substantiated, and one was amended. Four were upheld. At the appeal hearing, although the dismissal was deleted and the claimant reinstated to her employment contract, nevertheless it was not a complete win for her. One allegation was partially upheld by the appeal hearing, that of failing to directly record information gathered from the prisoner on the database, SystemOne. However, due to the Claimant's mitigation, the length of time the matter had taken to reach conclusion, and the impact that this had had on the Claimant's wellbeing, Mr Virdee decided to impose no sanction. Although it is not the Trust's policy on re-engagement on new terms to pay back pay of the salary to dismissal, as a gesture of good will on this occasion they did agree to back pay of the Claimant's salary. However, I note that this was not a re-engagement on new terms. The Claimant was to be re-instated into her old job on her existing terms and conditions. Therefore, it is likely that she would be entitled to her back pay (if that re-instatement actually occurred). In her witness statement, the Claimant does not rely specifically on dismissal being a breach of the implied term. The Respondent clearly did not think it was an issue for the full merits hearing, as they did not call the decision maker, Ms Halford, to give evidence. There is no specific reference to her dismissal in the Claimant's resignation letter. In so far as there is implied criticism of the disciplinary process, and in particular the length of time that it took, from the suspension in March 2016 to the disciplinary hearing in October 2016, Mr Brady gave evidence in explanation of this. The investigation was undertaken by the health services manager who was independent of HMP Woodhill. That investigation was delayed until the police investigation into the

prisoner's death had been concluded, as was the normal process. The police do not want any internal investigation to prejudice their criminal investigation. The investigation was further protracted due to the requirement to notify the prison and probation ombudsman of the serious nature of the allegations which required in-depth consideration. The report was available in draft in May, documents relating to it obtained in June, and then the report finalised in July 2016. Then, the investigation had to be halted again, as the police had made a data request in relation to the prisoner's death. The disciplinary investigation then concluded and a disciplinary hearing was recommended. At the beginning of September, the Claimant was invited to a disciplinary hearing which was to take place a month later, and was informed of the details of the six allegations and sent all relevant documents. She was advised of her right to be represented by a trade union or work colleague. The Claimant then became ill and was referred to occupational health, which further delayed the process. At the end of September there was a change to the hearing panel due to unforeseen circumstances, and the venue was changed to suit the Claimant in Milton Keynes, rather than London. I accept that these factors go some considerable way to explaining and mitigating the delay. Further, the appeal panel recognised the impact of the delay on the Claimant's wellbeing, and compensated her for it – see below.

5.8 The Claimant exercised her right of appeal, and her appeal was received by the Trust on 24 November 2016. Again, there were delays in the appeal process leading to the hearing. The hearing was first fixed for 1 February 2017 but did not go ahead as panel members were not available, and three of them were required. It was rescheduled for 24 February, some three months from the receipt of the appeal when the procedure says it should be held within 28 days. There were three senior managers / directors on the panel, chaired by the finance director, Mr Virdee.

5.9 The Respondent's appeal procedure gives the panel wide powers, including overturning management actions in their entirety (and presumably also in part), and substituting a higher or lower penalty (or no penalty, presumably). Of the four allegations found substantiated at the disciplinary hearing, three were not upheld or not substantiated, and one was partially upheld. Due to the mitigation presented by the Claimant, the length of time the matter had taken to reach a conclusion, and the impact that this had on the Claimant's wellbeing, no sanction was imposed. The panel were conscious that the process had been stressful for the Claimant, only one allegation was partially upheld, and the Claimant had a wealth of experience.

5.10 Thus, the appeal panel instructed that the Claimant should be re-engaged within the trust at Milton Keynes, as a band 4 senior HCA (her old grade). Her salary prior to dismissal was to be reinstated

and back dated to the date of dismissal, said to be a gesture of good will as it is not Trust policy. This was a sum of £7,955.

5.11 The outcome of the appeal was notified to the Claimant on 2 March 2017, and Mr Virdee apologised to the Claimant for the delay in the process. In the appeal outcome letter, the Claimant was told that Mr Richard White, Strategic HR Business partner, would contact her to discuss her return to work and make necessary arrangements for her reintroduction to the Trust, and her salary reinstatement. Of 3 March 2017, Mr White clarified with the appeal panel secretary that re-engagement could be at Woodhill (because of the higher pay there), or elsewhere in the Trust's Milton Keynes area. Mr Virdee told the Tribunal that the Trust serviced 19 prisons and had above average vacancy rates, and also vacancies in the community and mental health services. HCA bands 3 and 4 comprise a larger group of HCAs than other bands and apparently band 5s are being re-banded as band 4, so Mr White was confident that he could find a vacancy for the Claimant, either at Woodhill or elsewhere.

5.12 The Claimant had to chase Mr White thereafter, writing to him on 14 March 2017, seeking to arrange a meeting. Mr White responded, apologising for not contacting her (it was a mis-interpretation of his instructions), and suggested two dates for a meeting – 17 March or 20 March. The Claimant said that this was not possible and asked for dates for the following week, which Mr White then offered on 23 or 27 March. There was then no response from the Claimant, and another email was sent from Mr White on 28 March, asking the Claimant to suggest dates and saying that he would be on annual leave from 10 – 12 April. On 5 April Mr White still had not heard from the Claimant and wrote to her again, prompting a reply from the Claimant of the same day. It seems that the Claimant thought that she would have to return to HMP Woodhill, and she refers to that in her letter. She said that the last year's debacle was too great an obstacle to return from and she would not be taking up further employment with the Trust. She sought a meeting with Mr White to pursue a grievance. Mr White replied, on 13 April, asking for clarification as to whether the Claimant intended to resign, and pointing out that the appeal had been the proper opportunity for the Claimant to raise concerns about the process relating to the disciplinary outcome. Mr White invited the Claimant to reconsider her decision, and asked her to contact him again by 21 April. The Claimant wrote on 21 April to Mr White, terminating her employment with immediate effect. She still seemed to be under the impression that she was being required to return to HMP Woodhill, so Mr White wrote again, correcting that misapprehension, and saying that he would not action her resignation until 24 April to give her time to reconsider. The

Claimant's response was that the matter was now in the hands of her solicitor.

5.13 Nevertheless, Mr White went ahead and actioned the payment to the Claimant of back dated salary to the date of her dismissal, and a sum of some £7,955 went into her bank account on 18 May. This represented basic salary and holiday pay, including the Claimant's increment to the top of the band 4 scale. Mr White said that if the Respondent had known that the Claimant had found other employment and had been working for several months, which she had, then he would not have made that payment. The Claimant had found permanent employment soon after her original dismissal, on 1 November 2016, as a trainee recruitment consultant in a care agency. She is a single person with a mortgage to pay, she said, and needed to work, and it did not cross her mind to mention this employment to the Trust or to Mr White.

The Law

6. By section 94(1) of the Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer. By section 95(1)(c), for the purposes of the Act, an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) and in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct – so called constructive dismissal. An employee has the right to treat himself as discharged from his contractual obligations only where his employer is guilty of conduct which goes to the root of the contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract – see Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA. Thus, the employer's conduct must constitute a repudiatory breach of the contract. There is implied in a contract of employment a term that the employer will not, without a reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation which necessarily goes to the root of the contract – see Woods v WM Car Services (Peterborough) Ltd. [1982] IRLR 413, CA; and Malik v BCCI SA [1997] IRLR 462, HL. Conduct which breaches the term of trust and respect is automatically serious enough to be repudiatory, permitting the employee to leave and claim constructive dismissal – see Morrow v Safeway Stores [2002] IRLR 9, EAT. In Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445, CA, it was held that the range of reasonable responses test is not appropriate to establishing whether an employer has committed a repudiatory breach of contract entitling the employee to claim constructive dismissal. The Malik test is the correct test. In Hilton v Shiner Ltd. [2001]

IRLR 727, EAT, it was held that an employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence. However, it could never be argued that the employer was in breach of the term of trust and confidence if he had reasonable and proper cause for taking the disciplinary action.

7. The employee must leave in response to the breach of contract. In Nottinghamshire County Council v Meikle [2004] IRLR 703, CA, it was held that once a repudiation of a contract has been established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract as at an end. It must be in response to the repudiation, but the fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer. The innocent party must at some stage elect between whether to affirm the contract or accept the repudiation which latter cause brings the contract to an end. Delay in deciding what to do in itself does not constitute affirmation of the contract, but if it is prolonged it may be evidence of an implied affirmation – see W E Cox Toner (International) Ltd. v Crook [1981] IRLR 443, EAT. Whether there has been a breach of trust and confidence in any case is an objective test for the tribunal to determine. The fact that the employer's conduct must either be calculated or likely to destroy or seriously damage the employment relationship is arguably a high threshold. The particular incident which causes the employer to leave may in itself be insufficient to justify his / her resignation, but may amount to a constructive dismissal if it is the *'last straw'* in a deteriorating relationship. This means that the final episode does not in itself need to be a repudiatory breach of contract, although there remains the requirement that the alleged last straw must itself contribute to the previous continuing breaches by the employer – see Waltham Forest London Borough Council v Omilaju [2005] IRLR 35, CA. In Lewis v Motorworld Garages Ltd. [1986] ICR 157, CA, it was said that the breach of the implied obligation of trust and confidence may consist in a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each particular incident may not do so. In particular, in such a case the last act of the employer which leads to the employee leaving, need not itself be a breach of contract. The question is, does the cumulative series of acts taken together amount to a breach of the implied term? This is the *'last straw'* situation.

8. In Chindove v William Morrison Supermarkets Ltd., unreported EAT, 26 June 2014, it was held that a reasonable period is allowed before an employee is taken to have affirmed any breach of contract. It depends upon all the circumstances, including the employee's length of service, the nature of the breach, and whether the employee has protested at the change. The EAT recognised that deciding to resign is for most employees a serious matter. It may well require them to give up a job which provides them with their income, their families with support and be a

source of status to the employee in his / her community. Context rather than any strict time test is all important. The Respondent's counsel referred to the case of Quigley v University of Saint Andrews [2006] UK EATS 0025/05, where a two month delay was sufficient to affirm the contract, notwithstanding the Claimant's contention in that case that the delay was caused by him consulting a solicitor. In paragraph 37 of that decision, the EAT said: "….e*very day that passes after the repudiatory conduct, the repudiatory conduct will involve, if the employee does not resign, him acting in a way that looks very much like him accepting that the contract is, and is to be, an ongoing one."* In Hadji v St Luke's Plymouth, unreported EAT, 2013, the judge summarised the positions as follows:

The essential principles are that:

1) The employee must make up his / her mind whether or not to resign soon after the conduct of which he / she complains. If he / she does not do so, he / she may be regarded as having elected to affirm the contract whilst having lost his / her right to treat himself / herself as dismissed.

2) Mere delay in itself, unaccompanied by express or implied affirmation of contract, is not enough to constitute affirmation, but it is open to the employment tribunal to infer implied affirmation from prolonged delay.

3) If the employee calls on the employer to affirm its obligations under the contract or otherwise indicates an intention to continue the contract, the tribunal may conclude that there has been an affirmation.

4) There is no fixed time limit in which the employee must make up his / her mind. The issue of affirmation is one of which, subject to these principles, the tribunal must decide on the facts. Affirmation cases are fact sensitive.

9. In Roberts v West Coast Trains Ltd. [2004] IRLR 788, CA, it was held that an employee was not dismissed by his employers where, within the terms of a contractual disciplinary procedure, the initial sanction of dismissal was reduced on internal appeal to demotion to a lower grade. The demotion in such circumstances did not involve the termination of the existing contract or the entering into of a new contract. The effect of the decision on appeal was to revive retrospectively the contract of employment terminated by the earlier decision of dismissal so as to treat the employee as if he had never been dismissed. The fact that the employee made a complaint of unfair dismissal at a date between the initial dismissal and the hearing of his appeal does not affect the legal position in deciding whether or not he was dismissed for the purposes of an unfair dismissal claim.

In Thomson v Barnet Primary Care Trust, unreported EAT, 2013, it was held that the effect of reinstating an employee was to revive the contract of

employment. It was not an offer which was open to the employee to accept or reject. The repudiatory breach found by the tribunal in the form of dismissal was not open to be accepted by the employee, the innocent party, since it was set aside. Given the finding that the contract continued, the employee did not lose her right to invoke the unfair and wrongful dismissal and the matters leading up to it, when complaining of a series of events in aggregate amounted to repudiation. In that case, the employee had made successful complaints about her wrongful and unfair dismissal and continued to be unhappy about other aspects of her work including in terms of her return to the workplace (compulsory retraining programme and a final written warning). None of that constituted waiver of the breaches of the contract up to the date of dismissal. The claimant was therefore entitled to add together all of the events which she found unsatisfactory about her relationship with the respondent as at the time of her resignation. None of them needed in themselves to be a repudiatory act, but in aggregate they had to be. Earlier breaches continued to found a *'last straw'* argument, relied upon by the claimant. The conclusion was that the claimant resigned as a result of the imposition of the retraining programme, the culmination of what she saw as a two year refusal to allow her to work as before. The tribunal's finding that the claimant resigned because she did not agree to that programme was only another way of putting her dissatisfaction at the respondent's conduct which in aggregate constituted repudiation. The claimant was constructively dismissed. There was repudiatory conduct by the respondent dating from before the dismissal up to the resignation letter, and the claimant resigned promptly in response to that conduct and was entitled to have her case of unfair and wrongful dismissal tried.

In Taylor v OCS Group Ltd [2006] IRLR 613, CA, it was held that if an early stage of a disciplinary process is defective and unfair in some way then it does not matter whether or not an internal appeal is technically a rehearing or a review, only whether the disciplinary process as a whole is fair. After identifying a defect a tribunal will want to examine any subsequent proceeding with particular care. Their purpose in doing so will be to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at an early stage.

Conclusions

10. Having regard to the relevant findings of fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions:

    10.1 On the basis of Roberts, and the factual position in this case, it appears that the Claimant's appeal and the outcome of that had the effect of reinstating her employment with retrospective effect to her dismissal, and the Respondent accepts that position. Thus, the effective date of termination of the Claimant's employment was

when she resigned on 21 April 2017. Her claim is therefore brought in time.

10.2 I turn then to look at the specific allegations said by the Claimant to amount cumulatively to a breach of the implied term of mutual trust and confidence. The first allegation is the alleged falsification of the document recording her as attending an ACCT review meeting that she says she never attended. If this is correct, and the prison officer concerned was not investigated or disciplined for this, this is not an omission that can be laid at the door of the Trust who were not his employer. Further, the disciplinary allegations that arose from this issue were amended (in one case) and withdrawn (in the other) at the disciplinary hearing. Thus, it appears that the Claimant was not disciplined because of them. At the appeal, Mr Virdee apologised for any inaccuracy in the notes of the meetings that the Claimant attended. I conclude that there was no breach of the implied term here and no contribution to any such breach.

10.3 The allegation that the Claimant alone was disciplined. The simple answer to this is that she was the only Trust employee who was involved, save the trainee and a statement was taken from her in any event. Again, the Trust had no authority over any prison officers that might have been involved in the matter. The Trust's management was not directly involved in the incident. The Claimant has not identified any other specific Trust employee who she says should have been disciplined as a result of the prisoner's death. I conclude that the Claimant has failed to establish any breach of the implied term here, or contribution by this matter to such breach.

10.4 The allegation that the Claimant should not have been working alone and unsupported. This is not made out, on the facts. The Claimant had a trainee with her and so was not alone to that extent. Further, she had access to a registered nurse or an emergency response nurse who were on call. She could have contacted them in person, on the radio, or by mobile 'phone. The conditions of work the Claimant experienced on the day in question were normal practice for an HCA band 4, as the Claimant was, and she often worked alone. She had never complained about this before in the three years or so at that point that she had been in that post. There was therefore no breach of the implied term or contribution to such.

10.5 The decision to dismiss itself. It has not been established by the Claimant that the Trust was not entitled to investigate her actions and behaviour in connection with the prisoner's death. See Hilton v Shiner. The police also investigated, and may still be investigating. At the appeal hearing, the decision on one allegation was partially upheld. The Claimant herself does not really question the decision of Ms Halford in her witness statement, and the Respondent clearly thought that it was not part of the Claimant's case, and did not call

evidence from the decision maker. In the appeal panel's mind, when re-instating the Claimant, were other matters, such as the impact that the proceedings had had on the Claimant, and that she was a valued employee with a wealth of experience in many respects. In established unfair dismissal law respects, the appeal in effect cured any defects at an earlier stage – see Taylor v OCS Ltd. Just because the appeal panel overturned the original findings and decision does not mean that the original decision maker was in breach of the implied term by finding that allegations were made out and that dismissal was the appropriate sanction. Such decisions are matters of judgment, and the appeal panel had additional considerations in mind, as has been said. I conclude that, in all the circumstances, the decision to dismiss was not a breach of the implied term of mutual trust and confidence.

10.6 The allegation by the Claimant that the Respondent was planning re-engagement of her at Woodhill. I conclude that, on the evidence, that was not the case and I refer back to the findings of fact. If Mr White had had the opportunity to meet with the Claimant he would have explained that his remit was wide, and that she could be considered for any suitable band 4 vacancy in the Trust's Milton Keynes area, and there were a number of them. Or, if she preferred, she could return to Woodhill, and there is some evidence that the Claimant might have wanted to do that. She said that she loved her job there and of course it was better paid than other band 4 posts. Further, the Claimant in her evidence here said that she understood that she could have returned to Woodhill, although she later said that she realised this was a potential that had not been put to her. At the point that she resigned, the Claimant was expressly told by Mr White that her return was not confined to Woodhill. He gave her time to withdraw her resignation if she had mistakenly believed that it was. Thus, I conclude that on the facts this allegation fails. The Respondent was not planning re-engagement of the Claimant at the prison. The Claimant referred to her amended terms and of conditions in her evidence, which should prevent her working from a prison where she has been excluded, and dismissal being an option in those circumstances, but that is on a different point, I find.

10.7 The allegation by the Claimant that the Respondent made inadequate efforts to contact her and engage with her in the re-employment process. I have regard to the email correspondence I have set out in the findings of fact. The Claimant appeared to be reluctant to meet with Mr White, who offered her many dates for such meetings. I conclude that it was the Claimant who avoided the Mr White and was reluctant to engage in the process, not the other way around. Again, I conclude that the allegation is not made out

on the facts. Mr White was doing his best to move the process forward.

10.8 The Claimant complains about the protracted appeal process. There were three months from the notice of appeal to the hearing, when it should have been 28 days. However, there were reasons for this, such as the non-availability of senior personnel. Unfortunately, this seems to be a not uncommon feature in public sector cases, but with the constraints on them in these difficult times, it is an understandable difficulty. In my view, it is not capable of amounting in the circumstances to a fundamental breach of contract, or even contributing to one. Further, it was not relied upon by the Claimant as a *'last straw'*. The only last straw that she referred to was Mr White's assertion that she might be resigning after the letter of 5 April, which seems to be a reasonable assumption on his part. The Respondent in any event recognised their own fault in the protracted appeal process. It was one of the reasons why Mr Virdee did not impose a sanction on the Claimant, such as a warning for the partially upheld allegation, and reinstated her pay from the date of dismissal in recognition of this. There is therefore a distinct difference between this case and that of Thomson v Barnet PCT. The Claimant here cannot rely on any matters post dismissal that can add to repudiatory breaches or even be a *'last straw'*, as there clearly was in the Thomson case. In Thomson, the Claimant was given a final written warning and was made the subject of a retraining programme as part of that re-engagement process. There is nothing like that here. The Respondent was willing to re-engage the claimant in Woodhill or other places at her substantive post and salary and with no conditions imposed and no warning, and with full pay back dated to the date of dismissal (not Trust policy, even though the Claimant may be legally entitled to it, as she was to be re-instated on the same terms and conditions).

10.9 However, if I am wrong about this conclusion that there was no breach of the implied term, and there was in fact a breach of contract in the context of her dismissal and the events leading up to it, then I would conclude that by her actions post appeal the Claimant affirmed her contract. She gave every impression to begin with that she was engaging with the re-engagement process, and emailed Mr White on 14 March to chase him up about that and to arrange a meeting. In the next email, she also indicated that she was continuing with the re-engagement process or gave Mr White that impression. Then there was a gap of some three weeks before she sent her first resignation letter on 5 April. By then, they were some five weeks on from the date on which the Claimant had been told that her appeal had been successful – letter dated 2 March 2017. If and in so far as, in the circumstances in this case, the appeal hearing cured any defects in the process leading up to the dismissal and the dismissal itself, in the Taylor v OCS sense, then

the situation is that the Claimant had waited five months from the date of dismissal before resigning. That would certainly amount to affirmation of her contract of employment, by reference to her going through the appeal process and events thereafter. Although, in Thomson, following an appeal process was held not to be affirmation of the contract of employment, on the facts of this case and looking at the position overall, the Claimant's behaviour and actions in the period post dismissal, taken together with the fact that there were no breaches post appeal and no *'last straw'* has been established, constitute in my view affirmation. If I am wrong about that, then her behaviour post appeal on its own is sufficient to provide affirmation, in the circumstances, and by reference to the case law cited above.

10.10 A further point is this. I am not satisfied in any event that the Claimant resigned because of any breach that she can make out here. Although she went through the appeal, thereafter she failed to engage with the reinstatement process. Her heart was not in a return to work with the Respondent. She decided to stay instead with her new employer. This is understandable, perhaps, but means that she has not established that any breach up to and including the dismissal was causative of her resignation.

10.11 The Respondent accepts and agrees that the Tribunal has no jurisdiction to hear their employer's claim, because the Claimant has not brought any contract claim herself. This is required, of course, by article 4 of the Employment Tribunals Extension of Jurisdiction Order 1994.

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Employment Judge Sigsworth

Date: 31/8/18..

Sent to the parties on: .....

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For the Tribunal Office