Case No: 2423691/2017

EMPLOYMENT TRIBUNALS

Claimant: Mrs Joanne Needham

Respondent: Nuffield Health

Heard at: **Southampton** **On: 4 September 2018**

Before: **Employment Judge Fowell**

Representation:

Claimant: Mr R Ratcliffe (lay representative)

Respondent: Mr B Prajapati of Weightmans LLP Solicitors

RESERVED JUDGMENT

The complaint of unfair dismissal is dismissed

REASONS

Background

1. The claimant, Mrs Needham, worked as a nursing sister in the Outpatients Department of the respondent's hospital in Chichester. In May 2017 she was accused of falsifying her timesheets. This led to her suspension on 8 May and she resigned on the 24th, the day before her disciplinary hearing. Rather than simply accept her resignation the hearing was rearranged and went ahead on 9 June, resulting in a final written warning. Despite a number of suggestions that she rethink her decision the claimant did not seek to withdraw her resignation and her employment came to an end on 28 June. She then brought a complaint of constructive unfair dismissal.

2. At the heart of her complaint was the deterioration of her working relationship with the hospital's Matron, Mrs Patricia Hulse, who investigated the allegation and suspended Ms Needham. On the claimant's case the episode over the timesheets was therefore said to be the culmination of a series of events where she felt that she was overworked and under-supported.

3. In considering that complaint I heard evidence from Mrs Needham and two former colleagues of hers: Ms Mirella Spalding, a Health Care Assistant, and Ms Joanna Beckford, who worked in the company's finance department. I also heard evidence from Mrs Hulse and Ms Michelle Neal, a Matron at the respondent's hospital in Brighton who carried out the disciplinary hearing. Lastly, I had a witness statement from a Ms Novella Spalding, who was not able to attend. This concerned the rumours circulating later about the reasons for the claimant leaving and so was not directly relevant. I also had a bundle of about 300 pages. Apart from the witnesses, I will use initials for the names of those involved.

4. The relevant legal principles were set out by Judge Pirani in the first of two preliminary hearings in this case. Without repeating those points in full, the test for constructive dismissal derives from the wording of section 95 of the Employment Rights Act 1996:

> (1) For the purposes of this Part an employee is dismissed by [her] employer if (and, subject to subsection (2) … only if) – …
>
> > (c) the employee terminates the contract under which [she] is employed (with or without notice) in circumstances in which [she] is entitled to terminate it without notice by reason of the employer's conduct."

5. The breach here is said to be of the implied duty of trust and confidence. According to the House of Lords in the well-known case of *Malik v BCCI [1997] UKHL 23* a breach of this term occurs where an employer conducts itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence.

6. I therefore have to decide what, if anything, the respondent did on this occasion to damage the working relationship, and if it amounted to a breach of this important duty. Having considered the evidence presented and the submissions on either side I make the following findings.

Findings of Fact

7. Mrs Needham had been working at the hospital for just under six years at the time of her resignation. It is a small hospital and she had good relations with her colleagues. She managed the Outpatients department and from December 2014 she reported to Mrs Hulse who, responsible to the Hospital Director, managed all the clinical teams in the hospital and some other areas including housekeeping, records and portering.

8. Mrs Needham also had some additional responsibilities, including acting as health and safety co-ordinator for the hospital and then later as the manager responsible for pre-assessments of patients, i.e. in deciding whether they were fit and well enough to have their operation.

9. On her account there were a number of causes of disagreement between her and Mrs Hulse during the two years and five months in which they worked together. The first related to her uniform. The hospital required her to wear either a dress or a tunic and trousers. Mrs Hulse spoke to her two or three times about this, because she was not wearing regulation trousers. Staff were allowed

to buy their own blue trousers for a more comfortable fit, but Mrs Hulse took exception to those worn by Mrs Needham, saying they were leggings. Mrs Needham made no complaint at the time and duly ordered another dress for work. After that she usually wore a dress, but was spoken to about wearing the wrong trousers on at least one other occasion. It is hard to resolve such points with any confidence, when it is one person's word against another's, but I can see no reason for Mrs Hulse to take Mrs Needham to task over this if the trousers were in accordance with the uniform policy. If she was wearing regulation trousers the fact would be obvious. Nor do I accept that Mrs Hulse made a remark to her about her weight in this context; not only would that be unusually insensitive in a manager, but Mrs Hulse accepted in her witness statement that there would be no basis for such a remark and it was not put to her. I conclude therefore on balance that whatever was said, Mrs Needham, who saw herself as a responsible manager running a successful department, was irked about being spoken to over such a minor matter and felt she should have been given more freedom about what she wore.

10. Another bone of contention related to a live fire exercise or smoke test which Mrs Needham organised as part of her role as health and safety coordinator. It was unannounced and three fire engines attended. They set off smoke bombs and staff had to help evacuate the patients and some dummy patients as they would in the event of a real fire. It was suggested in Mrs Needham's witness statement that Mrs Hulse was not supportive of this incident, and indeed was furious with her for the dirty marks left by the fire crews on the newly painted walls. However, this was not an incident raised in the claim form or the eight-page further and better particulars which aimed to identify the breaches in question. Mrs Needham also accepted in evidence that Mrs Hulse had been supportive of the exercise when it was suggested and indeed volunteered to be one of the dummies. It does not seem to me likely in those circumstances that she would then blame Mrs Needham for holding the exercise. And any marks would not have been her fault but the result of carelessness by the fire brigade. Mrs Hulse's view was that it was the housekeeping manager who may have expressed frustration, not her. Whatever the precise position, it may well be that Mrs Needham was expecting more in the way of praise and recognition from her manager, having taken the initiative in this useful exercise, and this was not forthcoming, at least not on the day in question. She may also have felt that this was a slight, having different expectations in such matters, but I cannot conclude that there was any deliberate failure, and her contribution as health and safety coordinator was been generally understood and appreciated.

11. These incidents perhaps illustrate a difference in personal style between the two. Both would have been under pressure at work, with a heavy workload. It was also suggested by Mrs Needham that the Matron made sarcastic comments to her from time to time, although the example given at paragraph 8 of her witness statement – being told to "just get on with it" when asking for help with the pre-assessment work – seems more direct that sarcastic. That role was an additional duty for Mrs Needham, for which she received an extra monthly payment of £100. She agreed to take it on at Mrs Hulse's request but did not like making the calls to disappointed patients. Her expectation was that Mrs Hulse would help with this. It seems unlikely that Mrs Hulse would have agreed to do all these calls for

her as a matter of course, as this was an integral part of her paid role. It called for no particular seniority. But Mrs Hulse did do so for her on one occasion. Again, I conclude that Mrs Needham expected more in the way of support and encouragement, and interpreted the relative lack of sympathy shown – including from time to time being told that she would have to get on with it – as evidence of bullying. That was also the view of Ms Mirella Spalding, who felt that Mrs Hulse did not warm to Mrs Needham. Mrs Hulse on the other hand saw this approach as part of her role who described their working relationship as professional. The expression "firm but fair" is often something of a euphemism for a very direct management style, but that seems an appropriate description here. I note that Mrs Hulse did, for example, offer support in dealing with the pre-assessment work, as with the fire exercise, and although she spoke to Mrs Needham about her uniform, that does not seem inappropriate or unfair in the circumstances, especially where Mrs Needham is also a manager and expected to show a good example. I also note that Ms Spalding said in her evidence that Mrs Hulse spoke in the same "get on with it" way to other people, so I do not conclude that there was any ill feeling towards Mrs Needham.

12. I accept however that she was struggling with her workload, and had begun taking some paperwork home with her so that she could manage, and she shared her concerns to some extent with Ms Spalding. She raised no grievance about her workload or about Mrs Hulse however, as is often the case. People prefer to soldier on rather than admit they are struggling.

13. That was the background therefore to the disciplinary allegations which led to her resignation. As with her colleagues, Mrs Needham signed in and signed out each day at a book kept at the reception desk. Later, she would have to fill in a timesheet and pass it to the finance department who would check the arithmetic. Normal working hours in her case were 37.5 per week. If she worked for more than that she would be entitled to time off in lieu (TOIL) which she would take in occasional additional days of holiday. On Mrs Needham's admission at this hearing, she began to add hours to her timesheets, reflecting, she said, the additional hours she was having to do at home to cope with her workload.

14. This came to light when she was on holiday. On 28 April 2017 Mrs Hulse was visiting the outpatient's department to see if all was well. She spoke to a VL who appeared anxious, and they went to the Matron's room. There she said that she believed that Mrs Needham was falsifying her time sheets.

15. That led to a number of conversations with HR, who advised that Mrs Hulse should carry out an investigation. Over the next few days she did so, formally interviewing VL again on 2 May. Another member of staff, RS, also came to her during these few days with the same story. She too was very conflicted, having a good relationship with Mrs Needham. Apart from those two, the only member of staff interviewed before the claimant was the receptionist, who might have observed any discrepancy between the times of arrival and departure and that recorded in the book.

16. Mrs Needham returned to work on 8 May. She had planned to come in on 3 May, during her holiday, to give a course on manual handling but there was only one taker so the course was cancelled. This was therefore unrelated to the

disciplinary investigation.

17. On her arrival she was invited in to a meeting with Mrs Hulse in the office of the hospital director. This is next door to the HR officer, and she was there too to take a note. In that meeting, Mrs Hulse explained the allegation, and Mrs Needham immediately became upset. According to those notes (152), which she signed, her response was:

> "I don't have an excuse. I can't explain it, I would never do this intentionally."

18. She mentioned that she had been taking work home with her, but also suggested, for example, that she had made mistakes, had not looked at the clock, or had gone home earlier than planned and not altered her timesheets.

19. She has suggested that the conduct of that meeting was intimidating, with the HR manager barring the door and the general tone accusatory. In her oral evidence she qualified this, stating that the HR officer had her chair positioned in the doorway into her own office so she could not get out. Again, that may well overstate the position. This was not a matter which Mrs Hulse instigated. It was necessary to have such a meeting, and to have someone present from HR to advise and make a note. Usually it is the precursor to a suspension, but the main purpose is to put the issue to the employee and get their initial explanation. However it is done, it is likely to be a shock, especially when, as here, the employee knows that they have been to some extent at fault.

20. The conduct of this meeting was said by Mrs Needham in her evidence to have been the final straw, and that her resignation was inevitable from then on, although she wrestled with what to do for the next two weeks. This has not always been her consistent position however. The meeting was raised in her further and better particulars but was only mentioned in passing in paragraph one of her witness statement, which said that the last straw was being called into Matron's office and suspended. Nothing was said in that statement about what took place in the meeting. But most importantly, it is not mentioned at all in her resignation letter, which was of two pages, and went into some detail about her indignation over the evidence she had been sent in advance of the disciplinary hearing. Memory can play tricks, especially during periods of sleeplessness and anxiety, so I conclude from this that the position was less clear cut at the time, and that the decision to resign was only taken as the disciplinary hearing approached, with all the stress of going into work and accounting for what she had done. There may have been a build-up of things, but it was, in short, that hearing which prompted her decision to resign, and her feeling that she could not go through with the process.

21. Returning to the meeting on 8 May, the advice from HR was not in fact to suspend her, and so she was allowed to return to work. However, she was still very upset, and this was obvious to her colleagues. One way or another news had spread. VL came to see Mrs Hulse shortly afterwards to say that it was really awkward for her and she could not carry on working with Mrs Needham in such circumstances and so after further discussion with HR she was sent home with a suspension letter. The next day, understandably, Mrs Needham went to see her GP and was signed off with stress. She did not return to the hospital at any

point after that, except to attend the disciplinary hearing.

22. Mrs Hulse had prepared a six-page investigation report, which involved the use of CCTV. This showed Mrs Needham's car arriving and leaving at various times, which were then compared with the timesheets, although in the event the CCTV images were not relied on at the disciplinary hearing as being unclear. In any event, it was accepted that there were discrepancies, to reflect the additional work taken home.

23. It is unnecessary to go into much detail of the disciplinary process in view of the resignation. The hearing had been due to take place on 25 May, but Mrs Needham resigned by letter the day before, having it delivered to the hospital by her mother. The letter (233) is at odds with the previous admission, stating that she categorically refuted all of the allegations and had often worked overtime without any record or payment and should be reimbursed. She went on to challenge the timesheets themselves, noting that some had been signed off by staff nurses rather than Mrs Hulse, although how this came about was not explained in that letter or explored in this hearing. Further, she stated (234):

> "Due to the presentation of this alleged evidence I have now lost faith in the fairness of the company's procedure at this site. This was recently confirmed to me with the receipt of a message from a member of my team who approached me regarding this investigation."

24. She then attached a short statement from Ms Mirella Spalding to the effect that she had been manipulated by Mrs Hulse into making a statement as part of the investigation, that the questions had been badly constructed and her answers manipulated.

25. There were therefore two reasons given for the loss of confidence, the authenticity of the timesheets and pressure on a witness. However, neither point was raised subsequently, including at the disciplinary hearing or this hearing. Ms Spalding was in any event a peripheral witness. She was questioned briefly during the investigation but had little to add, having no real involvement in the timesheet issue. She was close to Mrs Needham and felt great sympathy for her, having formed the view that she was overworked and did not have enough support.

26. The thrust of these two points in the resignation letter however is that evidence was being fabricated or manipulated in order to remove Mrs Needham. I do not accept that that was the case, in part because it did not lead to her dismissal, and in part because this appears to be a mis-reading of Mrs Hulse's intentions and approach. There is a degree of drama about the resignation letter, consistent with putting a brave face on things, and a sharp change of tone from the investigation meeting, but that state of affairs was only temporary.

27. The hearing, which was due to take place the next day, was to be held by Ms Neal, Matron at the Brighton hospital, and she then wrote, on HR advice, asking Mrs Needham to reconsider. The resignation was on notice, expiring on 28 June, so it was also decided to reschedule the hearing rather than simply abandon it. In the circumstances that seems the logical approach, or at least one that cannot

be faulted. It was rearranged for 9 June, Mrs Needham having confirmed that she was not prepared to withdraw her resignation.

28. Nevertheless, she agreed to attend. In that meeting, at which she was accompanied, she gave the original explanation that she had been taking work home with her. There was no further mention of evidence being fabricated against her and she said she had been stupid. Since there was no question that Mrs Needham had no permission to add time in this way, it was found to be gross misconduct but she was not dismissed. Mrs Neal took into account her obvious remorse, that she had personal difficulties at home and her prompt admission, and so she was given a final written warning.

29. That might have been thought a very favourable outcome. Not only that but the hospital director then rang her the next day to ask her again to reconsider her resignation, telling her that something could be worked out with Matron. That strikes me as a significant intervention, altogether at odds with the idea that the respondent was looking to remove her. But she still refused. It may well be that she was unwilling or unable to face her former colleagues, which is understandable, so she maintained her stance, and took another job in nursing, on a lower salary, from 3 July 2017. She was therefore only out of work for about a week.

30. There was no appeal against the final written warning. Mrs Neal also emailed her managers later to say that she did not feel she should return to the same management position. In effect this would have been a demotion, but Mrs Neal did not address the question of whether she had the power to impose such a sanction, or do so after the disciplinary hearing. She assumed that the hospital management would, and it was by way of a recommendation. Mrs Needham was unaware of this at the time and it played no part in her decision to leave.

Applicable Law and Conclusions

31. Did all this amount to a fundamental breach of contract? Mutual trust and confidence can be undermined by the way in which an employer carries out a disciplinary procedure, although such situations are rare. In *Alexander Russell plc v Holness EAT 677/93*, an unreported case cited in the IDS Handbook on Contracts of Employment, the Employment Appeal Tribunal upheld an employment tribunal's finding that an employer had been oppressive in summoning an employee to a disciplinary hearing and giving him a final written warning for poor timekeeping, where he had been given a written warning for the same thing only 24 hours earlier.

32. Similarly, in *Stevens v University of Birmingham 2017 ICR 96, QBD*, the High Court held that the University had committed such a breach by refusing to allow the claimant to be accompanied by the person of his choice at an investigatory meeting into his alleged misconduct. That is not quite the same position as the meeting here on 8 May 2017. This was a follow-up meeting, when the employee had notice of the allegations, and was given an opportunity to respond before a decision was taken over whether to have a disciplinary hearing. Although there is a right to be accompanied by a work colleague or trade union representative, the University refused to allow him to be accompanied by a representative from

the Medical Protection Society (MPS) who serve a similar function to a trade union. The court regarded this as "patently unfair", which indicates the sort of situation required for the conduct of a disciplinary process to amount to a breach of the implied term. Although Mrs Needham will have found that first meeting distressing, there was nothing in my view particularly, let alone patently, unfair about it.

33. Nor was the decision to suspend inappropriate in the circumstances. It is often difficult for employers to strike the right balance. In *Gogay v Hertfordshire County Council 2000 IRLR 703, CA*, the County Council was held to be in breach of the implied term when it suspended a residential care worker pending an investigation into an allegation of sexual abuse made by a child in care. The Court of Appeal considered that to be accused of such a serious matter is likely to seriously damage the relationship of trust and confidence. The question was therefore whether there was 'reasonable and proper cause' for the Council's action in suspending the employee. The Court in that case thought not. The information provided by the child had been 'difficult to evaluate', meaning that it had been difficult to determine what she was trying to convey. The Court accepted that the matter warranted further investigation but to describe it as an allegation of sexual abuse at that stage was putting it far too high. In the present case however, it is accepted that the hospital was entitled to explore this issue and that it was serious. The fact of incorrect statements was admitted, and suspension was only resorted to when it became clear that the working arrangements were too difficult otherwise. It was not a "knee-jerk" reaction, such as has called for criticism in other cases.

34. The final complaint related to the fact that others had been involved in the disciplinary investigation before Mrs Needham knew anything about it. As noted already, these were VL, RS and the receptionist. Whether it was necessary to involve the receptionist at this stage is a moot point. It would in all probability have been better to have left that till later to ensure that confidentiality was preserved as far as possible. But it is rare for any disciplinary procedure to be handled entirely faultlessly, and there is no reason to point the finger of blame at the receptionist for leaking information rather than VL or RS. This was therefore at most a minor lapse.

35. There is therefore nothing in my view in the handling of the disciplinary procedure which could be said to amount to a breach of the duty of trust and confidence. Mrs Needham's case is that this process (put more broadly) was the last straw, against a background of previous slights and mistreatment. No doubt that is how it felt to her. I bear in mind that she was a dedicated and committed nursing sister. Her annual appraisals were always extremely positive and her performance was recorded as excellent. She worked diligently to prepare for the hospital's CQC inspection in July 2016, where her areas, the outpatient's department and health and safety were the only areas in the hospital which did not need improvement. In those circumstances, she may well have felt she was due more appreciation than she received. So, being picked up over her uniform will have rankled with her, as will organising a major smoke-test exercise and not being thanked on the day. But all these points have to be put in context. The smoke exercise was in late 2016 or early 2017, several months before her

resignation. The uniform comments were spaced over two years or more. The pre-assessment role may also have been something of a difficult and thankless task, but many other nursing staff will have such duties. The relationship between her and Mrs Hulse was not perhaps warm and friendly, as many of Mrs Needham's relationships at work were, but it was not cold either, and "professional" does probably sum it up. I cannot therefore find in these circumstances that either her treatment by Mrs Hulse was in any way a breach of this duty of trust and confidence, or that the disciplinary process was either.

36. It must have been extremely difficult for Mrs Needham to be accused of dishonesty against this background of hard work and feeling under-appreciated. On the other hand, she said herself in her disciplinary hearing that she had acted stupidly, and had put down additional hours to reflect her additional work, knowing that it was wrong to do so. Whether this was the result of strain, or a feeling of being taken advantage of does not altogether excuse her, and these points were taken into account by Ms Neal in her disciplinary decision. That conclusion and process generally appears to me to have been conducted fairly.

37. I note too that there was a subsequent referral to the Nursing and Midwifery Council (NMC), Mrs Needham's professional body, who concluded in March 2018 that she had no case to answer. That does not mean that the decision to issue a final written warning was inappropriate, in fact it reflects the decision by the respondent that there was no reason why she should not continue to be employed. That willingness to retain her, indeed to seek on several occasions to persuade her to stay, is also an important factor in the overall assessment. This is not in my view a case of a manager seeking to undermine and remove a subordinate, prompting a resignation by means of unfair treatment. The disciplinary allegations were the result of concerns raised by others member of staff, which Mrs Hulse was obliged to follow up, and Mrs Needham eventually chose to react to by resigning. It is unfortunate that she did so, but I am satisfied that she was in no way forced to leave or, more precisely, was entitled to regard herself as dismissed.

38. Having concluded that there was no fundamental breach of contract it is not necessary to go on to consider whether Mrs Needham waived the breach by any delay on her part in resigning, although in the circumstances of her illness a period of a couple of weeks to decide is not significant. But for all of the above reasons, the complaint of constructive dismissal must be dismissed.

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Employment Judge Fowell

_____
Date 05 September 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON: 5 October 2018

FOR THE TRIBUNAL OFFICE