# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Claire Wilson

**Respondent:** Cumbria Partnership NHS Foundation Trust

**HELD AT:** Carlisle **ON:** 19-21 November 2018

**BEFORE:** Employment Judge Humble

**REPRESENTATION:**

**Claimant:** Mr R Owen, Consultant
**Respondent:** Mr T Smith, Solicitor

# JUDGMENT

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed. The claim is dismissed.

## REASONS

The Hearing

1. The hearing took place on 19, 20 and 21 November 2018. The claimant was represented by Mr Owen, a representative from the Citizen's Advice Bureau and she claimant gave evidence on her own behalf. The respondent was represented by Mr Smith, a solicitor, and evidence was given on behalf of the respondent by Ms Zoe Lamour (Team Lead for the respondent's podiatry services), Ms Karen Hailes (another Team Lead for the respondent), and Ms Caroline Evans (Associate Director of Operations).

2. There was an agreed bundle of documents which extended to 564 pages. Evidence in chief was taken as read based on written witness statements prepared by the parties. The evidence and submissions were concluded on 21 November 2018 and Judgment was reserved.

**The Issues**

3. The claimant brought a claim for unfair dismissal and the issues were identified at the outset of the hearing as follows:

3.1 Whether the claimant resigned because of the actions of the respondent;

3.2 If so, whether the respondent's actions amounted to a fundamental breach of contract such that she was constructively dismissed under section 95(1)(c) ERA 1996. The claimant sought to rely upon a series of alleged acts and omission which she submitted cumulatively amounted to a beach of the implied term of mutual trust and confidence;

3.3 If there was a breach of the implied term, the tribunal would be required to identify the date of the last act or omission which contributed to that breach and determine whether there was any affirmation.

3.4 The respondent did not seek, in the alternative, to rely upon a potentially fair reason for dismissal under section 98 (1) and (2) ERA 1996. It did however contend that, if the dismissal was unfair, the claimant contributed to her own dismissal.

**The Law**

4. In respect of the constructive unfair dismissal claim, Section 95 (1) of the Employment Rights Act 1995 provides that an employee "*is dismissed by his employer if…(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*"

5. At common law, a party to a contract of employment is entitled to terminate the contract without notice if the other has committed a fundamental breach of contract. The test is whether the conduct of the 'guilty' party is sufficiently serious to repudiate the contract of employment. The Court of Appeal in Western Excavating (ECC) Ltd v Sharp [1978] ICR221 confirms that the common law test also applies to the statutory concept of constructive dismissal. Lord Denning put it this way:

*"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminated the contract by reason of the employer's conduct. He is constructively dismissed."*

6. In Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84 EAT it was confirmed that a term is to be implied in to all contracts of employment to the effect that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Browne-Wilkinson J in Woods v Wm Car Services (Peterborough) Ltd [1981] ICR 666, EAT described how a breach of this implied term might arise:

*"To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect,*

*judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

7. In Malik & Others v Bank of Credit and Commerce International SA (in compulsory liquidation) [1997] IRLR 462, HL, Lord Steyn stated that, in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, the intentions of the employer are not determinative. If conduct objectively considered is likely to cause damage to the relationship between employer and employee, a breach of the implied obligation may arise.

8. The employment tribunal's function therefore is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it. In order to determine whether there has been a breach of the implied term, two matters must be determined. "*The first is whether, ignoring their cause, there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts*" Hilton v Shiner Ltd [2001] IRLR 727.

9. For a claim of constructive dismissal to succeed, the employee must prove that the effective cause of his or her resignation was the employer's fundamental breach of contract and not some other reason, Jones v F Sirl & Son Furnishers Ltd [1997] IRLR 49, EAT. A repudiatory breach need only be a reason, and not necessarily the principal reason for the resignation, Logan v Celyn House Limited UKEAT/0069/12.

10. Where there is a 'final straw', the final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must contribute something to the breach and be more than trivial LB Waltham Forest v Omilaju [2005] IRLR 35, CA.

### The Witnesses

11. Catherine Zoe Lamour was an impressive and credible witness. She answered questions under cross examination directly and with precision. When she could not recall a point, she said so and where she believed she had made a mistake, in respect of a particular meeting which was central to the claimant's case, she readily admitted to it.

12. Karen Hailes and Caroline Evans were generally credible. In the case of Ms Evans there were some significant gaps in her recollection of the evidence and events, but that was explained in large part by the passage of time and the amount of information with which she was presented at the appeal hearing.

13. The claimant was less than impressive as a witness. She did not always answer the questions which were put to her directly and at times sought to make a different point unrelated to the question which was put, on occasions she came across as argumentative. A large part of this can be explained by the stress of cross examination and the tribunal did not doubt that the claimant genuinely believed that she had been treated unfairly and to her detriment.

### Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal made findings of fact only on those matters which were

material to the issues to be determined and not upon all the evidence placed before it):

14. On 11 December 2014, Claire Wilson ("the claimant") commenced employment with Cumbria Partnership NHS Foundation Trust ("the respondent"). The claimant was employed as a podiatrist for the West Cumbria podiatry team. The team consisted of nine podiatrists and one receptionist, all of whom reported to Ms Lamour who was the team leader. The claimant worked from Flatts Lane in Whitehaven but was required to visit other centres in the region from time to time. The claimant lived in Gateshead and had a property in Whitehaven where she lived during the week to reduce her travelling time to and from work.

15. The claimant was regarded as a competent practitioner and, aside from one occasion when she appeared to be having some time management issues, she performed well in her role. There was evidence from her team leader, Ms Lamour, during her cross examination which was revealing about the claimant. She said that the claimant was often quiet around colleagues, and that she seemed to have a very negative outlook on matters and was overly self-critical. Ms Lamour provided an example of an occasion when she was observing the claimant carry out a clinic for the purpose of a performance assessment. Ms Lamour was of the view that the claimant conducted the clinic extremely well and she had no reservations at all about quality of the claimant's work. However, when she asked the claimant to provide feedback on her own performance, the claimant gave only negative points and spent some considerable time criticising her own performance. Ms Lamour was surprised by the claimant's negativity and apparent lack of self-confidence and she therefore spent some time trying to reassure her as to the standard of her work. This incident was not directly relevant to the matters to be determined in the case, but it gave some insight in to the claimant's outlook and was consistent with the manner in which claimant perceived the events which unfolded from about the end of September 2016 onwards. The tribunal were of the view that the claimant tended to over-analyse matters and to view them in a very negative light.

16. In late September 2016, Ms Chambers, a member of the podiatry team who was on maternity leave, sent a message to colleagues in her team inviting them to a social "night out" to take place on the evening of 1 October 2016. This was not an evening related to work and the respondent was not involved in organising the event, the night out was organised by Ms Chambers who invited most of her work colleagues. The claimant did not receive an invitation. Shortly before the evening, the event was discussed among colleagues in the claimant's presence. The claimant felt excluded from the conversation and was offended that she had not received an invitation. She did not however mention this to her colleagues or ask whether she could go along.

17. The claimant reacted badly to what she perceived to be her exclusion from the night out. On 2 October 2016 the claimant sent an electronic message on the social messaging site 'Whats App' to Michelle James, a work colleague who did attend the event, which read as follows: "*You are all a bunch of absolute bitches. Don't give me any of your crap. Am deleting you, don't even bother with any small talk at work, am seeing Zoe [Ms Lamour] tomorrow.*"

18. The tribunal's view was that this was a substantial overreaction on the part of the claimant. Another employee, Sophie Slater, also did not receive the original invitation but she invited herself along and attended the night out. The claimant

admitted that she had been invited to previous events by work colleagues which she had declined to attend, albeit these were invitations to a gymnasium rather than a social evening. The claimant's work colleagues were aware that the claimant lived in Gateshead at weekends, which was a considerable distance from where the night out was due to take place. One possible explanation for the claimant not receiving an invitation therefore was that Ms Chambers assumed that the claimant would not wish to attend because she lived some distance away and/or because she had refused other invitations. The claimant however perceived it as a deliberately exclusion and chose not to say anything when the social event was being discussed. It was also quite possible that Ms Chambers simply did not want the claimant to attend the night out because she did not get along with her, if so the claimant's text to another colleague remained an unnecessary overreaction.

19. On 3 October 2016 the claimant met with Ms Lamour and said words to the effect that she believed she was been bullied and excluded by other staff members at Flatts Walk and that she was suffering from work-related stress. Ms Lamour's impression was that the claimant was upset at not been invited to the night out over the previous weekend. There was also some ill-feeling within the team toward the claimant, and particularly from Michelle James, because of the unpleasant text which the claimant had sent to Ms James. The claimant was thereafter absent from work with a stress-related illness for about a week before she was moved to the Workington clinic for a temporary period.

20. On or about 10 October 2016 Ms Lamour visited the claimant at the Workington clinic. She handed the claimant a stress questionnaire and asked her to complete it. The claimant completed the questionnaire that evening and a couple of days later she put the questionnaire in a sealed envelope and placed it in Ms Lamour's tray at the Workington clinic. Upon receiving the questionnaire, Ms Lamour forwarded it to the respondent's Occupational Health Department. The referral to Occupational Health was made on 17 October and is at page 47-48 of the bundle.

21. On or about 26 October 2016 a meeting took place between Ms Lamour, Sandra Eagles from Human Resources, and the claimant. During the discussion it was suggested that mediation should take place between the claimant and other staff and the claimant was offered the option of "*resilience counselling*" through an independent organisation. The claimant initially agreed to mediation but following the meeting she indicated that she would rather approach the staff herself than take part in mediation. Ms Lamour thereafter encouraged the claimant to speak directly with her colleagues in the hope that this would resolve the matter but, although the claimant indicated she would speak with them, she did not do so. Instead, on 7 November 2016, the claimant sent an email to all members of the team with the title "*night out*" in which she said that she "*didn't feel part of the team. The reason being is because everyone is invited to a night out…the whole team, excluding me. I get that Katie was the one who organised it, but it feels like the easy answer to give so no one has responsibility. I'm at the point where I will work with you professionally, but don't feel the same way about any of you, and certainly don't feel part of the team.*" (page 50-51).

22. Ms Lamour was frustrated at the lack of communication between the members of the team and the apparent unwillingness of the claimant to engage with her colleagues. During this period Ms Lamour spoke with Liz Turnbull, her line manager, and Liz Walsh, the trade union officer who represented the claimant, and Sandra Eagles of human resources. It was agreed between them that a meeting

should be arranged between the claimant, Zoe Lamour and the three other members of the team concerned, which was Michelle James, Dawn Solaire and Carol Gunn. It was agreed that such a "*clear the air*" meeting might help restore working relationships.

23. On Friday 4 November 2018, Ms Lamour met with the claimant and advised her that a meeting was to take place on 8 November with her and the three other members of staff. In an attempt to manage the claimant's expectations about the meeting, Ms Lamour said that the claimant could expect to "*be challenged*". This was because there was some ill feeling toward the claimant because of the content of the claimant's text in which she had referred to them as "*absolute bitches*".

24. The meeting took place on the morning of 8 November 2011 and was attended by Ms Lamour, the claimant, Dawn Solaire, Ms Gunn, and Ms Jones. There are different accounts of that meeting but essentially the tribunal accepted the evidence of Ms Lamour which was that she was unable to set out the ground rules for the meeting before the claimant became agitated. The claimant, no doubt feeling defensive, commenced the meeting angrily, refused to apologise for calling her colleagues "*absolute bitches*" and in the main was heated and aggressive. Michelle James was also agitated and called the claimant a "*disgrace*", she said words to the effect that she felt like handing in her notice because of the claimant's comments and behaviour. Dawn Solaire also expressed her unhappiness with the claimant's comments while Carol Gunn said very little.

25. Ms Lamour struggled to control the meeting. She attempted to calm proceedings and at one point said words to the effect of, "*it is not necessary for everyone in the team to like each other but you are all expected to act professionally.*" Ms Lamour also said words to the effect that she had been told, by Liz Turnbull, to "*lock everyone in the room*" until they had sorted it out. The tribunal was satisfied that both Ms Lamour and Ms Turnbull were speaking metaphorically when they used that phrase and that they did not in fact intend to lock the claimant in the room. The tribunal also found that the claimant recognised that it was not contemplated that she would be physically locked in a room with her colleagues as she appeared to imply. Ms Lamour accepted in evidence that she allowed the meeting to go on too long, she regretted not bringing it to an end earlier as soon as it became apparent that the two sides not likely to be reconciled. This was an error of judgement on her part, but the meeting was convened with the best of intentions in a genuine attempt to resolve a difficult situation which Ms Lamour was concerned would adversely impact upon patient care.

26. The following day, 9 November 2016, the claimant was timetabled to work with Dawn Solaire. The claimant took the view that was that this was a deliberate decision on the part of the respondent to make life difficult for her following the meeting of 8 November. The claimant maintained that position during her evidence, even after she accepted in cross examination that the respondent's work rotas were drawn up at least six weeks in advance. There was no evidence that a deliberate decision was made to place the claimant on the same rota as Ms Solaire, nor was it plausible that the rotas were re-organised the afternoon after the meeting of 8 November simply to cause the claimant stress. The fact that the claimant took that view was one of the examples of how the claimant made the worst possible assumptions of the events which took place during this period.

27. The claimant was absent from work with stress from 9 November 2016. On 17 November 2016 she lodged a formal grievance (pages 54-60). The gist of the grievance was that she been subject to "*bullying, ostracisation and victimisation*". She complained, among other things, that she had not been invited to the night out on 1 October 2016, about the nature and manner of the meeting of 8 November, and that she had been deliberately timetabled with Ms Solaire on 9 November 2016. The grievance was submitted to Elizabeth Turnbull, the respondent's senior Network Manager, and she acknowledged receipt on 21 November 2016. Ms Turnbull appointed Karen Hailes, a team lead from another department, to conduct the investigation.

28. On 19 December 2016 the claimant was interviewed as part of the grievance process. The notes from that meeting were reproduced at 242 to 247. Zoe Lamour, Dawn Solaire, Michelle James, Carol Gunn, Diane Berry and Pauline Moore were also interviewed as part of the investigation (pages 250-324). Those interviews took place between 24 January and 9 February 2017. Each person interviewed was given an opportunity to amend the notes of their interviews and some chose to make changes.

29. The claimant was absent from work from 9 November 2016. She was due to return to work on 20 January 2017, and on 16 January she was offered a return to the Kendal clinic. The claimant rejected this suggestion due to the travelling distance and she put forward some alternatives, including the Workington clinic. Ms Eagles informed the claimant that the respondent would re-imburse her travel expenses but that, if she was still not willing to travel to Kendal, she could either submit a further sick note, take unpaid leave or take annual leave until other arrangements were made. The claimant visited her General Practitioner who issued her with a further sick note and the claimant then took annual leave until 11 February. The respondent made arrangements for the claimant to work from Carlisle and on 13 February the claimant returned to work at that clinic.

30. There was some delay in Ms Hailes conducting the investigation and in Ms Turnbull reaching a conclusion to the grievance. There were several reasons for this, including an initial delay because of the unavailability of the claimant's trade union representative, the intervention of the Christmas period, difficulties in co-ordinating meetings with all the witnesses and then awaiting their responses to the notes of the interviews. The respondent's normal procedure was to give oral feedback upon the outcome of the grievance, and it was initially suggested that an outcome meeting would take place at the end of March 2017. However, the claimant was due to go on annual leave on 24 March and she requested the outcome before her holiday. Ms Turnbull had considered and reached a conclusion in respect of the grievance by that date and there was a document containing notes in which she summarised the evidence and her findings (pages 118-124).

31. On 22 March 2017 Ms Turnbull sent a brief letter to the claimant in which she stated that she had found there was no evidence of bullying or harassment (page 126). The claimant was advised that a meeting would take place upon her return to work on 5 April 2017, and she was advised of the right of appeal. At the same time a letter was sent to the claimant inviting her to attend a mediation meeting on 19 April with a qualified mediator and Ms Lamour.

32. The claimant responded by email on the evening of 22 March 2017 (page 129). She pointed out that there was no information provided on the grounds upon

which her grievance was rejected and that she could not appeal since she had not received any feedback and did not have any detailed explanation of the reasons for the respondent reaching its conclusion. Ms Turnbull responded on 23 March 2017 (page 131) and indicated that the meeting to discuss the outcome would be deferred until 10 April and that the time for the claimant's appeal would run from the date of that meeting.

33. The claimant attended the meeting of 10 April at which Ms Turnbull gave a verbal summary of her findings. At the end of that meeting Ms Turnbull raised the issue of the text message which the claimant had sent to Michelle James on 2 October, in which she had referred to her colleagues as a "*bunch of absolute bitches*". Ms Turnbull said words to the effect that the text was inappropriate and said that a note that her conduct was unacceptable would be placed on her file for six months. Ms Turnbull wrote to the claimant on 12 April 2017 summarising the reasons for the outcome of the grievance (page 148). A further letter was sent on 13 April headed "*Issue of conduct following meeting 10th April*" which contained a reprimand for the claimant sending both the text of 2 October and the email of 7 November which she had sent to her colleagues. The letter concluded, "*I have decided that this letter will be placed on your personal file where it will remain for 6 months from the date of this letter and if there is any further evidence of this nature it will be taken forward seriously in respect to your professional conduct and capability*." (page 149).

34. At the meeting of 10 April 2017, the claimant asserted that the notes which had been taken from her at the grievance investigation interview was not an accurate reflection of what she had said that interview on 19 December. The claimant was therefore informed in the letter of 12 April that she could submit amended notes and that the outcome would be put "*on hold*" pending this. The claimant indicated by email that she did not wish to submit any amended notes and wished to proceed "*straight to appeal*" (page 146). Ms Turnbull therefore wrote to the claimant on 13 April indicating the next step for the appeal (page 150).

35. The claimant complained that the respondent had failed to follow a disciplinary procedure in respect of the letter which had been placed on her personnel file to the effect that her conduct in sending the text was unacceptable. However, the tribunal found that the claimant was not informed at the meeting of 10 April that she had been issued with a formal written warning, only that a note and later a letter would be placed on her file. The claimant sent an email to Ms Turnbull on 13 April objecting that no formal disciplinary hearing had been convened to deal with the matter (page 151). Ms Turnbull responded on 18 April stating that no written warning had been issued and said, "*I can assure you that this letter has not been treated as or recorded as a disciplinary matter*". Despite acknowledging that she received that letter, the claimant still maintained in cross examination that she was the subjected to a formal disciplinary warning. This was another example of the claimant appearing to take the worst possible view of any given situation, even when she had been specifically informed in writing that she was not subjected to a formal disciplinary warning she still believed that she had.

36. On 18 April 2017 the claimant lodged a letter of appeal which is reproduced at pages 153-156. The appeal contained 52 separate allegations which we do not recite. In essence, the claimant alleged that the grievance process was conducted unfairly and that there was unfairness and bias among decision-makers.

37. The appeal hearing took place on 9 June 2017 and was chaired by Ms Caroline Evans, an associate director of operations for the respondent. Ms Turnbull was in attendance to present the management case, along with Ms Eagles from human resources. It was a lengthy meeting which took place over several hours and the claimant was given a full opportunity to outline the basis of her grievance (pages 424-441). Ms Evans had some difficulty in following the claimant in respect of the points which she made since she did not appear to follow a coherent or chronological pattern in respect of the issues which she addressed.

38. Ms Evans decided to adjourn the appeal hearing to give some further consideration to the matter. She took the papers home with her that weekend and, having spent some time considering the case, by Monday morning had concluded that the appeal could not be upheld. She wrote to the claimant on 12 June 2017 with a letter which outlined the basis of her findings and effectively rejected all the main points of the claimant's appeal (pages 442-445). Ms Evans held that the grievance process was fairly conducted and there was no bias among decision makers. It was a decision which was open for her to find on the evidence before her.

39. On 13 June 2017 the claimant submitted her resignation by an email which set out in some detail the reasons she believed she had "*no option but to resign*". The claimant accepted in her evidence that the points in that email were the principal reasons for her resignation and therefore the content of that email requires some scrutiny. It stated as follows:

*"I believe I have been left with no option but to leave as I feel after 8 months my grievance has still yet to be resolved satisfactorily; the grievance process conducted has been unfair and the appeal fails to acknowledge and respond to all the points I raised on the day, including:*

- *why I suffered detriment through half pay*
- *why my return to work procedure, which led to unfairness, unlawful advice and further work-related stress was badly managed*
- *why I was issued with disciplinary action months after the issues had been dealt with*
- *why, although you believe both parties were in the wrong, I am the only one at a disadvantage*
- *for not addressing why all the relevant witnesses weren't interviewed*
- *for not addressing why mediation was being discussed in the early stages of a formal investigation*
- *for not addressing why confidentiality had been breached*
- *for not fully addressing why a manager is allowed to take an employer into a room under false pretences and allow bullying and intimidation to occur*
- *why the Trust will not acknowledge that exclusion is a form of bullying that it is unacceptable behaviour and should be addressed*
- *why the Trust stated there is 'no evidence of deliberate exclusion' yet a witness stated that she didn't invite me out as I had previously declined offers (this is deliberate)*

- *why a detailed outcome letter was never given to me even though the Trust policy states that I should receive one*
- *why the reasons given in the grievance outcome meeting/letter were futile and were not a basis to establish that no bullying had occurred*
- *for not fully addressing issues surrounding a lack of transparency*
- *for not fully addressing issues surrounding a lack of consistency during the process*
- *for not addressing why my notes made on 19/12/16 weren't accurately transcribed, that key evidence was missing, and why the Trust deemed it suitable to allow an intern to be in charge of this task*
- *while my transcript from 19 December 2016 was not automatically sent to me, unlike other witnesses*
- *why two witness statements which support in my case were removed from the investigation as they didn't support the trust view on events (this is not the action of someone who is impartial).*

*It is on this basis that I have lost all trust and confidence in you as an employer.*

*I aim to proceed through the ACAS early conciliation so service you should receive notification of this by them in due course."*

40. These complaints, together with the exclusion from the social event of 1 October, were the principal issues relied upon by the claimant in support of her contention that there was a breach of the implied term. The tribunal therefore examined each of these grounds to assess whether there was a fundamental breach of contract and the findings follow.

<u>Detriment through half pay and unfair return to work procedure</u>

41. It was the claimant's case that she was placed on half pay as a consequence of the respondent not "*allowing her*" to return to work in January 2017. She said that he was instructed to get a sick note by the respondent until arrangements had been made for her to return to a clinic other than Flatts Walk. However, the respondent did make arrangements for the claimant to return to other locations throughout the period of her grievance, including the Kendal clinic on 20 January. The claimant refused the return to Kendal since she considered it too far to travel and therefore arrangements were later made for her to attend the Carlisle clinic.

42. The claimant submitted a sick note on 23 January 2017 only after consulting her general practitioner and she did so at her own volition. The fact that the respondent had suggested this to her as an option after she had refused the return to Kendal could not be said to have determined the opinion of the claimant or her GP as to whether she was fit to work. The claimant was paid half pay since that was the contractual obligation upon the respondent. It was not therefore a breach of contract in itself, nor did it contribute to a breach of the implied term.

43. The claimant was granted additional annual leave until 13 February 2017 at her request and later attended the Carlisle clinic. The tribunal were satisfied that the respondent took reasonable steps to find alternative sites for the claimant to work at following the fall out with her colleagues at Flatts Walk. She was given work at Workington and Carlisle and the respondent sought to minimise contact with those people at Flatts Walk about whom she complained. The respondent was

contractually entitled to require the claimant to work at Kendal and, when she refused to do so, it took steps to re-assign her elsewhere.

Disciplinary Sanction

44. The tribunal found that the claimant was not subject to a disciplinary warning. There was no suggestion from the notes of the meeting of 10 April 2017 that a disciplinary warning was issued to the claimant. The claimant, quite rightly, sought clarification upon the status of the letter which Ms Turnbull indicated she was placing on her file and she did so by way of her email of 13 April 2017. Ms Turnbull clarified in writing on 18 April 2017 that it was not a disciplinary warning. In view of the claimant's message of 2 October 2016 in which she referred to her colleagues as "*absolute bitches*", the decision to place such a note on the claimant's file, which would have been taken in to account in the event of any further conduct issues during the next six months, was not unreasonable. Further, given that the matter related directly to the grievance which took some time to investigate and conclude, the delay in issuing the reprimand was not one which was capable of amounting or contributing to breach of the implied term.

Although you believe both parties were in the wrong, I am the only one at a disadvantage

45. The premise of this alleged breach was incorrect since Ms Turnbull did not find that "*both parties were in the wrong*", in fact she dismissed the claimant's grievance. The claimant suggested in her evidence that she was disadvantaged because she was the only one moved from Flatts Walk. However, the claimant was the only one who had refused to work with colleagues at Flatts Walk, and even if the respondent had found those colleagues to be responsible for the breakdown in the working relationship (which it did not) the only alternative would have been to remove three other members of staff, who were working harmoniously with each other, from that location. In those circumstances, there was no breach of contract in the decision to allocate the claimant duties elsewhere.

Relevant witnesses were not interviewed

46. Sandra Eagles was the only person named by the claimant who she said should have been interviewed and was not. It was not clear to the tribunal how this would have assisted the claimant's case. Ms Eagles was not a member of the podiatry team and was not involved in the issues central to the claimant's complaints and she had little or nothing to add to the matters about which the claimant complained. The claimant pointed out that Ms Eagles was present at the meeting of 26 October 2016 when it was agreed to have "a clear the air meeting" between the claimant and the other staff on 8 November 2016, but it did not appear to be in issue that Ms Eagles had supported the decision to proceed with that meeting so it is not clear how interviewing Ms Eagles would have assisted. The decision not to interview Ms Eagles was not matter which amounted or contributed to a breach of the implied term.

Why mediation was discussed in the early stages of the grievance procedure

47. The respondent suggested mediation on more than one occasion, once before the claimant submitted her grievance and again in January 2017 after she had submitted her grievance. This was a situation in which they had been a fall out between several members staff who were part of the same team and were required to continue working together and, in those circumstances, mediation was one

possible solution that the respondent was entitled to explore. Once the grievance was submitted it would have been more prudent to await the outcome of the grievance before determining whether it was a viable option. However, the tribunal was not of the view that, in the circumstances of this case, that decision was capable of amounting to a breach of the implied term.

Breach of confidentiality

48. The tribunal had some difficulty understanding the basis of the claimant's complaint of breach of confidentiality. The claimant complaint arose from the fact that Ms Eagles disclosed to the claimant the names of the individuals against whom she had raised a grievance. Ms Eagles was a human resources adviser who was involved in advising upon the matter and she therefore necessarily had some awareness of the situation and of the people involved. Further, the claimant had told Ms Eagles the names of the people about whom she had complained at an earlier meeting in October 2016. There was no suggestion that Ms Eagles had disclosed that information to any third party and therefore there was no breach of confidentiality.

8 November 2016 meeting

49. The tribunal did not accept that the meeting was convened by Ms Lamour under "*false pretences*" as the claimant appeared to believe. The claimant had refused an earlier offer of mediation and indicated that she preferred to approach the individuals directly. Ms Lamour gave her an opportunity to do so but no progress had been made in that regard and the difficult working relationship persisted. The situation was not helped by the claimant sending the email on 7 November to all staff which further damaged working relations. Ms Lamour was concerned by this stage that the poor working relationship between the claimant and the other individuals might impact upon patient care and there was therefore a reasonable and proper cause for convening a meeting which, it was hoped, would clear the air and give the individuals an opportunity to air their differences. The claimant was advised of the reason for the meeting and that she would be challenged. The fact that the meeting was unsuccessful was due in large part to the claimant who was heated and aggressive. When assessing the evidence during the grievance investigation, the respondent was entitled to accept the evidence of Ms Lamour, Ms James and Ms Solaire who reported that the claimant was aggressive and not listening when points which were put to her. Ms Solaire reported that the claimant said, "*she hated us all*" and that "*she didn't want to talk to us*".

Ms Lamour was taken aback by the hostility which emerged at that meeting and admitted she should have stopped the meeting earlier than she did, but it was a meeting was convened with the best of intentions; that it turned out badly was a consequence, at least in part, of the claimant own behaviour.

Exclusion from the social event of Saturday 1 October 2016

50. Ms Turnbull and Ms Evans views were that the claimant was not deliberately excluded from the social event. The claimant had declined previous invitations and she lived in Gateshead and it seemed that this was the most likely explanation as to why she was not invited. In any event, even if Ms Chambers chose not to invite the claimant simply because she did not like her then that was not something capable of amounting to a fundamental breach of contract on the part of the respondent. This was not social evening arranged or paid for by the respondent, it was one which was

arranged by Ms Chambers and it was for her to invite those people whom she wished to attend and/or whom she believed would accept the invitation.

51. The respondent took a reasonable view that a decision by a work colleague not to invite the claimant to a night out on one occasion did not amount to bullying and exclusion.

Failure to provide detailed outcome letter

52. The claimant complained that the respondent did not provide a detailed outcome to her grievance. The letter of 22 March 2017 was extremely brief, particularly given the time which had passed from the date that claimant raised her grievance. The claimant was not able to submit a detailed appeal upon receipt of that letter since she could not discern the grounds upon which her grievance was rejected. However, the claimant did specifically request an outcome to her grievance before she departed on holiday on 24 March. After her return from holiday, at the meeting of 10 April 2017, the reasons for rejecting the grievance were explained verbally at some length and a more detailed outcome letter followed on 12 April 2017 which set out those reasons. At that point the claimant was also given additional time in which to submit her appeal.

Reasons for grievance outcome were futile

53. This appeared to be part of the claimant's wider complaint that those dealing with the grievance investigation and the appeal were not impartial and essentially bias against the claimant. There was no persuasive evidence before the tribunal to satisfy it that either Ms Turnbull or Ms Evans were bias or that their reasoning was not sound. The tribunal did not hear from Ms Turnbull but the investigation was thorough, Ms Hailes investigation report extended to 177 pages, there were detailed notes of Ms Turnbull's interpretation of the evidence and the findings which she made were open to her on the evidence available. Ms Evans conduct of the appeal was thorough, and tribunal was satisfied that she approached the matter with an open mind. The reasons given for outcome of the grievance and appeal were coherent and sufficiently detailed for the claimant to understand why her complaints were not upheld.

Lack of transparency and consistency

54. There was no specific evidence before the tribunal in support of these assertions. In her evidence the claimant indicated that this related to the notes of the investigation interview of 19 December 2016, which is dealt with below.

Failure to accurately transcribe notes of meeting of 19 December 2016

55. The claimant was provided with copies of the notes of the meeting of 19 December 2016 on or about 1 February 2017. She did not seek to challenge the accuracy of those notes until 9 April 2017 and then only after she was informed of the outcome of her grievance. In her evidence the claimant alleged that 50% of the notes from that meeting were missing and the other 50% were inaccurate. However, she could not explain why she did not submit revised notes to the respondent when she received them in February. Ms Turnbull also wrote to the claimant on 12 April and invited the claimant to submit her amendments for her consideration, but the claimant did not do so. The claimant also challenged the accuracy of notes and minutes from other meetings. The tribunal found on balance that, while not a

verbatim account, the notes produced by the respondent from the various interviews and meetings were a reasonably accurate summary of what was said.

Why my transcript from 19 December 2016 was not automatically sent to me

56. The transcript was sent to the claimant on 1 February 2017 and, while there was some delay, this did not impact upon the investigation and the claimant had ample time to correct any inaccuracies which she believed were in it before the grievance was determined.

Removal of two witness statements

57. The claimant did not specify in her evidence which two witness statements she believed were "removed" and there was no evidence before the tribunal to persuade it that any evidence had been removed or ignored.

Other issues

58. There were several further issues that were raised in the claimant's evidence and which she sought to rely upon as causing or contributing to a breach of implied term of mutual trust and confidence. The tribunal shall seek to deal with the significant issues raised.

59. It was alleged that Ms Lamour did not "*review the risk assessment*" completed by the claimant which left in Ms Lamour's in tray in October 2016. The tribunal accepted Ms Lamour's explanation that it was not her role to review that assessment but rather she was required to forward it to Occupation Health for them to process and assess it since they were best placed to do so. Ms Lamour made the referral (page 47-48) and the claimant was reminded by Ms Lamour that she was required to speak to Occupational Health about her stress-related illness, which would have included the risk assessment she completed. The respondent later assigned the claimant to other locations to alleviate any work related stress caused by her working with the people against whom she raised a complaint. There was no evidence that Occupational Health advised the respondent that they were required to carry out any further steps in relation to the claimant.

60. The claimant alleged that Ms Eagles acted in a bias and unfair manner by initially supporting Ms Lamour and then been involved in co-ordinating the claimant's return to work in January and February 2017. The tribunal were of the view that Ms Eagles, in her capacity as HR adviser, was entitled to provide Ms Lamour with advice on how to address the issues which had arisen between the claimant and her colleagues and this did not disqualify her from later assisting the claimant in her return to work in January and February 2017.

61. The claimant alleged there was deliberate delay in investigating and communicating the outcome of the grievance. There was no evidence to that effect before employment tribunal. There were several issues which delayed the outcome of the grievance, including the initial unavailability of the claimant's trade union representative, the Christmas period and the need to arrange meetings with various witnesses. The fact that a detailed written response was not provide until 12 April 2017 was less than ideal, but the tribunal were of the view that the delay was neither deliberate nor, in the circumstances of the case, negligent such that it would contribute to any breach of the implied term.

62. The claimant alleged that Ms Evans failed to address every point which she raised in her appeal letter. The claimant raised a grievance appeal which extended

to 52 separate points and Ms Evans took some time to consider those matters and, when reaching her conclusion, she set out with reasonably clarity the grounds for her decision. The tribunal found that Ms Evans was not obliged to address each individual point and that her method of dividing the claimant's grievances in to two separate sections, the alleged unfair conduct of the grievance process and the unfairness and bias of the decision makers, was a reasonable approach to take. Many of the points raised by the claimant were repetitive and essentially dealt with the same point, for example "*grievance policy not followed*", "*ACAS Code of Practice not adhered to*", "*Grievance process has been badly managed*" were all essentially the same complaint.

63. There were other more specific complaints about the handling of the grievance process. The tribunal were of the view that this was a grievance procedure which was handled less than perfectly, there were some minor flaws but none which could be said to amount to a breach of the implied term. The claimant complained about the partiality of almost everyone who was involved, including Ms Eagles, who was not involved in the decision making, and Liz Walsh, her own trade union representative. The tribunal was not persuaded that there was any significant evidence that any of people involved in the grievance or the appeal process were bias or lacked partiality. The claimant also took issue with the location and timing of the grievance appeal hearing but it was not a matter which she raised at the time, she did not for example ask for the meeting to be re-scheduled to later in the day or at a different location.

64. Another issue upon which the claimant's case focussed was that was she was the only member of staff who received tunics which did not have an NHS badge upon it. She sent an email to Ms Lamour pointing this out on 29 September 2016. Ms Lamour replied promptly, apologising for her oversight and requesting that the claimant return the tunics and she would immediately order new ones. This was an example of a minor issue which the tribunal did not regard as capable of contributing to a breach of contract but the claimant, looking backwards, perceived to be part of a campaign to undermine her and which she sought to rely upon in support of her belief that she had been excluded and treated to her detriment.

## Conclusion

65. The claimant's case stemmed from the decision of a colleague not to invite her to a night out on 1 October 2016. The claimant believed she had been deliberately excluded from that event and was genuinely hurt by it. Aside from that incident, and the later meeting of 8 November, there was little else relied upon by the claimant in the way of her been excluded or bullied. There was mention in her witness statement of unfair timetabling, too many domiciliary visits and the negative attitude of staff toward her but no specific allegations were made and there was no evidence to support those assertions. The tribunal reminded itself that the onus was on claimant to prove the breach.

66. The tribunal found that the respondent was not responsible for the decision of one of its employees not to invite the claimant to a social evening. The subsequent breakdown in relations which followed was in large part due to the claimant's reaction to that perceive slight, and in particular her disparaging and ill-judged message to her colleagues. There were some matters which the respondent did not handle particularly well, principally the meeting of 8 November, the delay in investigating the grievance and the very brief outcome letter issued on 23 March

2017. There are of course two aspects to establishing a breach of the implied term, the first of which is determining whether there was a reasonable and proper cause for any alleged breach. The tribunal found that there was a reasonable and proper cause for the delay, a number of factors contributed to it; the brief outcome letter was sent in advance of the claimant's annual leave and she had requested an outcome before her holiday; and the meeting of 8 November was a genuine attempt to resolve a difficult situation, the claimant reacted angrily at that meeting which contributed in large part to the adverse outcome. The tribunal held that these matters did not separately or collectively amount to a breach of the implied term.

67. In respect of the other issues, which focussed in the main upon the handling of the grievance and appeal, the tribunal held that the respondent approached the investigation, grievance and the appeal with an open mind and did a reasonably diligent, although not flawless, job of collating and reviewing the evidence. Both the grievance and appeals officers were entitled to reach the conclusions which they did based upon the evidence before them. The tribunal were of the view that the claimant was in a mind-set from late 2016 onwards whereby any minor flaw or perceived error on the part of the respondent was regarded as part of an attempt to undermine her or cause her disadvantage, and she had closed her mind to mediation or attempting to reconcile with her colleagues.

68. The tribunal found that there was not a breach of the implied term of mutual trust of confidence by the respondent, either in respect of any one incident or by cumulative effect which entitled the claimant to resign.

69. Accordingly, the claimant was not unfairly dismissed. The claim is dismissed.

Employment Judge Humble

Date: 9th January 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 January 2019

FOR THE TRIBUNAL OFFICE

[JE]

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