EMPLOYMENT TRIBUNALS

Claimant: Mrs M Murray

Respondent: The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust

Heard at: Southampton On: 8 & 9 May 2018

Before: Employment Judge Maxwell

Representation
Claimant: Mr Peck, Counsel
Respondent: Mr Milsom, Counsel

RESERVED JUDGMENT

1. The claimant's unfair dismissal claim is well-founded and succeeds.

2. The claimant's breach of contract (wrongful dismissal) claim is well-founded and succeeds.

REASONS

Preliminary

Claim

3. By a claim form presented on 5 December 2017, the claimant brought claims against the respondent:

   3.1. constructive unfair dismissal

   3.2. breach of contract with respect to notice pay.

Witness Evidence

4. I heard evidence from the following witnesses

   for the claimant

4.1. Mary Murray, the claimant;

4.2. Declan Murray, the claimant's husband; for the respondent

4.3. Stephen Banks, the respondent's Portering Manager;

4.4. Karen Griffiths, the respondent's, HR Business Partner.

Documentary Evidence

5. I was provided with:

5.1. an agreed bundle of documents running to 133 pages;

5.2. audio excerpts from the recording of the claimant's grievance meting on 10 April 2017.

Issues

6. In answer to a request for further and better particulars of the matters the claimant relied upon as a fundamental breach of contract, she replied:

> Mrs Murray's claim is that the fundamental breach of her contract of employment was the respondent's failure to deal with her grievance about bullying and harassment at work promptly and/or within a reasonable time and/or within their own timescales this was a continuing course of conduct during all part of the period from when she first raised a formal grievance on 27 July 2016 until 8 August 2017 when she resigned.

7. As to the term allegedly breached, the claimant replied:

> The term(s) of Mrs Murray's contract which were breached by the respondents where the implied term of trust and confidence and the implied term that the respondent would deal with her grievances promptly.

8. Accordingly, the issues which arise on the claimant's constructive unfair dismissal claim are:

8.1. whether, by reason of the respondent's delay in addressing the claimant's grievance, there was a breach of the implied term of trust and confidence and / or the duty to address grievances promptly;

8.2. whether the claimant resigned in response to any such breach;

8.3. whether the claimant waived any such breach or affirmed the contract;

8.4. whether, if so dismissed, the claimant's dismissal was unfair within section 98(4) of the Employment Rights Act 1996 ("ERA").

9. The issue on the claimant's breach of contract claim is:

9.1. whether the claimant was dismissed, as above.

Facts

10. The claimant was employed by the respondent NHS trust as a housekeeping assistant.

11. By a letter of 25 July 2016 ("the first grievance"), the claimant raised a formal grievance, complaining about having been made to feel "uncomfortable, uneasy and intimidated" by a supervisor on 18 July 2017, when he had asked her to complete a cleaning task she was unable to. She made three copies of this letter and handed these to a ward sister, her line manager and the Deputy HR Manager, Leann Willis. One copy of the letter was date-stamped by the respondent's HR department as received on 27 July 2016.

12. The respondent's Dignity at Work ("DW") policy includes indicative times for the completion of various steps:

12.1. it is expected that a meeting would be held by the investigating officer with the complainant within 7 working days of the complaint being received;

12.2. The investigation should be completed within 8 weeks unless it is highly complex.

13. The respondent's policies include guidance on conducting investigations generally (i.e. disciplinary and grievance). This makes a distinction between simple and complex investigations and identifies factors relevant to the same. A single complaint (such at the claimant had made) which if upheld (in a disciplinary context) would call for a low level warning, would fall into the simple category.

14. On Friday 5 August 2016, the claimant received two letters from the respondent:

14.1. the first dated 4 August 2016 from Ms Willis, acknowledged her grievance, advised this would be investigated under the respondent's dignity and work policy (attaching a copy) and informed her that an investigator would be appointed, before pointing her toward the respondent's Employee Assistance Programme ("EAP");

14.2. the second was from Mr Banks, explaining that he had been appointed to investigate her grievance and inviting her to a meeting on 15 August 2016.

15. The claimant worried about the matter over the weekend. On Monday 8 August 2016, she felt unwell and attended her GP. The claimant was signedoff as unfit for work.

16. Contrary to the impression given by Mr Banks' witness statement, he did not speak with the claimant about her grievance prior to 15 August 2016, rather he began a period of annual leave on Monday 8 August 2016 and did not return from that until the 15th.

17. On his return, Mr Banks received a copy of the claimant's letter of 12 August 2016 ("the second grievance"), which explained that she had been signed-off work by her GP by reason of stress and anxiety, and this would also prevent her from attending an interview. The claimant went on to describe the event in her previous letter as merely the "tip of the iceberg", saying she had been the victim of bullying and harassment throughout her 9 years of employment with with Trust. Having stated she was not well enough to go through the entire history, she did set out 7 matters in detail, with dates, names of perpetrators and witnesses, together with an account of the offending behaviour. In her penultimate paragraph the claimant wrote:

> I need to have this resolved permanently because I cannot go back to work whilst this intimidating and harassing behaviour continues. Due to the fact that previous complaints have been ignored I don't have any trust or confidence in the management to make sure that this bullying and harassment stops and it is safe for me to come to work again and not have my health further damaged by the stress of it all.

18. The additional allegations made by the claimant, citing a number of employees (either as perpetrator or witness) took this matter into the complex category under the respondent's guide to investigations. The indicative timetable gave a maximum total time period of 10 weeks for the process.

19. In his witness statement, Mr Banks refers to the need to meet with the claimant in order to clarify her "historical allegations". This seems to be an after the event rationalisation. In cross-examination during this hearing, it having been pointed out to Mr Banks that only one of the matters cited by the claimant had been complained about more than 13 weeks after the event itself (the time limit in the respondent's DW policy), he conceded the reference to these matters as being "historical" was misplaced. Mr Banks also accepted that the claimant's allegations were already clear.

20. I find the reason that Mr Banks sought to meet with the claimant to discuss her grievance is simply that was consistent with the respondent's DW policy, usual practice when investigating grievances, and advice from Ms Willis of HR.

21. Mr Banks says he then telephoned the claimant several times over the next two to three weeks, but did not speak with her and instead left voicemails. I find he did not, for the following reasons:

    21.1. the claimant denies having received any such calls or messages, and on this I accept her evidence;

21.2. in his next letter, Mr Banks says nothing of his unanswered telephone calls or voicemail messages, and I would have expected him to mention this if it were the case.

22. Mr Banks carried out some interviews with staff identified by the claimant in her first grievance, although no detailed evidence in this regard was put before the Tribunal.

23. Mr Banks wrote to the claimant again on 19 September 2016. As above, his letter made no mention of any unsuccessful attempts to contact her by telephone. Mr Banks said that that in order to continue with the investigation he needed to interview the claimant and discuss the grievance with her. He said that he wished to refer her to Occupational Health to ascertain her fitness for this purpose and asked her to contact him by letter or telephone to confirm she was happy with that referral.

24. The claimant did not reply directly to Mr Banks, rather she instructed solicitors to reply on her behalf. The letter of 27 September 2016 from Aldridge Brownlee Solicitors ("AB") said the claimant had not received an acknowledgement of her second grievance and that her GP advised her not to go to work. AB suggested that in the event the respondent needed to ask the claimant any questions in connection with her grievance, those questions be asked of AB, who would take instructions and reply on her behalf. AB's letter said nothing about the claimant's willingness to attend OH.

25. Ms Willis replied on 3 October 2016. Having referred to the history of this matter, including calls made by Mr Banks (which I do not find were made), she emphasised the importance of the respondent's timescales being adhered to and the unfairness to those accused, caused by delay. She offered the facility for the claimant's OH consultation to take place offsite, before saying that if the respondent was unable to meet with the claimant it would only consider her first grievance.

26. AB responded on 17 October 2016. AB expressed the claimant's feeling of having been let down by the lack of any acknowledgement of her first grievance until 8 days later and sought an assurance that all of her complaints in both grievances would be addressed. The letter said the claimant was unfit to attend an interview "at present". AB repeated their call for questions to be asked of them rather than her. AB also asked for disclosure of the investigation.

27. Notwithstanding the claimant did not agree to attend OH, an appointment appears to have been made for her on 15 November 2017, which was then cancelled by OH for their own convenience. From the OH email of 15 November 2016, it is apparent they were unable to contact the claimant:

> Good afternoon Kim, I write to advise you that we contacted Mary yesterday regarding today's appointment as we needed to reschedule [redacted]

> Mary did not return our call, so we are currently waiting to reschedule this appointment. I would be grateful if you could ask her to contact the department to reschedule this appointment.

28. There is no evidence the claimant contacted OH, or otherwise took any steps to support a referral.

29. The respondent's letter to AB of 17 November 2017 was written by Mrs Griffiths. She apologised for the delay in replying to that from AB of 17 October 2017. She gave an assurance that the matters in the claimant's second grievance would be investigated. She also expressed a hope that the claimant might now be able to attend an investigatory meeting. She said there had been several attempts to arrange an OH appointment and reminded the claimant of the expectation in the attendance management policy that employees would cooperate in connection with the same. Mrs Griffiths rejected the suggestion of sending questions and statements to the claimant's solicitor, proposing instead that the investigation interview might take place elsewhere (i.e. not at the respondent hospital).

30. In reply on 1 December 2017, AB confirmed the claimant would meet the investigator at her home and invited the suggestion of suitable dates.

31. On 22 December 2017, Ms Griffiths wrote to AB saying the due to illness and "the forthcoming festive season" the claimant's meeting with the investigator would be in the new year. Ms Griffiths was unable to explain the 3-week delay from the beginning of December, other than in the vaguest terms by reference to workload.

32. At this point in time, there appears to have been some confusion on the part of those charged on the respondent's behalf with addressing the claimant's grievance as to who was responsible for conducting the investigation. Mr Banks had become concerned by the challenging nature of the claimant's grievance, which now included the somewhat daunting prospect of corresponding with her solicitors, and the demands he faced in his own department, as a result of which he wished to step down as investigator. Mr Banks believes that he handed over this responsibility at some point after 17 October and before 17 November 2016. Inconsistently with that position, however, Mr Banks also maintains that he carried out related investigatory interviews on 29 November 2016. Mrs Griffiths, on the other hand, believes she took over the role of investigator early in 2017, perhaps close to February. Unsurprisingly in such circumstances, no action was taken by the respondent to progress the claimant's grievance between December 2016 and mid-February 2017.

33. By a letter of 14 February 2017, Ms Griffiths wrote to the claimant saying the investigator (a reference to Mr Banks) was unable to continue with the grievance and she, Ms Griffiths, now wished to meet with the claimant to

discuss her complaints. Ms Griffiths asked the claimant to call her to arrange a mutually convenient date, and copied the letter to AB.

34. Between mid-February and mid-March, the claimant did not respond to attempts by her employer to make contact. The claimant explained her mental health was poor during this time, and she accepted the respondent could not be blamed for delay in that month.

35. Ms Griffiths wrote to the claimant again on 14 March 2017. She referred to the lack of any contact with the respondent or OH, the fact that sick pay had been stopped because of that, and said that if nothing was heard back it would be assumed the claimant had resigned. Ms Griffiths also copied this letter to AB, asking whether they had heard from the claimant.

36. AB emailed Ms Griffiths to say they were taking instructions. Ms Griffiths replied that she was waiting for contact from the claimant to arrange a meeting, the claimant had been contacted by OH several times but had not responded or provided a consent, and nor had GP fit notes been received since January.

37. On 17 March 2017, AB proposed dates for a meeting. On 22 March 2017, AB provided a report from the claimant's GP, seemingly intended to avoid the claimant having to meet with OH.

38. Finding a mutually agreeable date for the claimant and Mrs Griffiths took some time.

39. The grievance investigation meeting eventually took place on 10 April 2017, with Ms Griffiths attending at the claimant's home. During the course of this meeting the claimant was, on several occasions, very upset and tearful. The claimant also handed over a letter which read:

> I have been bullied and harassed at work for a long period of time and the stress has got too much for me. Management failed to protect me from this bullying and harassment even though they knew it was going on.
>
> I raised a grievance. My manager did not deal with it promptly. As my employer you are vicariously liable for acts of harassment and bullying carried out by other members of staff.
>
> It's been nine months since this episode started and I have now got to the point where my anxiety and stress levels and my low self esteem are severely affecting my quality of life. I would like this to be concluded satisfactorily.

40. The meeting transcript runs to 25 pages and it is agreed that Ms Griffiths explored all of the matters raised in both the claimant's first and second

grievance. The claimant was also asked what she would wish for in terms of a satisfactory outcome and replied:

> Not going back to work that's for definite I couldn't face, I couldn't I mean it's taking a hell of a lot out of me now I mean I'm not getting any young and 62 in May so I just feel like you know is wearing me down.

41. Interviews were conducted by Ms Griffiths with other relevant witnesses on 25 and 26 April 2017. As a result of her workload, it was another 6 weeks before Ms Griffiths finalised her report.

42. Ms Griffiths finished her investigation report in June 2017. Whilst she found evidence of tension and some difficulties in the working relationship between the claimant and her supervisor, Mrs Griffiths did not uphold the complaint of harassment and bullying.

43. Ms Griffiths' report was provided to a senior manager, Ms Daughters, for review and validation, on 5 July 2017. Ms Daughters communicated her agreement with the outcome on 13 July 2017.

44. The grievance outcome, which reflected Ms Griffiths findings, was sent to AB under cover of the respondent's 4 August 2017 letter. This was received by the claimant's solicitor on 8 August 2017.

45. On the same day, 8 August 2017, the claimant resigned, by way of a letter her husband hand-delivered, which provided:

> Is now a year since I first raised a grievance and it is now four months since you interviewed me. I made it clear to you how much this was affecting me and that I wanted it to be concluded satisfactorily. I received a copy of the recording of that interview but nothing since then. I cannot go on waiting. The hospital have failed to deal with my grievance in anything like a reasonable time and I no longer have any trust and confidence in the hospital as my employer.

46. The claimant said she had decided to resign on the 1-year anniversary of raising her first grievance, she had written the letter on 1 August 2017, and then paused to give Ms Grffiths the "benefit of the doubt" before deciding to tender her resignation (by her husband) on 8 August 2017. The claimant says she knew nothing of the respondent having provided an outcome to her grievance until a point later that day and after her notice was delivered. I do not accept the claimant's evidence on this point, rather I find she was prompted to act by learning the respondent's decision was with her solicitor. I reach this conclusion for the following reasons:

    46.1. after such a long and protracted process, the coincidence in timing is an extraordinary and improbable one;

46.2. there was, on the claimant's evidence, no need for this letter to be hand-delivered, and it could more easily have been sent by post;

46.3. Ms Griffiths made a hand-written note of her own at the bottom of the handwritten resignation letter from the claimant saying:

Mary's husband presented me with this letter and advised that this was Mary's resignation, however, this is not clear in the letter. He advised her solicitor have been in touch and Mary was therefore aware of the outcome.

46.4. notwithstanding Mr Murray's denial, I am satisfied this is a genuine note made by Ms Griffiths shortly after the material conversation, and accurately reflects what was said.

47. I find the claimant had decided against returning to work for the respondent many months earlier, at least by the point of her grievance interview with Ms Griffiths on 10 April 2017. She felt let down by the respondent, on the basis her grievance had not been taken seriously or dealt with in a reasonable period of time. The claimant held off, however, from resigning. At the point when she learned that a grievance outcome was with her solicitor, she believed she had to make her mind up and would lose the ability to complain about the respondent's delay if she did not act immediately. Whilst the respondent's sending out its decision triggered the claimant to act, it was not the principal reason for her resignation.

Law

48. So far as material, section 95 of the Employment Rights Act 1996 ("ERA") provides:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only 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.

49. Where, as here, the respondent denies dismissal, the claimant has the burden of proving dismissal within section 95(1)(c).

50. In accordance with Western Excavating v Sharpe [1978] IRLR 27 CA, it is not enough for the claimant to leave merely because the employer has acted unreasonably, rather a breach of contract must be established.

51. In order to prove constructive dismissal four elements must be established:

51.1. there must be an actual or anticipatory breach by the respondent;

51.2. the breach must be fundamental, which is to say serious and going to the root of the contract;

51.3. the claimant must resign in response to the breach and not for another reasons;

51.4. the claimant must not affirm the contract of employment by delay or otherwise.

52. Implied into all contracts of employment is the term identified in Malik v BCCI [1997] IRLR 462 HL:

> The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

53. In Baldwin v Brighton and Hove City Council [2007] IRLR 232 the EAT held that a breach of trust and confidence may be caused by conduct calculated or likely to have the proscribed effect.

54. When determining whether, objectively, the employer's conduct was likely to seriously damage trust and confidence, the employee's behaviour may also be relevant, see Tullett Prebon PLC v BGC Brokers LP [2010] IRLR 648 per Jack J:

> 84. An alternative approach as to how the employee's own misconduct should be taken into account was suggested, and perhaps preferred, by Mr Bernard Livesey QC, the judge in RDF, namely that the employee's conduct may have so damaged the mutual relationship of trust and confidence that the employer's conduct is of little effect. I refer to paragraphs 120 and 141 of the judgment. But I think that this breaks down on analysis. I accept that the relationship is a mutual one, but that means only that the employer is entitled to have trust and confidence in his employee, and the employee is entitled to have trust and confidence is his employer. If the one is damaged it does not follow that the other is damaged. Nor does damage to the one party's trust and confidence in the other entitle him to damage the other's trust and confidence in him.
>
> 85. In my judgment the conduct of the employee may be relevant in this way. Whether the employer's conduct has sufficiently damaged the trust and confidence which the employee has in him objectively judged, is to be judged in all the circumstances. The circumstances will include the employee's own conduct to the extent that it is relevant to that question. There may in practice be little difference with the approach suggested by Mr Livesey.

55. Either as an incident of of trust and confidence, or as a separate implied term, employers are under a duty to afford their employees a means of prompt

redress with respect to their grievances; see W A Goold (Pearmark) Limited v McConnell [1995] IRLR 516 EAT, per Morrison J:

> 11. […] It is clear therefore, that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course, with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the industrial tribunal that such could be a breach of contract.

56. At least insofar as the question of breach of the implied term of trust and confidence is concerned, the band of reasonable responses test does not apply; see Buckland v Bournemouth University [2010] IRLR 445 CA.

57. Whilst mere delay will not amount to affirmation, where the employee continues to perform their contract a point may be reached when that becomes persuasive evidence they have indeed affirmed the contract; see W E Cox Toner (International) Limited v Crook [1981] ICR 823 EAT.

58. Where the breach of contract relied upon is comprised of conduct over a period of time, if there affirmation in the middle of the same the question may arise as to whether the claimant has lost the right to rely upon the earlier behaviour. This point was addressed recently by the Court of Appeal Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, per Underhill LJ:

> 51. […] As I have shown above, both Glidewell LJ in Lewis and Dyson LJ in Omilaju state explicitly that an employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series (as explained in Omilaju) it does not "land in an empty scale". I do not believe that this involves any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the Malik term (which was not the kind of term in issue in either Safehaven or Stocznia Gdanska) fall within the well-recognised qualification to that principle that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breach continues thereafter. It is true that, as Safehaven says, the correct analysis in such a case is not that the victim can go back on the affirmation and rely on the earlier repudiation as such: rather, the right to terminate depends on the employer's post-affirmation conduct. Judge Hand may therefore have been right to jib at Lewis J's reference to "reactivating" the earlier breach (though, to be fair to him, he did say "effectively re-

activates"); but there is nothing wrong in speaking of the right to terminate being revived, by the further act, in the straightforward sense that the employee had the right, then lost it but now has it again.

59. Where the claimant resigns in part because of a repudiatory breach of contract, that will suffice, the breach need not be the only or the main cause for that decision; see Nottinghamshire County Council v Meikle [2004] IRLR 703.

60. If a constructive dismissal is established the employment tribunal must still consider whether the respondent has shown a potentially fair reason for dismissal within ERA section 98(1) and whether or not dismissal was reasonable in all the circumstances under section 98(4).

Conclusion

Implied Term

61. I proceed on the basis that as an incident of the implied term of trust and confidence identified in Malik, the respondent was obliged to offer reasonably prompt redress with respect to any grievance the claimant might raise, consistent with the principles in McConnell, and that a failure to do so would, objectively, be conduct likely to seriously damage trust and confidence.

25 July to 15 August 2016

62. Given the claimant raised her grievance on Monday 25 July 2016, under the respondent's DW policy an interview with her should have been arranged within 7 working days, which is to say Tuesday 2 August (if the date of presentation is counted) or Wednesday 3 August (if not). The respondent did not meet that deadline. Shortly thereafter, however, on 5 August 2016 the claimant was given an interview date, which was to be on 15 August.

63. Whilst this timetable fell outwith the policy, it did not, objectively, amount to conduct likely to seriously damage trust and confidence. The claimant's first grievance, concerned as it was with single incident of a relatively minor character, would not have appeared to respondent as a matter which was likely to imperil the employment relationship if its resolution was delayed to a modest extent. The claimant did not, when provided with an appointment date, ask for this to be brought forward or say it was too long to wait. Furthermore, the respondent had reasonable and proper cause for this delay, as the investigation officer, Mr Banks, was taking annual leave, and it is commonly the case that progress on disciplinary or grievance proceedings is slowed by holidays at the time of year.

15 August to 19 September 2016

64. The claimant's interview did not go ahead on 15 August 2016 because she told her employer she was not well enough to attend. This prevented the respondent from following its DW policy and usual practice of conducting an early interview with the complainant. In the absence of being able to commence matters in this way, Mr Banks began to make enquiries of witnesses relevant to the claimant's first grievance.

65. Although I did not accept Mr Banks' had been telephoning the claimant at this time, given she had reported being unwell such an approach would not, necessarily, have been a helpful one.

66. Furthermore, the claimant's letter of 12 August substantially added to her existing grievance and, understandably, Mr Banks met with Ms Willis of HR for the purpose of obtaining advice in connection with a now far more complex grievance than that he had originally been tasked with investigating.

67. The claimant's case as put in cross-examination to Mr Banks included that he ought, at this early stage, to have sought to find an alternative to meeting with the claimant for the purposes of carrying out an interview. In my judgement this is an unrealistic proposition.

68. Allegations of harassment and bullying are almost always serious matters. Such conduct, where established in grievance proceedings, may be followed up by a disciplinary process. In fairness both to the employee who seeks protection, and to those accused of wrongdoing, a reasonably thorough investigation should take place, which in most cases will include interviews with the person raising the complaint, those accused, and those who were said to have witnessed the same. As a starting point, therefore, it is entirely reasonable that the respondent should have wished to interview the claimant.

69. Whilst in a long-term absence case, where the employee is presenting as too unwell to participate in an interview, a point may be reached where it will be incumbent upon the employer to consider alternative ways of proceeding, so as to comply with the obligation to provide reasonably prompt redress to a grievance, dispensing with an interview will in most cases, properly, be a last resort and not an early step. The claimant is not to be criticised for being unwell. Her poor health at this time and inability to attend for interview is, however, relevant to whether by reason of the delay there was, objectively, conduct likely to damage trust and confidence and I find there was not. Further and separately, the respondent had reasonable and proper cause to proceed as it did.

19 September to 1 December 2016

70. Mr Banks request, in his 19 September 2016 letter, that the claimant confirm her willingness to consult with occupational health was an entirely reasonable

one. The period to mid-September had allowed an opportunity for the claimant's health to improve such that she might meet be able to meet with with Mr Banks. When this did not happen spontaneously, it was proper that the respondent seek to obtain medical advice on the position.

71. The suggestion in the letter from the claimant's solicitor's letter of 27 September 2016 that any questions for her be put to them was, at best, highly premature. Absent medical evidence to the effect that communication from her employer would likely be injurious to the claimant's health, the respondent could properly deal with her direct. The respondent was at this time seeking to obtain medical evidence, but the claimant, through her solicitors, ignored this request.

72. The solicitors' letter includes assertions about the medical advice received by the claimant. No medical evidence was, however, provided to support the position. In the event it had been, the respondent would have been required to look carefully at the same. An employer in such circumstances should consider whether and when the employee might be fit, or to where and how an interview might be conducted such that it was compatible with that person's health. This might require a delay, or other adjustments, such as going off site. An entirely written process, in most cases, will be a poor alternative, and would not be expected until the other options have been reasonably exhausted.

73. The claimant's unwillingness to meet with the respondent's occupational advisors coupled with her failure to provide medical evidence of her own, did not help the situation.

74. I am not persuaded that the respondent's contribution to the delay at this time was, objectively, likely to damage the employment relationship. Further and separately, the respondent had reasonable and proper cause to proceed as it did.

1 December 2016 to 14 February 2017

75. In her solicitors' letter of 1 December 2016, the claimant sought to engage with the respondent's proposal for Mr Banks to attend her home for the purposes of an interview. Whilst this did not dispense with the need for an OH referral in concretion with the claimant's long-term sickness absence, it removed the 'road block' to an interview in connection with her grievance.

76. The delay from 1 December 2016 has been explained by Mrs Griffiths in only the most vague and unsatisfactory terms. Whilst a short period of delay may not have gone very far toward a breach of contract, some two and a half months was allowed to pass. This was a substantial further period. The claimant cannot be blamed for and did not contribute to this delay. Given the protracted history there was a need to move matters on and instead the claimant's grievance appeared to be ignored or forgotten by the respondent.

Objectively, this delay was likely to seriously damage or destroy trust and confidence. Furthermore, the respondent did not have reasonable and proper cause to proceed in this way. The respondent's conduct in this regard did, therefore, amount to a breach of the implied term.

14 February to 14 March 2017

77. From mid-February to mid-March 2017, the respondent was seeking to contact the claimant and pursue her grievance. The claimant was unwell at this time and did not respond. The respondent did not cause this delay and its conduct at this time did not contribute to a breach of the implied term.

14 March 2017 to 10 April 2017

78. Once the claimant got back in touch, the respondent went about arranging an interview. This took a little time because of availability issues on both sides. The respondent did not, by any unreasonable or blameworthy behaviour, cause this delay and its conduct did not contribute to a breach of the implied term.

10 April 2017 to 8 August 2017

79. A meeting between the respondent's investigator, Mrs Griffiths, and the claimant having finally taken place, a further period would, reasonably, have been necessary for any follow-up in terms of further investigation, and for a final decision to be made. At most, a period of 4-weeks would have been reasonable for this to be done. Unfortunately, that did not happen.

80. Given the history of enormous delay in this matter, a substantial part of which in 2017 the respondent was to blame for, the need to resolve this matter speedily ought to have been obvious. Instead of doing that, Mrs Griffiths and the respondent waited another 4 months. The explanation for this, essentially workload, is remarkably thin and inadequate in the circumstances. This piece of work was 'crying out' to be prioritised and instead, is appears to have been left at the back of a long queue. I have no hesitation in concluding that the respondent's delay in this period, in isolation, was likely to seriously damage trust and confidence. Furthermore, the respondent did not have reasonable and proper cause to proceed in this way. Separately from what had gone before, the respondent's conduct in this regard was a breach of the implied term.

Affirmation

81. As set out above, I have found that the respondent's delay from December 2016 to February 2017 amounted to a repudiatory breach of contact. By agreeing to meet with the respondent on 10 April 2017 and then allowing Mrs Griffiths a reasonable period of time in which to provide an outcome,

objectively, the claimant's conduct was consistent with her affirming the contract of employment, consistent with Crook.

82. Mrs Griffiths did not, however, provide a response within a reasonable period of time. Rather the respondent engaged in further repudiatory conduct. Having affirmed in April, was the claimant prevented from relying upon the respondent's earlier conduct between December and February? In my judgment she was not. Applying the principle identified in Kaur the right to terminate in response to that earlier conduct was revived by the respondent's subsequent acts.

83. The respondent also argued that if a repudiatory breach were occasioned by the respondent's delay from April, then the claimant had to make her mind up promptly as to whether she would resign, and that by waiting until August she had waited too long and should be taken as having affirmed the contract. I do not agree.

84. The breach occasioned by the delay from April to August 2017 did not occur at the beginning of that period with the result the claimant had to make her mind up in April. As above, a further 4-week period would have been reasonable for the respondent to provide an outcome. Only after that point, from mid-May 2017, was the respondent's delay once again likely to seriously damage trust and confidence. This was, however, an ongoing breach and one which became more serious with the passage of time. Further and separately, this is not a case in which the claimant was at work, carrying on with her duties (i.e. she was not 'soldiering on') rather she was off work ill and pursuing a grievance. In the circumstances, this did not evidence an affirmation of the contract. The breach occasioned by delay did, however, crystallise at the point when, finally, the respondent sent its decision. Then the claimant had to make her mind up promptly, which she did, by resigning the same day.

85. Accordingly, at the point of her resignation, the claimant was entitled to rely upon a breach of the implied term occasioned by the respondent's unreasonable delaying addressing her grievance from December 2016 to February 2017 and from May 2017 to August 2017.

Reason

86. As above, whilst the respondent sending out its grievance decision triggered the claimant to act, the principal reason for her resignation was a belief that her grievance had not been taken seriously or dealt with in a reasonable period of time. Whilst the claimant's belief in this regard was in-part based upon earlier periods of delay for which the respondent was not to blame, I am satisfied that it was sustained in the main by the claimant's very considerable unhappiness at the lack of progress from December 2016 to August 2017,

punctuated as it was by her short-lived expectation in April that an outcome was imminent.

87. The respondent's repudiatory breach of contract was, therefore, the main reason why the claimant resigned. On that basis, she was dismissed.

Fairness

88. In the event of a dismissal, the respondent did not contend this was for a potentially fair reason and none has been established.

Unfair Dismissal

89. Accordingly, and for the reasons set out above, the claimant's unfair dismissal claim is well-founded and succeeds.

Wrongful Dismissal

90. The claimant having been dismissed without notice, her breach of contact (wrongful dismissal) claim succeeds.

Remedy

91. The parties agreed that, in the event of a finding for the claimant. I should determine issues of principle relevant to her compensatory award for unfair dismissal, but that final quantification of the same and the question of whether

she reasonably mitigated her losses would be determined at a remedy hearing.

92. I will also indicate my provisional view on certain remedy questions which were not canvassed. The parties will be at liberty to address me further on these matters at a remedy hearing should they disagree.

Compensatory Award

93. As above, on my findings there was no prospect of the claimant returning to work after the 10 April 2017 meeting. Had the respondent provided its outcome shortly after that meeting this would not have resulted in the claimant returning to work, she would simply have resigned sooner.

94. Furthermore, given the outcome was a decision (of which no complaint is made in these proceedings) not to uphold the claimant's grievance, I can see no realistic prospect of her having returned to work in light of the same. As far back as 12 August 2016, the claimant said she could not go back to work and it was not safe for her to return, unless the bullying and harassment was stopped. Had the respondent given this decision in, say, December 2016, the claimant would have resigned then. In the absence of the respondent's delay and repudiatory breach, the claimant's employment would have terminated

sooner. Accordingly, she has suffered no loss of earnings by reason of her unfair dismissal. On this basis, questions of apportionment or ACAS uplift do not arise.

Breach of Contract [Provisional View Only]

95. I express the preliminary view that the claimant, having been dismissed without notice, is entitled to damages with respect to the pay and benefits she would have received during her contractual notice period.

Basic Award [Provisional View Only]

96. I express the preliminary view that the claimant would be entitled to a basic award for unfair dismissal calculated in the usual way.

Case Management

97. By 22 June 2018, the parties are to write to the Tribunal confirming:

97.1. whether a remedy hearing is required;

97.2. if yes, their dates of non-availability for a 3-hour hearing between July and September 2018.

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Employment Judge Maxwell

Date: 18 May 2018