Case number: 2601995/2017

EMPLOYMENT TRIBUNALS

BETWEEN:

and

Mrs A Cooper	Spire Healthcare Limited
Claimant	**Respondent**

At a Hearing

Held at: Leicester

On: 26 & 27 November 2018 with further deliberations on 11 January 2019

Chairman: Employment Judge Clark (Sitting Alone)

REPRESENTATION

For the Claimant: Mr Gray-Jones of Counsel

For the Respondent: Ms Gould of Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal **fails and is dismissed**.

REASONS

1. INTRODUCTION

1.1. This is a claim with a single allegation of unfair dismissal. It centres on the disciplinary allegations, suspension, investigation and the associated outcome during July and August 2017. The claimant resigned with

immediate effect by letter dated 5 September 2017. She claims she was constructively dismissed.

2. The Issues

2.1. The single issue is whether the circumstances behind the claimant's resignation amount to a dismissal in law. There is no alternative case pleaded by the respondent that any dismissal found to have occurred was fair although such was alluded to in the course of the hearing without any application to amend being made.

3. The Evidence

3.1. I heard three witnesses give evidence on oath. For the claimant, I heard from Mrs Cooper herself. For the respondent, I heard from Mr Shaun Fretter, the then Deputy Matron who conducted the investigation and formed his conclusions about the way forward, and Mrs Mary Day, Matron, who suspended the claimant and commissioned that investigation. All produced written statements and all were questioned.

3.2. I say at the outset that I found all 3 witnesses to be genuine in the oral evidence they gave before me and all did their best to assist the tribunal. However, in respect of the claimant's written evidence, there were occasionally very clear conflicts apparent between what she said on oath and what was said in her statement on important points. I suspect that may largely be down to the drafting or editing by her advisers but I nonetheless concluded that those areas of her statement where the conflict arose was either not her evidence or, if it was, I did not accept it.

3.3. I was taken to a bundle running to 232 pages.

3.4. Both parties made closing submissions

4. FACTS

4.1. It is not the tribunal's function to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to determine the issues in the case and to put the decision reached in its proper context. On that basis, and on the balance of probabilities I made the following findings of fact.

4.2. The respondent is a private healthcare provider. It has its own, in-house Human Resources support and a developed employment policy framework.

4.3. The claimant was most recently employed as a pharmacy technician. She worked in a small pharmacy department led by Ms Sheetal Pancholi. From the evidence I saw, I find that the staff in the department are generally competent in their technical and clinical skills. The manager is particularly noted for her clinical pharmaceutical skill and knowledge. That in itself should paint a picture of a positive team environment. However, technical competence is not the full picture. I find the team suffered from a

dysfunctional culture which manifested in the interpersonal relationships between various members. That dynamic was often described as a "clique". Any "clique" divides a workplace into those within it, those without it, and no doubt others who do their best to struggle on despite it. It provides fertile ground for petty interpersonal disputes and a culture where the necessary communication between professionals can suffer. This sort of problem is at a level that might be solved by management actions colloquially referred to as "knocking heads together". In this working environment, I find it went further and could have potentially critical consequences to the nature of what this team does, that is dispensing controlled medication to patients. I have to find that Ms Pancholi's management skills and style may not always have operated at the same high level of her clinical skills.

4.4. I find the claimant was one of the individuals who was on one side or the other of the "clique". In other words, she was not a passive party to the dynamic that caused the dysfunction in the team. She was not alone, however, and it is clear to me in the final analysis that the inappropriate behaviour of a number of individuals she worked alongside was contributing to the culture and environment.

4.5. In recent years the claimant and Ms Pancholi had come into conflict and Ms Pancholi had taken some steps to try to deal with the situation.

4.6. In November 2016, the claimant received a letter from her manager after she had had a meeting with the Matron, Mary Day. That meeting had discussed the claimant's part in a dispute between her and a colleague called Aisha Yunus. In respect of that matter, I find there had been an investigation into the issues which had shown a breakdown in communication and concern over the manner in which the claimant had questioned a senior colleague. It also identified failings in the colleague's conduct. I find an action plan was put in place. I find both parties were asked to sign up to a professional working relationship into the future. All in all, this appears to be just the sort of "knocking heads together" that I have referred to already – Indeed the outcome letter concluded: -

> ***Both Aisha and you were asked to make any further comments and asked whether you could continue working amicable and respectfully to each other, to which both agreed.***
>
> ***I hope that this meeting has now resolved the differences between you both and that you both have an understanding of what is expected of you whilst working in the department.***

4.7. About a month later, in December 2016, Ms Pancholi had further cause to meet with the claimant with regard to her behaviour in the department. In this incident, Ms Pancholi had become concerned by the claimant's body language and tone of voice during her own discussions with her. She formed the view that the claimant appeared disengaged and invited her to express any concerns.

4.8. The phrase "low level" had been used to describe the nature of these problems. I understand that label but however low level they may be, that is

not to say that these issues are not unnecessary distractions which divert management time. Nevertheless, those management interventions that became necessary did not lead to any formal action, disciplinary sanction nor did they prompt any complaint or grievance from the claimant.

4.9. On 20 July 2017, the claimant was involved in another example of low level, but nonetheless unacceptable, behaviour in the workplace involving one of her colleagues, Sarah wright. Ms Pancholi intervened again. The notes [93] summarise the points discussed. In short, there was an issue about arranging late night cover and the claimant's response. In the course of that discussion, the claimant seems to have acknowledged her behaviour was unacceptable. Ms Pancholi raised some other concerns about the claimant's work. The claimant indicated she was unhappy in the department and was looking for another job as the team dynamics had changed. That seemed to be given as the reason for her behaviour.

4.10. I find that in the days following this intervention, the relationship between the claimant, Ms Pancholi and others involved was more likely than not to have been tense and particularly strained.

4.11. Within a week, on 25 July 2017, the events that are central to this case unfold. The claimant was working a late shift between 12 noon and 8 pm. She routinely had a key to the drugs cabinet but did not have it with her on this occasion. An issue arose as to her ability to lock up due to the absence of the key and the claimant accepted in evidence that she had told Ms Pancholi that she had "misplaced it", which I find to be a more likely account than that contained in her witness statement that she had merely "forgotten it". Forgetting the key would have been unlikely to lead to the annoyance and frustration in Ms Pancholi's response than if it had been misplaced. A misplaced drugs key was effectively a lost drugs key which, I find, would mean the locks would need to be changed on the drugs cabinets. That is quite different to forgetting one's key the whereabouts of which was otherwise known. In fact, the claimant was hopeful that she had merely left it at home in a pocket of some clothing being washed. The relevance of this matter seems only to be to explain why the claimant left work during a break between sometime between 4.35 to 5pm to locate it and she was, in fact, able to find it. By the time she returned to work, Ms Pancholi had left for the day. The fact of leaving the work premises seems to be why she missed the 5pm handover between day and night pharmacists which is relevant to what then happened.

4.12. Later that evening, the claimant noticed a controlled drug, Tramodol, had been left out on a side in the pharmacy. She could not process the drugs herself as they had been prepared by a Technician of a similar grade to her earlier in the day and the local protocols required them to be second checked by a pharmacist. I find that she did mention the fact to Lauren King, the night pharmacist. It seems thereafter nothing further happened with those controlled drugs and they were not only not processed, but they were then left out on the counter overnight. This is a serious matter and amounts to an adverse drugs handling event which requires something called a "Datix" report to be made. That is a report of an adverse incident leading to

an investigation of some sorts into what went wrong and a learning outcome. The clue to the issue in this case is in the name “controlled drugs”. These drugs were subject to controlled use and possession and were not being safely controlled. It may not have been the claimant who was initially at fault for leaving them out in the first place, but she effectively acquired a responsibility to deal with the situation on discovering the issue. Whilst mentioning it to the night pharmacist was not inappropriate, it seems this did not pass responsibility to act.

4.13. The next day, Ms Pancholi spoke with the claimant about the drugs incident and the need for a Datix report.

4.14. During the course of evidence before me, an issue arose as to whether the Datix reporting procedure required a response within 24 hours. I find this is not the case. The expectation is that the response is considered as soon as possible and whilst that will often be within 24 hours, that is not the test. The only backstop is that there must be a report outcome within 30 days. The actual Datix documentation was completed on 8 August which is therefore within the expected standards of the procedure. It is significant to record my finding that a Datix report is about understanding what went wrong so as to learn in the future and improve the systems. It is not about blame. I reject the claimant’s contention in her statement that this Datix report was done at the time it was done only because Ms Pancholi had found out the claimant had left the business and was covering her back. The claimant had not in fact left the business at that time and did not do so until about a month later. Moreover, I am satisfied a Datix report would have been done if anyone else had been in the claimant’s situation on that night.

4.15. The interaction between Ms Pancholi and the claimant on this matter was strained. The claimant had formed the view that Ms Pancholi did not like her personally and that opinion explained in her mind why she was being named on the Datix report. I find the reason Ms Pancholi named the claimant in the report was for no other reason than because it was the claimant who had identified the unsecure controlled drugs and had not then secured them.

4.16. After a handover later on that day, the claimant and Ms Pancholi discussed the matter. Ms Pancholi put to her that it was part of her responsibility to check the pharmacy before she closed up for the night. The claimant perceived she was being treated differently to the pharmacist to whom she had mentioned the presence of the tramadol. The claimant maintained it was not her responsibility. The tension was increasing. Ms Pancholi asked the claimant to come outside the department to discuss it away from others. I find that the claimant was annoyed by Ms Pancholi’s decision, that her voice was raised and she queried whether Ms Pancholi “wanted her to go”, that is to leave the employment, in which case she said she would go.

4.17. At that point, it is common ground that there was physical contact between the two and in response Ms Pancholi exclaimed “don’t touch me”. The claimant says what she had done was simply to put her hand out to lightly touch Ms Pancholi on the shoulder, in what she described as a “calming

manner". Ms Pancholi on the other hand, described being pushed in the shoulder after the conversation had become heated.

4.18. There were then some further brief exchanges with others getting involved. Ms Pancholi left the scene there and then to try to find the Matron, Mrs Day but she was not in her office at the time. The following day, on 27 July, Ms Pancholi was able to speak with the Matron. She told her about the exchange and how she had been pushed by the claimant during this altercation. Mary Day took advice from HR. The decision was taken that the allegation of using physical force was serious and needed investigating.

4.19. This was a serious employment matter and despite her lengthy experience was of a nature which I accept Mrs Day had not previously had to deal with. I therefore find it more likely than not that she would have explored, extremely carefully, the procedure that applied, that she did seek advice and that she did carefully weigh the options open to her. I am satisfied that she had in mind the question whether or not to suspend the claimant and, in that regard, she considered how an investigation might unfold within this small and already dysfunctional team if the claimant was in work during it. She sought and received HR advice along the lines that if there was concern that this allegation may have taken place it was a serious matter and would justify suspension whilst the investigation took place. There was also the recent background to the dynamics in the department to consider. I am satisfied that this was a matter Mary Day was weighing up as it was the first time in her long career, previously 36 years in the NHS, that she had had to take a decision on suspension and I found her evidence compelling particularly in that she was seeking to do the right thing for all concerned. I accept she wanted a swift and fair investigation to be conducted.

4.20. The claimant was not in work immediately after the day in question. On 31 July, Mary Day contacted her by telephone and asked her to report to her on her next work day. That was 2 August. On that day, the two met as planned. Lyn hall from HR was also in attendance. At that meeting Mary Day suspended the claimant. The terms of her suspension were set out in writing. That letter [101] defined the allegation as; -

"on 26th July 2017 you were unprofessional in your behaviour/attitude and that there was physical contact with your line manager".

4.21. I find Lyn Hall did remain with the claimant whilst she left the premises following this meeting. That was part of normal process but, in this case, it was very much also a human response to the claimant's understandable state of upset. I find Lyn Hall's response was principally out of concern for the claimant's wellbeing.

4.22. The claimant's evidence before me, which I accept, was that in the circumstances it was reasonable for Mary to decide to suspend her during the investigation and that, in view of the fact that Ms Pancholi's perception was of a push, it was necessary to investigate it quickly and thoroughly.

4.23. Shaun Fretter was appointed to investigate the matter. He had only very recently been appointed to the post of Deputy Matron about a month or so earlier. He had come from the NHS. Irrespective of his past experience, this was his first investigation working for a non-NHS employer. Consequently, I find he conscientiously set out to thoroughly research the local policies and procedures relevant to disciplinary investigations. I also accept that his recent appointment meant he had limited awareness and knowledge of the individuals concerned and he was, to that extent, an independent and fresh pair of eyes.

4.24. Mr Fretter wrote to the claimant on 2 August [103]. Between then and 8 August he interviewed those members of the team that were on duty at the time as well as both the claimant and Ms Pancholi. Within a further 3 days it appears he had compiled his investigation report which is dated 11 August 2017 and was signed on 16 August [147A].

4.25. After being interviewed, each witness was given the opportunity to review the notes and to add to or amend it as necessary. The same happened with the claimant. She responded with a number of points to be added into the notes of her interview. Lyn Hall from HR responded to the claimant saying that she could not recall those points being raised but nevertheless she would include the comments in the notes. I find that to be a fair and reasonable approach to what was a dispute of recollection. I find, as the claimant accepted in evidence, that Ms Pancholi's recollection of the incident given to this investigation was measured, that she was not "over egging" it and, if anything, her account was down playing the incident.

4.26. Many investigation reports come before the ET with varying quality. In this case, I find the questioning of witnesses was succinct and to the point. In so far as he applies some methodical forensic analysis to the evidence before him, Mr Fretter's report is at the better end of reasoning its conclusions. It sets out factors which he felt pointed both towards and away from the allegation; it sets out potential conflicts and it also sets out mitigation and wider contributing factors. He appears to have applied a standard of proof he describes as "all reasonable doubt" – at least in respect of the allegation of physical contact with Ms Pancholi.

4.27. He reached his conclusions. In summary, they were that the evidence showed the claimant had been questioned by Ms Pancholi in front of the team, that the claimant had raised her voice in both tone and pitch and had become irate. Whilst Datix is not about blame, it is easy to see why the claimant would perceive it that way. As to the physical contact, this could not be proved one way or the other. Overall, he concluded that there were examples of unprofessional behaviours displayed on the part of **both** the claimant and her manager.

4.28. I am reassured that he concluded at least the broad direction of the report before 16 August as, on 15 August, I find there was a meeting with Mary and Ms Pancholi about her role in the whole situation. She was told of the outcome but also told that she was expected to participate in mediation which was to be arranged. Any differences in the manner in which she was

spoken to compared to the claimant were entirely as a result of the fact that the claimant was the subject of the investigation. Apart from that distinction, the two would receive the same outcome. Ms Pancholi, on the other hand was not facing any allegations but the outcome of the findings levelled shortcomings at her which I find the employer felt necessary to address with her. Hence the informal response that both would face in engaging in mediation.

4.29. Mr Fretter therefore decided there would be no formal disciplinary action against the claimant.

4.30. He set out a series of recommendations which whilst arising from the situation with the claimant and her conduct, went much further. They included that the employer had cause for concern in both parties; that mediation should take place; that an action plan should be put in place; that management of the staff who had left the medication out and not followed policy should be considered and, finally, that I find it was open to him on the facts I have seen to form the conclusion that there was an issue with the team dynamics generally giving rise to a need for some sort of team building and support be put in place.

4.31. The claimant's evidence was that she agreed that the disciplinary process was a thorough investigation, conducted in a reasonably quick time although she had no prior experience of such processes.

4.32. The same day as the report concluded and Ms Pancholi was spoken to, Mr Fretter also telephoned the claimant [153A]. During that 'phone conversation, he told her that her suspension was over and she was to return to work. In essence, he explained that there was no case to answer in respect of the formal disciplinary allegations, however, I find it is clear from what he told her that this was not an entirely clean bill of health. There were concerns remaining and he made clear: -

"*we will have to do some mediation with you both and that won't be a choice you will both have to participate in that so we can sort this out*".

He indicated a supportive action plan. He confirmed that other things had come out of the investigation that needed attention which I find to be a reference to the generally dysfunctional relationships in the team. I find the claimant was part of that issue even though she certainly was not alone.

4.33. The claimant accepted that although Mr Fretter was not pursuing a disciplinary case, he could not ignore the messages he was picking up in the course of his investigation. I accept that was the case.

4.34. In terms of mediation, it is abundantly clear that is what was planned and the claimant understood that to be the case as a result of the phone call from Mr Fretter. During that phone call, there were three attempts to arrange a date for the first mediation session between the claimant and Ms Pancholi. Eventually it was set for 22 August.

4.35. The claimant was asked to attend the next day to meet with Mary Day. I find it was known to the claimant that Mr Fretter would not be on duty that day and therefore it was Ms Day who would close the formal part of the investigation rather than him. The claimant's witness statement criticised what she describes as his unexplained absence. That criticism is wholly misplaced. He clearly made it known he was not going to be in attendance and the meeting was with instead to be with Ms Day.

4.36. In her witness statement, the claimant described her return to work as being reluctant. In oral evidence, she confirmed she enjoyed it and (at least some of) the people she worked with and I find that she wanted to go back to work.

4.37. On 17 August, the claimant attended work and met with Mary Day who simply read out Mr Fretter's outcome letter [154]. I find Ms Day conducted herself in a matter of fact way and did not display any annoyance or anger at the claimant. I do find Mary to be someone focused on patient care and, frankly, I can quite understand how this sort of issue would be seen as an unnecessary diversion to that aim, and understandably so. I find the claimant was more likely to be in a heightened emotional state and more inclined to misinterpret the situation or to perceive things as being present that weren't there. I am also satisfied that she clearly went into that meeting with a plan of sorts as, after the letter was read out, she produced a sick note which seems to have brought the meeting to an end. She then commenced a period of sickness absence and, in fact, she would never return to work.

4.38. The mediation planned for 22 August did not, therefore, take place.

4.39. As for the letter, much was placed on the suggestion that it expanded the allegations after first finding the claimant to be cleared of the allegations. I am not satisfied that is in fact what it says or that a fair reading of the letter and the two conversations related to it leads to that conclusion. There was one allegation with two parts to it. The physical contact was not taken further as it was found that "it was difficult to ascertain beyond all reasonable doubt that this allegation took place". The rest of the allegation is not dismissed *in fact*, but the decision is taken not to progress matters to any formal disciplinary action. That is not the same as being cleared and it does accord with Mr Fretter's conclusion of a theme emerging in the interviews. I find it was open to Mr Fretter to conclude that the claimant did sometimes display conduct which was a cause for concern and whilst he decided this should not lead to formal disciplinary action, addressing it constructively was clearly both appropriate and does form part of the plan going forward.

4.40. In that regard, there is a clumsy sentence in the letter which appears to suggest the claimant accepted her past conduct. Having explored with the witnesses what was meant and, importantly, how the claimant herself read it, I am satisfied the phrase "this letter is to be treated as confirmation……" means that the claimant agrees that she would be equally responsible for playing her part in the future to bring about a better working environment along with others in the department

4.41. The letter invited contact from the claimant if there were any queries. There were no queries from her raised over the next two weeks whilst she remained off sick. By letter of 29/8/2017 [161] she did respond. In that letter, she apologised for the delay as she had been ill but was now well enough to consider and respond. She expressed concern that the outcome did not deal with the controlled drug issues. I find that it did and made recommendation of further consideration of the system failure of 25 July. Her letter made clear she did not accept responsibility for any past misconduct but did accept responsibility going forward to act in a professional manner, an interpretation which confirms my earlier finding of the understanding of what the letter meant. She referred to the focus of the investigation on certain team members and stated her position in respect of the dysfunctional team dynamics.

4.42. I find it significant that the letter concludes with the following statements:-

"I do want to return to work and sort out these issues. I am quite happy for my conduct to be monitored along with that of all my colleagues and will happily discuss in a constructive way any concerns that may arise.

I can assure you going forwards I will always behave in a professional way, adhere to all Spire and General Pharmaceutical Council Standards and respect all my team members"

4.43. The claimant remained off sick after the letter was sent. The respondent had written to the claimant on the same date as she had written to it, presumably each letter crossed in the post. The respondent had requested a GP report about her continued ill health which by then was subject to a 3 week GP fit note. That is the only intervention that could be said to have occurred that the claimant did not know about when she wrote her letter of 29 August.

4.44. A week later on 5 September 2018 the claimant resigned with immediate effect [171]. She said she was not expecting a response to her earlier letter by that time. She said she feared mediation may not have happened. I don't accept that was a true reason. Her true reason was because of her view she could not work with Ms Pancholi in the future. If anything, far from the reason being because there was not going to be any mediation, I find the claimant was well aware that the respondent very much <u>was</u> planning mediation between the claimant and Ms Pancholi. I find her reluctance to engage in that mediation was central to the decision to submit her resignation.

4.45. I find the claimant's letter of resignation marks a complete change of mind from the view she had expressed the previous week in the letter of 20 July. The reasons for the resignation are set out in a series of bullet points. They relate to the relationship with Sheetal and the fact she feels she could not trust her; Her feeling of alienation from her colleagues; Her view there had been gossip by others during her suspension; Mr Fretter's conclusions going beyond the two allegations and his investigation methodology; mistrust of Lyn Hall in HR for the way she dealt with the investigation notes and the assertion that she was frog marched out of the building.

4.46. There is no explicit reference to the fact of suspension in the reasons for resignation. There is the fact that the claimant perceives the outcome was wider than the two parts of the allegation that she faced.

4.47. In her witness statement, the claimant advanced a different factual causation. She said in paragraph 50 that

"as there was no sign of any mediation, redeployment or solution to the difficulties I faced with Sheetal I believed that it was not possible to return to working together".

I find that was not her view at the time. As I have said, I find the reverse was operating on her mind in that the respondent positively was arranging mediation in order to find a solution to the working relationship. In paragraph 54 she states how the relationship with Sheetal was

"somewhat fractured, and the respondent's stance of doing nothing, expecting me to return without any intervention is unfair and unreasonable causing a breakdown in trust and confidence".

Again, and for the reasons I have already expressed, this statement does not reflect the reality. Far from doing nothing, I find it was the respondent's intention to do something, by way of mediation, which was itself the fact that was troubling the claimant.

4.48. The Matron, Ms Day, responded to the letter of resignation on 7 September. [174]. She took the reasonable approach of inviting the claimant to reconsider her decision and directed her to the grievance procedure. She gave her until 14 September to respond and let her know her final decision.

4.49. The respondent holds back on taking any action with her resignation but then has to deal with it. That does not extend the relationship beyond the claimant's act of resignation without notice and the E.D.T. remains 5 September 2017.

4.50. There was no response by the date Ms Day had stated. On 18 September 2017, a Mr Andy Gilmore telephone the claimant. He was a new HR Manager without any previous dealings in the matter. He asked her if she had a view on rescinding her resignation and she confirmed she was 100% sure in resigning. [176]

4.51. Through September and October, Mr Fretter was taking his concerns about the dynamics in the department further. I find as a fact that as a new senior manager he was concerned about what he was hearing about the department generally. I find this was not just an issue arising from the claimant's contribution but a number of individuals. I find he set up a series of 1:1 meetings in an attempt to get to the bottom to the poor dynamic, he realised he needed an anonymous response to get to the full truth and sent out questionnaires to the team [110-138]. I find he discovered that the problem was much wider than he had first thought but the process confirmed how the claimant was one of those who other members viewed as contributing to a negative culture in the department.

4.52. Of course, the claimant did not know of this at the time as it occurred after her resignation. Nevertheless, she accepted in evidence it was an appropriate step for Mr Fretter to take to get that wider understanding. I find Mr Fretter was genuinely concerned and was taking appropriate steps to explore in a way that was constructive and not heavy handed.

5. LAW

5.1. It is for the claimant to establish a dismissal under s.95(1)(c) Employment Rights Act 1996. This 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)—***
> ***(a) ..***
> ***(b) ..***
> ***(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.***

5.2. Whether the claimant is "entitled to terminate it…by reason of the employer's conduct" is to be answered by reference to principles of contract law. It is not enough for the employee to leave merely because the employer has acted unreasonably. (Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27). In order for the claimant to make out her claim, she must satisfy four conditions: -

a There must be a breach of contract by the employer. In assessing this, the position of the tribunal is no different to that of the High Court when it has to determine whether or not there is a breach of contract.
b That breach must be fundamental.
c He must leave in response to the breach and not for some other, unconnected reason.
d He must not delay too long in terminating the contract in response to the employer's breach or otherwise affirm the continuation of the contract.

5.3. The contractual term relied upon by the claimant is the implied term of mutual trust and confidence. The elements of this term should not be paraphrased or reduced to shorthand. It was identified in (Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462) as:-

> ***'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.'***

5.4. There are therefore three elements to the term. Conduct by the employer; whether that conduct was without reasonable and proper cause; and whether that conduct was likely to seriously damage the relationship of confidence and trust. Unless all three elements are satisfied, the term has not been broken

5.5. The test requires an objective assessment of the gravity of the situation. It is not a question of the claimant's subjective beliefs and feelings. That breach must be sufficiently important to justify the employee resigning. The circumstances of the breach must be a significant breach going to the root of the contract or showing the respondent no longer intended to be bound by one or more essential terms of the contract. As to the seriousness, in Croft v Consignia [2002] IRLR 851, Lindsay P observed there is only a breach where conduct destroys or seriously undermines trust and confidence, both sides are expected to absorb lesser blows. I was also referred to Transco plc v O'Brien [2002] EWCA Civ 379 on the application of that test and to Crawford and another v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138 on the effect suspension could have on the implied term of trust and confidence.

6. Discussion and conclusion.

6.1. I am satisfied that embarking on an investigation into, and making, a disciplinary allegation is capable of amounting to conduct that is likely to undermine the relationship of confidence and trust in the employment relationship. I am, however, entirely satisfied that in this case the findings of fact establish that the respondent had reasonable and proper cause for embarking on that investigation and in raising the issue of the allegation in the first place. I am reinforced in that conclusion by the claimant's own acknowledgment that it was reasonable that this matter was investigated within this process.

6.2. I have similarly considered what effect the decision to suspend had on the contract of employment. As for the previous conduct, I am satisfied that suspension in isolation may well be sufficient to amount to conduct that is likely to undermine the relationship of confidence and trust in the employment relationship. Again, however, I am entirely satisfied that in these circumstances the respondent had reasonable and proper cause for imposing a period of suspension, that Mrs Day gave serious consideration to the competing arguments for and against and did not respond with a "knee jerk" response to the situation. The conclusion reached by Mrs Day was reasoned and open to her in the facts of this case. It therefore amounts to reasonable and proper cause which does not breach the implied term.

6.3. The investigation was accepted by the claimant as being both reasonable and concluding in a relatively swift timescale. Whilst the claimant has no benchmark against which to make this concession, in my judgment she was right to do so. This investigation was both reasonable, reasonably thorough and concluded in a swift timescale. There is nothing further about the process I can see in the facts which could be advanced to undermine the implied term of trust and confidence.

6.4. Similarly, the decisions reached in respect of the outcome of that investigation are entirely reasonable ones. There are plainly reasons for wanting to address the dynamics in the department but this employer acted entirely reasonably in deciding to adopt a light touch response, as opposed

to any formal disciplinary action. The very fact of mediation between the two protagonists recognises that there is learning to be had by both parties.

6.5. That is my assessment of the elements of the case which could potentially offend the implied term, whether or not they are expressly relied on by the claimant. So far as she asserts the nature of the breach, particularly in paragraphs 50 and 54 of her statement, I have already expressed my findings of fact which, bluntly, conclude how she is wrong in her assessment. As a result, and having viewed matters from a perspective wider than that strictly advanced by the claimant, I am satisfied that the implied term of trust and confidence has not be breached.

6.6. I have nevertheless then gone on to consider the reason for the resignation. It is trite that the alleged breach must be a material factor in the reason for resigning but it need not be the whole or only reason. (Meikle v Nottinghamshire CC [2004] EWCA Civ 859)

6.7. Had there been a breach of the implied term it is an essential part of the claim that the claimant resigned in response to it. On my findings, I am satisfied that the reason for resignation was not, as stated in the claimant's evidence, the failure of the employer to put in place any measures to facilitate a more constructive working relationship within the department, it was to the contrary because of the very fact that the respondent was intending to facilitate some mediation between the claimant and Ms Pancholi that forced her to elect to resign. That intended course was entirely with reasonable and proper cause in the light of the history and could not in itself found a breach of the implied term, but in any event, it is that which I have concluded was the principal reason why the claimant reflected upon, and then changed, her stated position about future work for the respondent and decided to resign.

6.8. I am not satisfied that the fact of suspension can be said to form part of the reasoning. It is not in the claimant's witness statement. It is not in her contemporaneous letter of resignation. It does not feature in the other correspondence or any of the other criticisms of what has happened. In fact, the oral evidence of the claimant was that the decision to suspend was reasonable. Her subjective view may be no more than one factor in the necessary objective assessment as to whether suspension was a breach of the implied term, but it is the overriding factor in respect of the reason why she resigned. I have to conclude it simply was not the reason nor part of it.

6.9. Finally, I have considered whether if my conclusions so far are wrong, the claimant nevertheless affirmed the contract of employment in the explicit statements she made in her letter of 29 August 2017

6.10. There is no material dispute between the parties on the applicable law of affirmation of the contract (sometimes imprecisely expressed as a waiver of the breach). This principle is succinctly stated in WE Cox Toner (international) v Crook [1981] IRLR 443 per Brown-Wilkinson J :-

If one party ('the guilty party') commits a repudiatory breach of the contract, the other party ('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: **Allen v Robles** ***(1969) 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation:*** **Farnworth Finance Facilities Ltd v Attryde** ***(1970) 1 WLR 1053.***

6.11. The claimant also advances an argument based on the observations of Jacob LJ in Bournemouth University higher Education Corporation v Buckland [2010] ICR 908 that:-

52 … I do not share Sedley LJ's regret in holding that a repudiatory breach of contract, once it has happened, cannot be "cured" by the contract breaker. Once he has committed a breach of contract which is so serious that it entitles the innocent party to walk away from it, I see no reason for the law to take away the innocent party's right to go. He should have a clear choice: affirm or go. Of course the wrongdoer can try to make amends – to persuade the wronged party to affirm the contract. But the option ought to be entirely at the wronged party's choice

And at 54

54. Next, a word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation.

6.12. Those passages were in response to Sedley LJ who had said in this judgment:-

44. Albeit with some reluctance, I accept that if we were to introduce into employment law the doctrine that a fundamental breach, if curable and if cured, takes away the innocent party's option of acceptance, it could only be on grounds that were capable of extension to other contracts, and for reasons I have given I do not consider that we would be justified in doing this. That does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends. The present case, for reasons explained by Jacob LJ, may be seen as the kind of exception which proves the rule.

6.13. The respondent submits that the claimant's letter of 29 August 2017 is a most emphatic expression of her position that the employment relationship is continuing into the future in the face of what has just happened. The claimant argues to the contrary. Mr Gray-Jones asks me to interpret the letter as saying no more than she does accept she has a responsibility to act in a professional capacity, not that she is returning to work. It states her disagreement to the conclusions reached about her responsibility for the clique in the department and her concerns about others' conduct. He says her expression that she wants to return to the department is no more than every employee faced with a repudiatory breach.

6.14. Mr Gray-Jones says the claimant does not return to work and perform her duties therefore she has not affirmed the contract. I don't accept that the performance of duties under the contract is the only way in which a party can affirm the continuation of the contract.

6.15. The letter, read as a whole sets out the basis for the future employment relationship. I do not accept its contents should read down in any way. There is no way of interpreting the phrase

"I can assure you that going forwards I will always behave in a professional way, adhere to all Spire and GPC standards and respect all my team members"

other than in the context of a future ongoing employment relationship.

6.16. The significance of this letter is this. Firstly, it is clearly not either the letter of resignation itself, nor does it threaten or even hint at a resignation. Secondly, I have considered where this letter might sit on the spectrum of responses identified in WE Cox Toner. I do not accept that it is a letter reserving the claimant's position or continuing the relationship only under protest. It is not preserving the position pending the respondent remedying any perceived breach (by which I mean in the factual and not legal sense). It is, in my judgment, an act of election by the claimant which is only consistent with an acceptance of where the parties had arrived at by that point in time and, against that, an expression of her intention of the continued existence in the future of the employment relationship. Such an explicit act therefore amounts to an affirmation by election of the contract.

6.17. I have further considered whether there is anything in the fact that the claimant was off sick at this time which should prevent this conclusion. I found she was off sick. At the time of writing she stated that her health was sufficiently recovered to engage head on with the relevant issues. I therefore have concluded that this was a considered response to the situation and is one which is not vitiated by the circumstances of her sickness absence. I must add into the mix the fact that in her evidence about this letter the claimant says she "meant it". She had been unwell but explicitly stated in the opening paragraph of the letter the phrase "until now". This reinforced my conclusion that what the letter says on its face is what the author meant which is itself consistent with her evidence.

6.18. This letter of 29 August was an election and, once made, deprives the employee of the opportunity of resurrecting the breach. This letter conveyed a current intention to return to work, notwithstanding what had gone before. If there was an earlier breach, the contract was affirmed by this express act.

6.19. It follows from those conclusions that I am not satisfied there was a breach of contract in the first place but, if there was, I am satisfied the contract was affirmed by the claimant's stated intention of future relations compliant with what had been expressed as being expected of her in the future. There was therefore no dismissal in law. I have also already referred to the fact that the respondent's pleaded case is simply that there was no dismissal and there is no alternative pleaded case going to the fairness of any dismissal that was made out. It does not therefore fall to me to reach a conclusion on that matter. I do however, note that there has been an assertion by the respondent that it was entirely reasonable for the it to suspend and investigate the concerns raised about the claimant in the way that it did. To that extent, I would agree with the respondent and if there had been an alternative defence of fairness based on the claimant's own conduct, I would have been inclined to accept it. The only reason events happened as they did was due to the concerns about the claimant's behaviour in the workplace that would fall within the definition of conduct or, if not, arguably some other substantial reason such that a statutory potentially fair reason is made out. Similarly, I cannot see why the measured approach Mr Fretter and Mrs Day adopted when investigating the concerns and the conclusions they came to could be said to fall outside the range of reasonable responses of a reasonable employer. Even if there was a dismissal in law arising from those circumstances, which I have rejected, it would have been open to the respondent to argue that the circumstance amounted to a fair dismissal within the meaning of s.98 of the 1996 Act.

EMPLOYMENT JUDGE R Clark

DATE 20 March 2019

JUDGMENT SENT TO THE PARTIES ON

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS