Appeal No. UKEAT/0069/18/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 29 November 2018

Before

HER HONOUR JUDGE KATHERINE TUCKER

(SITTING ALONE)

EPSOM & ST HELIER UNIVERSITY HOSPITALS NHS TRUST — APPELLANT

MRS B STARLING — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR LANCE HARRIS (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St Georges Road Wimbledon London SW19 4DR
For the Respondent	MS RACHEL BARRETT (of Counsel) Instructed by: Martin Searle Solicitors 9 Marlborough Place Brighton BN1 1UB

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

An Employment Tribunal did not err in concluding that a member of staff had been constructively unfairly dismissed when she resigned in response to the issuing of an informal "Improvement Notice" in a manner which was inconsistent with the Respondent's own policy.

HER HONOUR JUDGE KATHERINE TUCKER

1. This is an appeal against the Judgment and Reasons of an Employment Tribunal ("ET") sitting in London South Employment Tribunal. The Employment Judge was Judge Baron and the lay members were Ms C Bonner and Mr G Henderson. Before the Tribunal, the Claimant contented that she had been constructively unfairly dismissed and that she had been discriminated against by her employer because of, and for grounds relating to, her disability. The Tribunal found in her favour in respect of the claim of constructive unfair dismissal but dismissed all of her claims of disability discrimination. The Respondent employer, the NHS Trust, now appeals against the decision that the Claimant was constructively unfairly dismissed. In this Judgment I will use the terms "the Claimant" and "the Respondent", as the parties were below before the Employment Tribunal.

The facts

2. The Claimant worked for the Respondent NHS Trust as a Nurse. From 2002 onwards, she worked in the Assisted Conception Unit (known as the "ACU"), as a Fertility Nurse Specialist. The Claimant had started working for the Respondent organisation and its predecessors in 1976. She had a good (i.e. clean) disciplinary record. The ACU is a small unit within the Respondent organisation. Dr Croucher was the lead Consultant, and there were two other Consultants working within the unit, together with a Registrar. There were two Nurses; the Claimant and another individual, Ms Higgins. In addition, a matron, Matron Barron, worked (to some degree) within the unit. She was, technically, the Claimant's line manager, but she did not have any day-to-day responsibility or indeed any day-to-day contact with the Claimant.

3. On 9 June 2015 the Claimant was working in the ACU alongside Ms Higgins. They were both aware that the following day a patient was attending for a procedure and, that for that procedure to take place, incubators needed to be put on charge that day. Ms Higgins left early and as she left, she reminded the Claimant that the incubators needed to be put on charge. The Claimant said that she would switch them on. However, during the afternoon, the Claimant began to feel unwell: she developed a sudden headache and her vision became distorted. Miss Ding, who was one of the other Consultants in the ACU, advised her to go immediately to A&E; Miss Ding believed that the Claimant might be having a TIA (that is often, in lay terms, referred to as a 'mini-stroke') or, that she might have meningitis. The Claimant went to A&E in the afternoon. She was discharged at 7 o'clock that evening and she went home.

4. The following morning the Claimant realised that she had forgotten to switch on, and therefore, to charge, the incubators. She immediately called Dr Croucher to inform her of that fact. By that time, the incubators could not be charged in time for the procedure which had been planned for that day. That was significant: the patient had been due to undergo an egg collection and failure to undertake that procedure, on that day, put her entire IVF cycle at risk. Fortunately, however, the Trust was able to arrange for the patient to have the procedure elsewhere. However, no one disputed, either here or below, that the failure to turn on the incubators to charge was a serious error or oversight, with potentially significant consequences for the patient, actual inconvenience for her, and difficulty for the Trust because it incurred a cost in making the alternative arrangements for the patient.

5. Subsequently, Dr Croucher considered that an 'Improvement Notice' should be issued to the Claimant and to Ms Higgins. She drafted the document and directed Matron Barron to serve

A the notice upon each of them. A copy of the notice was at page 184 of the appeal bundle. That provided as follows:

> **"RE: Improvement Notice issued on 8th July 2015**
>
> **…**
>
> **At this meeting I explained that I was concerned that on Tuesday 9th June 2015 you failed to charge the incubators for the following day's egg collection. This put the patient's whole IVF cycle at risk.**
>
> **Whilst no harm came to the patient because we arranged for her egg collection to take place at another unit in London, this incident has resulted in a financial loss to the Trust.**
>
> **I appreciate that once you realised that you had failed to appropriately manage the incubators that you then notified Carolyn Croucher who was then able to take steps to resolve this matter.**
>
> **Whilst you informed Carolyn as soon as you were aware, this remains a very serious oversight, resulting in a risk to our patients (sic) IVF cycle as well as a financial loss to the Trust.**
>
> **I have, therefore, decided that it would be appropriate to issue you with an Improvement Notice to ensure that in future you take the appropriate steps regarding the charging of the incubators in order to prevent any further incidents.**
>
> **Should there be any further issues of this nature; formal action may be taken under the Trusts Disciplinary Policy. The purpose of raising this with you informally and issuing this informal notice is to ensure that you have been provided with the opportunity to improve, and therefore I hope that any future formal disciplinary action will not be necessary.**
>
> **A copy of this notice will be kept on your personnel file. However, it does not form part of your disciplinary records.**
>
> **Please do not hesitate to contact me if you have any further queries regarding this matter."**

The letter was stated to have been issued by Heidi Barron (Ms Barron, the Matron for the unit).

6. Matron Barron did as she was requested by Dr Croucher and gave the Claimant a copy of the notice on 8 July 2015. When she did so, she met briefly with the Claimant, spoke with her, and then handed the pre-prepared letter to her, which was in Matron Barron's name although it had been directed to be issued by Dr Croucher.

7. The term "Improvement Notice" is set out within the Respondent's disciplinary policy. Although paragraph 18 is the paragraph which specifically addresses Improvement Notices, that paragraph is set out within the disciplinary policy and should be read in that context. In my view,

A paragraphs 3 and 17 should also be read to understand the context of Improvement Notices as set out within the policy. Paragraph 3 provides as follows:

> **"3. *SUMMARY***
>
> **Where a problem clearly exists, the Trust encourages informal discussions between staff and their managers/supervisors. The discussion is intended as a basis for advising staff. These informal discussions should be followed up with an Improvement Notice letter to the member of staff outlining the expectations that have been set, and that if these expectations are not met the formal disciplinary procedure will be followed. The formal disciplinary procedure will begin when the informal discussion and subsequent Improvement Notice has failed to achieve the desired effect or when an offense is serious enough to warrant formal action."**

B

C 8. This paragraph makes it clear that if the informal discussion and subsequent improvement notice fails to achieve the desired effect the formal disciplinary procedure will begin.

D 9. I ought to add that in the preceding paragraph (paragraph 2), the policy states that "*Managers should seek support and guidance from Human Resources when dealing with disciplinary matters*" and furthermore the following passage:

> **"This policy is designed to help and encourage employees to achieve and maintain high standards of conduct and to ensure that employees are treated fairly and consistently in all disciplinary matters."**

E

10. Paragraph 17 sets out provisions relevant to a preliminary investigation. It sets out that:

> **"17. *PRELIMINARY INVESTIGATION STAGE***
>
> **The Manager should seek HR advice and guidance when a potential disciplinary matter arises. If the Manager considers that an Improvement Notice is appropriate in the circumstances they should follow the process as outlined in Sections 3 and 15 of this policy.**
>
> **…"**

F

G (Section 15 is not relevant to this appeal because it relates to unauthorised absence.) The paragraph continues:

> **"…**
>
> **It is the responsibility of the Manager, with advice from Human Resources, to consider the allegations and judge what investigation is appropriate on the basis of the information available at that time."**

H

11. Paragraph 18 provides:

> **"18. *IMPROVEMENT NOTICE***
>
> **Where a problem exists with regards to a member of staffs [sic] conduct a manager may have an informal discussion with the member of staff. This discussion is intended as a basis for advising staff on conduct concerns. The manager will have an informal meeting with the member of staff and this may be followed up with an informal Improvement Notice letter to the staff member advising them on the issue(s) discussed and the manager's expectations going forward. Any such letter will not form part of an employee's disciplinary records. Formal steps may be taken under this procedure if the matter is not resolved, or if informal discussion is not appropriate (for example, because of the seriousness of the allegation). …"**

An example of the letter to be sent is contained within the disciplinary procedure at Appendix F. Importantly, in that example, the letter refers to a meeting having taken place prior to the Improvement Notice being issued. The letter starts, "*I am writing further to our informal meeting held on: …*" and then a suggestion that the date, time, and venue of the meeting should be set out. The opening words of the example are, "*At this meeting I explained that I was concerned that you had …*" and then a gap is left, clearly for the manager to complete what the concern was. It continues:

> **"I asked you if you had any comments in relation to this matter, you said [add in comments from individual].**
>
> **We agreed that going forward [add here what was agreed / the manager's expectations regarding future improvement of issue]."**

12. Looking at the draft example and comparing it to the Improvement Notice actually issued in this case, although the letter issued to the Claimant refers to a meeting, the sentences providing for the opportunity for the Claimant to make comments, or the agreement reached at that meeting are wholly absent. In context it is easy to see why that was: the letter was written without either having heard what the Claimant had to say or any agreement for the future being reached.

13. Returning to the Respondent's policy document, Appendix G, sets out a flowchart for use by managers. I say 'managers', but I recognise that very often in the context of employment within the Respondent, those managers will also be clinicians who are managing a busy clinical

and administrative workload. The flowchart starts with, at the top of the chart, the possibility that there is a "*potential conduct issue raised*". It then directs managers to consider whether the issue should be "*managed formally or informally*", thereby suggesting that the manager, at that point, has a binary choice; either there will be reasons why the issue in hand is an informal matter, or, there will be reasons why it is a formal matter. If the manager choses to go down the formal route, there are a number of steps to take which may culminate in a disciplinary hearing being convened. If the manager opts to go down the informal route, there are simply two steps; the manager meets with the employee to discuss the concerns and, I highlight, <u>if necessary,</u> then issues an Improvement Notice.

14. As I have stated, the Claimant was issued with an Improvement Notice on the instruction of Dr Croucher, and Dr Croucher issued that Notice, although she did not attend any meeting with the Claimant. That notice recorded that it was issued 'further to' an informal meeting held on 8 July 2015 at 11.45 in the Gynaecology OPD and was then as set out above.

15. It was drawn to my attention, by counsel for the Respondent, that the letter ended with the words "*Please do not hesitate to contact me if you have any further queries regarding this matter*", the 'me' presumably being Matron Baron, as she met with the Claimant, although she had not decided that the Improvement Notice should be issued. I am told today, and there was no dispute about this matter, that the evidence before the Tribunal was that Matron Barron's evidence was that she met with the Claimant and handed the letter over, and it was after that that the Claimant informed her about the events which had taken place on the afternoon of 9 June 2015.

16. On 24 July 2015 the Claimant gave notice of her resignation and her intention to leave her then current post. She sought to work for the Respondent pursuant to its flexible retirement policy. It was agreed by the parties that her notice, given on that day, would expire in December 2015. I have included that particular fact at this point in a different chronology to that set out by the Tribunal in its Reasons.

17. On the facts found by the Tribunal, the issuing of the Improvement Notice was one of two issues which contributed to the Claimant's decision to resign. I refer to paragraph 28 of the Reasons:

> **"28. We find that the service of the Improvement Notice and the change to the rota each contributed to the Claimant's decision to resign from the ACU and move to a theatre role on a flexible retirement basis."**

18. The other was an issue in respect of alterations, or potential alterations, to the Claimant's working hours. However, the Tribunal found that that did not amount to a breach of contract. That is clear from paragraphs 21 to 25 of the Reasons.

19. No issue has been taken on appeal regarding the Tribunal's analysis that the Improvement Notice was found to be sufficiently causative of the Claimant's decision to resign.

20. The questions raised on appeal has been whether or not the Tribunal erred in finding that the Claimant was constructively unfairly dismissed, on the basis that it found that there was a breach of the implied term of trust and confidence resulting from the issuing of the Improvement Notice in the circumstances that it was issued.

21. As I mentioned earlier, the last line of the Improvement Notice included the words, "*Please do not hesitate to contact me if you have any further questions regarding this matter*".

In fact, the Claimant did write back to Matron Barron on 27 July 2015. In that letter, she expressed concerns about the fact that the Improvement Notice had been issued. In particular, she raised the fact that there had not been any informal meeting with her before the notice was issued and that she believed that that was in contravention of the disciplinary policy. She raised other points, but particularly the fact that had there been discussion it would have been established that she had had to go to A&E on 9th June 2015 and remained there until 7 o'clock in the evening.

22. The Claimant met with Matron Barron on 29 July 2015 and she explained in more detail the events of 9 June 2015. Subsequently, Matron Barron fed that information back to Dr Croucher. Dr Croucher, however, decided that the Improvement Notice should stand.

23. On 25 August 2015, the Claimant was diagnosed with a brain tumour. She underwent surgery to remove it and was absent from work. I have no doubt that that period of time was a particularly stressful and difficult one for her, her family, and her husband. Her husband corresponded with the Trust on her behalf. In view of the seriousness and the nature of her illness, he and the Trust agreed to extend the notice period, first by a number of emails sent in October to November (paragraphs 32 to 34 of the Judgment), and then, by express agreement, until the end of February 2016.

24. I consider that one important point to note in respect of those emails is that in several emails the Respondent made it clear that the Trust's position was that it could not retract the Claimant's resignation (see, for example, paragraphs 38 and 43). The Trust, on the basis of the findings made by the Tribunal, agreed to extend the Claimant's notice period and therefore postpone her leaving date. It made it clear, however, that it had recruited to the Claimant's substantive post within the ACU and that it could not agree to any suggestion that she could go

back on her resignation. Its stance was that the Claimant had resigned, with the express intention of taking flexible retirement, and that that required her to leave her original post and return to another post whilst drawing her pension. She would also be required to sign pension documents or forms, which she had not done before her diagnosis.

25. My reading of the explanation set out by the Tribunal in its Reasons was that the extension was agreed to as part of an effort to support to Claimant through a difficult period of her ill health, and, to ensure that she was not unfairly prejudiced by the fact that she had become ill at the very point when she needed to consider the filling in and completion of documents with potential long-term pension implications.

26. I have mentioned that the Claimant was unwell during this period. Precisely how unwell she was, is not clear, in my judgment, from the Reasons. Her husband was responding on her behalf to correspondence; she had seen Occupational Health and that fed back to the Respondent that she was not fit to work. Submissions made today were that for a period of time after the surgery, she lost her sight, she had difficulties with her memory and with her cognitive ability. Those submissions were not challenged before me, but I note that those facts are not within the Tribunal Judgment.

27. However, on 4 February 2016 the Claimant did write an email (set out at paragraph 48 of the Reasons). The Claimant wrote to Matron Barron and she stated:

> **"Further to previous correspondence on my illness, operation, and surrounding issues. I note, in particular, that I have yet to receive a response to the letter sent to you on the 27 July 2015 concerning an "Improvement Notice" issued by you on the 8 July 2015 on the instructions of Dr Croucher.**
>
> **This was a matter, as the letter identifies, which caused (and continues to cause) me much stress and on which I feel particularly aggrieved and was an issue, aggravated by my illness, which very much influenced my decision to leave.**
>
> **I have now recovered sufficiently to properly consider my future and feel that my decision to leave, issued to a greater extent under duress and the stress of my illness, together with its**

surrounding circumstances, was an ill considered reaction taken at a time where my judgement was significantly impaired by illness.

…

I therefore wish to advise you that I am withdrawing my letter of 24 July 2015, informing you of my resignation and as a result will not be resigning on the 29th February 2016."

28. The Claimant was subsequently told by the Respondent that she could not retract her resignation. She was also told, however, that a post for her to work within the Theatre on the basis of flexible retirement was still open to her.

29. The Claimant was further informed of the outcome of her letter regarding the Improvement Notice. Paragraph 20 of the Reasons set out that a decision had been made to rescind that notice. It was not clear when that decision was made because none of the Respondent's witnesses who gave evidence could provide that information. It appears that Ms Harris did consider the matter towards the end of August 2015, after she discovered the Claimant's diagnosis, and she was of the view that the matter should be withdrawn but did not consider informing the Claimant about that because she felt that she "*had far more challenging issues to consider*" at that time. It was agreed that the first the Claimant knew of the revocation of the notice - and again I put in context that it is not clear how and when that decision was made - was when she received the email of 12 February from Ms Harris. That email set out that the Respondent considered that it was issued prior to an understanding of the Claimant's illness and, at the time, that could not, therefore, be considered as mitigation for her failure to act.

30. The Claimant's contract ended at the end of February 2016. That, the Tribunal found, was a dismissal on the basis of the Claimant's resignation, not on the basis of a dismissal by the Respondent. Part of the Tribunal's reasoning for that conclusion was authority which establishes that a resignation cannot be retracted without agreement.

31. On the question of breach of the implied term of trust and confidence, the Tribunal set out its conclusions in some detail. At paragraphs 64 to 66 it set out its analysis of the relevant law:

> **"64. The next issue is therefore whether the Claimant was entitled to give notice so that there was a dismissal within section 95(1)(c) of the Employment Rights Act 1996. We were referred by both Miss Barrett and Mr Harris to *Western Excavating (ECC) Ltd* relating to the concept of a repudiatory breach, and to *Malik* relating to the implied term as to mutual trust and confidence. Those authorities are well known and we will not set out any extracts from them.**
>
> **65. The term implied into all contracts of employment is that neither party must without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. The function of the Tribunal in such circumstances is to look objectively at the employer's conduct as a whole, and decide whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. Any breach of such term is of necessity a fundamental breach. The conduct amounting to a breach of that term may be a series of actions which cumulatively amount to a repudiation of the contract by the employer.**
>
> **66. There are two alleged breaches in question. The first relates to the change of the rota, and the second to the issuing of the Improvement Notice. There may be some ambiguity in the way that the list of issues has been drafted, in that the reference to the implied term is only in connection with the issuing of the Improvement Notice, and not the change of the rota. Both counsel appeared to accept that each matter was said to be a breach of the implied term."**

32. I considered that paragraph 65 was particularly important.

33. The Tribunal then set out its analysis regarding the issuing of the Improvement Notice in paragraphs 71 to 80. I consider that it is particularly important to read paragraphs 74 and paragraphs 76 to 79:

> **"72. Mr Harris submitted that the issuing of the Notice was entirely appropriate because of the seriousness of the incident. Further, Matron Barron met the Claimant and discussed what had happened with her. He drew attention to the comment in the Claimant's witness statement that she had not been given a chance to defend herself, and that her complaint was about the procedure. He submitted that Matron Barron had in fact discussed the matter with the Claimant.**
>
> **…**
>
> **74. We agree with Mr Harris that the complaint by the Claimant is really that the Notice was issued without there having been a prior discussion with the Claimant. We conclude that it would clearly have been preferable for Dr Croucher or Matron Barron to have had a discussion with each of the Claimant and Nurse Higgins to find out what had occurred before deciding to issue the Notice. That accords with the spirit of the policy. What we have to decide is whether the failure to do so in the circumstances amounted to a breach of the implied term.**
>
> **…**
>
> **76. We have concluded that what the Respondent did was likely seriously to damage the trust and confidence which the Claimant had in it. The Respondent's policy clearly anticipates that there will be an informal meeting with the employee before a decision is made to issue a Notice. If there had been such a meeting then Dr Croucher (or Matron Barron) would have been fully informed of what had occurred, and would have been able to make a decision in full knowledge of the facts. The Notice was prepared without there having been such a meeting.**

> **77. The serving of a Notice is said in paragraph 18 of the disciplinary policy not to form part of the employee's disciplinary records, but the procedure forms part of the disciplinary policy. Further, in the introductory para' a clear link is made between the issuing of such a Notice and the more formal procedure:**
>
> > **The formal disciplinary procedure will begin when this informal discussion and subsequent Improvement Notice had failed to achieve the desired effect or when an offense is serious enough to warrant formal action.**
>
> **78. It is of the essence of fairness that appropriate enquiries be made before any disciplinary sanction is imposed. Although not considering the issue of fairness within section 98(4) of the 1976 Act at this stage, we do consider that point to be a material one when considering the issue as to whether there had been a breach of the implied term. Further, the Claimant had been employed for nearly 40 years. There had not been any previous disciplinary incidents. She was entitled to receive better treatment than this.**
>
> **79. There is the further point raised by Mr Harris that the Claimant sought to return to work in the ACU. We are required to consider the actions of the Respondent in July 2015 on an objective basis, and our conclusions are set out above. We have also concluded that the Claimant resigned partly as a result of the service of the Improvement Notice. The fact that the Claimant later sought to return to work in the ACU does not affect the decision we have made. The Claimant explained to us her nervousness about returning to work in the Theatre as a Band 6, and we can understand her reasons for seeking to return to the ACU despite what had occurred."**

34. It is important to look at how the breach was framed before the Tribunal - that was set out at paragraph 74 - and, in my judgment, the Tribunal also recorded within the passages that I have cited a summary of the submissions that were made in relation to this term. The Respondent's case was that the issuing of the notice was entirely appropriate, for example see paragraphs 72 and 77 to 78.

35. Furthermore, it was recorded in the Reasons, at paragraph 80, that Mr Harris had not pressed the point of affirmation by the delay or other conduct to any great degree. Ultimately, the Tribunal concluded that there was a breach of the implied term of mutual trust and confidence and that the Claimant had resigned as a result of that. (On this issue, note also paragraphs 17-19 of this Judgment above.)

36. I listened carefully to the submissions that were made orally today and read, with care, the skeleton arguments lodged on behalf of both parties. I considered that both counsel presented

succinct and helpful skeleton arguments, they argued their points clearly and I thank each for their hard work and diligence on behalf of their respective clients.

37. Turning then to the grounds of appeal and I will address them in the order that the advocates raised them today.

The Respondent's submissions

Ground 1: error in respect of the requirements of the implied term of trust and confidence

38. The first ground of appeal is that the Tribunal erred in law by finding that the implied term of trust and confidence operated so as to require the Respondent to hold, in effect, an investigatory meeting before issuing the Claimant with an informal non-disciplinary Improvement Notice. The Respondent, in its submissions, made it clear that it did not seek to challenge the factual determinations made by the Tribunal. What it did do, however, was to challenge its approach to the analysis of that which was said to amount to a breach of the implied term. It submitted that the Tribunal had erred in one of its initial steps in the precursor to the factual determination, in that it had misinterpreted the effect of the disciplinary policy and that that misinterpretation had carried on into the Tribunal's analysis of whether or not there had been a fundamental breach.

Ground 3: error in eliding the requirements to be taken in respect of formal and informal disciplinary action

39. Ground 3, from the Respondent's perspective, was closely related to Ground 1. It was that the ET erred in law by eliding the procedural requirements to be followed by an employer when taking formal disciplinary action with the procedure that must be followed when taking an informal non-disciplinary step. In this context, Mr Harris referred me particularly to the phrase at paragraph 78 of the Reasons which states, "*It is of the essence of fairness that appropriate*

enquiries be made before any disciplinary sanction is imposed". That line, in Mr Harris' submission, taken with the approach of the Tribunal as a whole, belied the fact that the Tribunal believed that the Improvement Notice was a disciplinary sanction, whereas, in his submission it was far from that; it was an informal step and a part of the informal process set out within the disciplinary policy. I perhaps cannot put the point any better than Mr Harris himself did in paragraph 12 of the Notice of Appeal. The Respondent's case was that it was an error of law to find that the implied term of trust and confidence operated so as to require the same, or similar, procedural steps to be taken in respect of an informal non-disciplinary measure as would be required for a formal disciplinary sanction.

Ground 2: failure to consider whether the Respondent had acted with reasonable and proper cause

40. Ground 2 was that the ET had erred in law in that it had failed to consider, properly, one important aspect of the determination of whether or not there had been a breach of the implied term, and that was whether or not the Respondent had acted with reasonable and proper cause. That, in the Respondent's submission, was a fundamental part of the relevant analysis and it was simply missing from the Tribunal's analysis.

Ground 4: affirmation of contract

41. Ground 4 was that the Tribunal had erred in law by failing to find that the Claimant had elected to affirm the contract by her post-resignation conduct. The Respondent accepted that this point, as argued before this Tribunal, was not argued before the Tribunal. However, Mr Harris drew my attention to many issues of fact and law, which, in his submission, were before the Tribunal and which were argued before the Tribunal. He submitted that this was a matter which I could properly consider on appeal, having regard to the decision in the case of **Secretary of**

State for Health v Rance [2007] IRLR 665, in particular looking at the headnote, paragraphs 6(b), (e) and (f). He asserted that the following amounted to an affirmation: first, the two occasions on which the notice period was extended and, secondly, the Claimant's attempt to withdraw or retract her notice by her email of 4 February 2016.

The Claimant's submissions

Grounds 1 and 3

42. The Claimant's counsel took issue with all of the points made by the Respondent. A starting point was the assessment of whether or not there had been a breach of the implied term of mutual trust and confidence was a question of fact, which this Tribunal ought not to go behind. Secondly, she submitted that in respect of Ground 3 it was clear, on the face of the Reasons provided of the Tribunal, that the Tribunal did not elide the two matters the Respondent had asserted that it had done; it distinguished between the issuing of the notice and the failure to hold the meeting, it found that it was the failure to hold the meeting before issuing the notice which amounted to the breach and it carefully distinguished between the informal and formal part of the procedure.

Ground 2

43. As to ground 2, the Claimant's submission was short: it was that reading the Judgment as a whole, and looking at the Tribunal's self-direction, it simply was not correct to say that the Tribunal failed to consider whether or not the Respondent had reasonable and proper cause to act as it did.

Ground 4

44. Finally, as to Ground 4, the submission made on behalf of the Claimant was that this was clearly not argued below. The Claimant submitted that, in fact, no real point was taken on affirmation. What was argued by the Respondent below was that the fact that the Claimant had sought to withdraw her resignation showed that the breach was not so bad after all (see paragraph 79). The Claimant submitted that the Tribunal (correctly) rejected that contention. It was submitted that it was not an error of law for the Tribunal not to determine issues which were not presented to it during the hearing, and, that in any event, this was not an issue that was suitable for determination on appeal; that there were a number of factual issues which were required to be considered in more detail than they were before the Tribunal if this point were to be argued on appeal. Counsel identified them in her skeleton argument. Orally, she added that it was not at all clear what had happened to the Claimant during her absence from work, or indeed the precise reasons why she sought to retract her resignation (again, that is set out in paragraph 79).

45. Both counsel took me helpfully to authorities. I do not propose to set out the detail included within the written arguments in this *extempore* Judgment.

The law

46. Turning to the law, employees with sufficient service are protected from unfair dismissal; as set out in section 94 of the **Employment Rights Act 1996**, (ERA 1996). Employment law is based on, but differs slightly to, contractual law. Dismissal includes a constructive dismissal; as set out in section 95 of the **ERA** 1006. A constructive dismissal can in some circumstances be fair, although that was not an issue for this case. A constructive dismissal occurs when an employee terminates a contract in circumstances where he or she is entitled to do so by reason of the employer's conduct where that conduct amounts to a fundamental breach of contract. In lay

terms, a fundamental breach of contract is a serious breach of contract, one which evidences an intention by the party in breach, not to be bound by the terms of the agreement between parties to it; one which is so serious, when viewed objectively, that that is its effect. One breach which can give rise to the right to elect to bring a contract to an end, is a breach of the implied term of mutual trust and confidence. A breach of that term is necessarily fundamental. Resignation on notice can still give rise to a constructive dismissal. I was referred to the case of **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121.

47. However, it is important to note that when an employer is in fundamental breach of contract, an employee has a choice, often it is a binary choice. In lay terms, they can put that breach to one side and chose to ignore it, to try and rise above it; or, put up with it. In doing so, in legal terms, at that point, the employee might be choosing to waive the breach or to affirm the contract. He or she might do that expressly or by action (for example staying, even after the breach has occurred). However, the acceptance of that breach can only be withdrawn by agreement.

48. I was taken to a number of cases, as I have stated, but in particular to the decision in the case of **Woods v W M Car Services (Peterborough) Ltd** [1982] IRLR 413, at paragraphs 33 to 35 and paragraph 42, which advises caution to Appellate Tribunals when considering the question of whether or not there has been a fundamental breach of contract. A number of the cases that I was taken to (**Buckland v Bournemouth University** and **Cockram v Air Products plc** UKEAT/0038/14) refer to how fact sensitive issues in cases like these can be. I was also taken to two cases by the Respondent (**London Underground Ltd v Ferenc-Batchelor** [2003] ICR 656 and **Ministry of Justice v Parry** UKEAT/0068/12) when seeking to identify precisely what a disciplinary sanction is.

Analysis and conclusions

Ground 1

49. In this case, in my judgment, it is important to focus on what the breach of contract was said by the Claimant, and subsequently found to be by the Tribunal. The breach was not asserted to be the issuing of the Improvement Notice. Rather, the breach was said to be issuing that notice in the way it was issued; i.e. doing so without having first spoken to the Claimant.

50. I do not accept that, on a fair reading of this Tribunal's Judgment and Reasons, it can be said that the Tribunal erred in its construction of the Respondent's disciplinary policy. In my judgment, paragraph 3 of that policy and its opening paragraph at paragraph 2 are particularly important in this context: they set the tone of the document. They encourage managers to talk, informally, to staff about difficulties that may arise at work. That is clear from the express words at paragraph 3, "*the Trust encourages informal discussions between staff and their managers/ supervisors. The discussion is intended as a basis for advising staff*". Finally, at the end of that paragraph, the document states, "*This policy should not be viewed primarily as a means of imposing punitive sanctions, but to emphasise and encourage improvements in individual conduct*". (Emphasis added).

51. The significance of meeting and talking about potential problems with staff carries on throughout the document in paragraphs 17 and 18. It also is evidently clear on the face of the example of the Improvement Notice itself, and evidently clear in the flowchart, at Appendix G. I note also, that from that flowchart, it would appear to be the case that the issuing of an Improvement Notice was not foreseen as something which would automatically follow the meeting held with the employee to discuss the relevant concerns in the workplace. Equally, what *did* appear to be something that was required, once the decision has been made to deal with

something informally, was that a meeting should take place so that the manager and employee could meet and discuss those issues. There are, in my judgment, likely to be very good reasons for that. Employee relations are just that; they are about relations between employers and employees. Good employment, or indeed other, relationships are based in sound communication and understanding of the roles and responsibilities of each partner in that relationship. Good employee relations are of benefit to employee and employer alike: frequently, if those are good then, often, an organisation performs well, partly at least because there is mutual trust and mutual confidence between the organisation and its staff who work together towards a common objective of getting a job done and done well.

52. In my judgment, the Tribunal did not misinterpret the provisions within the Respondent's policy relating to resolution of conduct issues informally, with the formal disciplinary steps that could be taken, and which may have contractual consequences. In my judgment, the policy set out a procedure, which the Respondent asserted that it would use in the workplace, for dealing with issues of potential conduct which did not immediately merit formal action. The reality is that Dr Croucher did not follow that informal procedure. Consequently, she did not find out about key information prior to deciding to issue the Improvement Notice. She was not required to hold anything like an investigatory meeting with the Claimant. What she was required to do - under the Respondent's policy - was to meet and to talk with the Claimant, or (at the very least) to ensure that someone else had met and talked with the Claimant, to understand her account of the potential conduct issue before issuing an Improvement Notice. That did not need to be a formal, minuted meeting, still less was it required to be a formal investigation. It could have been a 'light-touch' conversation about what had happened on 9 June which had led to the incubators not being charged. It is quite right to record that it would not be part of the disciplinary record, although it would of course remain on the employee's file.

53. It would be wrong, however, in my judgment to say that a notice issued under that policy would be irrelevant to an employee or indeed the employer; of course, it is relevant, because it existed. Its consequence, or effect, was to mark an incident of potential conduct, which a manager had chosen to deal with informally. I have no doubt that if a similar incident occurred again, it would be something which the employer could legitimately have had regard when deciding how to deal with the subsequent issue. Again, that was clear from the policy itself. It was a step within the policy, albeit an informal one.

54. I dismissed the Respondent's case in relation to ground 1. I did not consider that the Tribunal had erred by holding, in effect, that there needed to be an investigatory meeting before it issued the informal Improvement Notice. What it found was that the manner that the Improvement Notice was issued in this particular case, to this particular employee and in these particular circumstances - was a breach of the implied term of mutual trust and confidence.

Ground 3

55. I then considered ground 3. I am not satisfied that the Tribunal improperly elided the procedure required for its formal disciplinary process and for the informal process. I carefully considered the words used by the Tribunal at paragraphs 77 and 78 of the Reasons and in particular the sentence, *"It is of the essence of fairness that appropriate enquiries be made before any disciplinary sanction is imposed."*. We have today, at this hearing, spent hours pouring over the Tribunal's Reasons. Having done so, I took a step back, and returned to my initial impression of those words when I first read the Judgment. My initial impression, when I initially read the Judgment, with an open mind, but live to the criticisms of it, was that, in context, that sentence merely sets out an acknowledgement of a primary rule of natural justice. During the course of submissions, I wondered if that was an incorrect reading. Ultimately, I concluded not. The use

of the word "sanction" is perhaps one that should not have been chosen. In my judgment it does not, however, vitiate the decision when read as a whole. It was perhaps a little clumsy, it might have been better to say that before any step is taken under a disciplinary policy, appropriate enquires should be made/ an employee ought to have the opportunity to put their case. Nonetheless, I am not satisfied, reading the judgment as a whole, that the criticism advanced in this ground of appeal is well made.

Ground 2

56. In respect of ground 2, I simply do not accept that it is made out. In my judgment, the Tribunal carefully and properly identified the different elements that it was required to analyse when considering whether or not there had been a breach of the implied term of mutual trust and confidence and set that out at paragraph 65. In addition, within its analysis, at paragraphs 71 to 80, I consider that the Tribunal was careful to consider all relevant issues. The Tribunal acknowledged how serious the failure to charge the incubators was and how serious the failure was. It went on to consider, in its own words, "*this [i.e.,the question of whether there had been a breach of the implied term] matter with particular care*". It acknowledged that it was not straightforward and involved a judgment as to whether what occurred was likely to destroy or seriously damage the relevant trust and confidence between employer and employee. It acknowledged that it was not a deliberate action, but went on to say why, in detail, it considered that there had been a breach of that term. Its conclusion was, in truth, that there was no reasonable or proper cause for the Respondent, or its employees, not to speak to the Claimant before issuing the Improvement Notice, it simply just issued the Improvement Notice.

57. The real issue, in my judgment, was whether or not what had happened (the issuing of the Notice without a prior meeting) was enough to amount to a breach of the implied term of trust

and confidence. I was astute in my analysis to consider whether or not the Reasons might belie any underlying sympathy for the Claimant, in light of her subsequent diagnosis. I am not satisfied that there was any evidence of that when I read the Reasons.

58. I have also carefully heeded the warning, set out in cases like **Woods** that I was referred to. This is an appellate jurisdiction; the Tribunal heard this case. They heard from and saw the witnesses, they read the witness statements, and they heard from the Claimant. I might have reached a different view, but, had I heard the evidence, I might not have done. In any event, I am not satisfied that there is an error of law in the approach that this Tribunal took or decision it reached.

Ground 4

59. This ground of appeal was not argued below. I do not consider that all the information that would be required to determine it is before the EAT. In particular, I consider that there is a paucity of evidence regarding the Claimant's state of health and her ability to engage in and deal with the matters that were being raised between the Respondent and her husband on her behalf. It is not clear to what extent he was able to talk to her and get her to engage in those issues. Furthermore, I am not satisfied that this case comes within any of the exceptions that were drawn to my attention from the **Secretary of State for Health v Rance** case. I am not satisfied that all the evidence is available and, I am not satisfied that it is an obvious knockout point.

60. In reaching that conclusion, the fact that I do not have all the material to decide it is highly relevant. Affirmation, in my judgment, is a highly fact-sensitive analysis. I am not satisfied that this is a discreet matter of pure law which can be determined in the absence of relevant facts. The point was not taken below and there appears to be no reason why it was not. A similar and closely

aligned point was, but this particular point, namely that the Claimant had affirmed the contract through the extension of her notice period by (i) an agreement reached between her husband and the Trust; and (ii) the writing of her letter, was not argued. I also note that there are, in any event, the findings at paragraph 79 which would tend to go against the conclusion that I am invited to make. That paragraph suggests that, in fact, there were other reasons why the Claimant had sought to withdraw her resignation, not simply that she had decided that she wished to affirm the contract.

61. For all those reasons I consider that the appeal should be dismissed.

Concluding remarks

62. I would like to make a number of points which were not determinative of the appeal but, which I would hope the parties might find helpful moving forward. I am conscious that there may well be an ongoing employment relationship between the Respondent and the Claimant. However, even if there is not, I hope that these points might be useful for the Respondent.

63. The Respondent, as an NHS Trust is no doubt an 'investor in people' and an organisation that would say that it values its staff. Resources in healthcare, and elsewhere, are under pressure. Nonetheless, organisations such as the Respondent must provide their services, notwithstanding any pressures on resources. That will, no doubt, have an impact upon the organisation as a whole, but also upon the individuals working within it. I do not doubt that Dr Croucher was under pressure to manage staff, manage the unit, and, perhaps, manage a budget.

64. From the documents I have seen, it appeared that what the Respondent has sought to do, is to set out in a policy the careful balance between dictating to managers the individual steps that

they should and should not take when managing staff, whilst also leaving it, ultimately, for the managers to decide whether or not it is appropriate to act in a particular case. It might be instructive for the Respondent to imagine what might have happened if Dr Croucher, rather than issuing the notice in the way that was done, had taken the time (or asked someone else to take the time) to sit down with the Claimant, and indeed Ms Harris, and explain the problem that had arisen, the implications for the patient who had undergone fertility treatment (no doubt a very stressful and difficult experience) and the cost implications, perhaps for that patient, but also for the organisation. Whether Improvement Notices were subsequently issued or not, that meeting itself might have had a much greater impact on the employees who had made the error than simply issuing a formal letter, setting out in bold terms that which had not been done and that which was expected to be done for the future. If something has more impact on staff, it may be more likely to produce better future performance. But, a meeting such as that may well also make, I anticipate, the staff involved feel more valued because they can see and understand the importance of their role within the organisation.

65. Indeed, the problem with not holding that meeting is that it can lead someone to feel wholly undervalued. The letter that was issued in this case, did not acknowledge the good work that had been done by the Claimant. Nor did it not acknowledge that the Claimant had been in an exceptional situation the day before. I understand that it is difficult for staff working within Human Resources to train busy professionals, particularly if their primary focus is on their own work. However, perhaps taking steps to encourage them to understand that the management of staff is not simply a tick box exercise, but something which requires initiative, common sense and, where appropriate, a degree of compassion may be a valuable exercise. Part of the purpose of effective communication between organisations and their employees is to enable the former to understand the latter's challenges and, conversely, to ask the staff to understand the organisation's

challenges. That, in my judgment, is an important part of good employee relations. Effective communication is key.