Case Number: 1809288/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms R Hildreth**

Respondent: **Ramsay Healthcare UK Operations Ltd**

Heard at: **Leeds** **On:** **26th, 27th 28th and 29th March 2019**

Before: **Employment Judge Lancaster**

Representation
Claimant: **Mrs Datta, counsel**
Respondent: **Ms Del Priore, counsel**

JUDGMENT

The claims are dismissed.

REASONS

1. There is helpfully now an agreed list of issues and I shall deal with those matters in turn.

2. Primarily this is a claim of constructive unfair dismissal where the fundamental breach of contract relied upon is a breach of the implied term of mutual trust and confidence. That, as is well established, is a term that an employer must not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously to undermine the relationship of mutual trust and confidence that ought to exist between employer and employee.

3. There is no dispute as to the law in this regard. That test is established in the case of Malik & another v Bank of Credit & Commerce International [1997]ICR 606 and its trite law that it means that I must view this matter objectively. Also, I must look at the specific conduct on the part of the respondent which is said to have breached the term.

4. More particularly, this is a case which is said to invoke the principle of a "last straw". The claimant resigned by letter sent by email at 11.17 on the morning of 12 March 2018, and she referred within that resignation letter to "a last straw". Again, it is relatively trite law, as established in the case of Omilaju v Waltham Forest London Borough Council [2005] ICR 481, that the last straw relied upon need not itself be a fundamental breach not necessarily a breach of contract but it must not be wholly innocuous and it must in some way contribute to the acts of alleged fundamental breach that proceeded it. Where there is such a last straw, then it will reactivate any previous fundamental breaches. If there is no such event then I will look at the matter again and establish whether historically there has been a fundamental breach, if so when it was and whether by her conduct subsequently the claimant has in fact affirmed the contract and waived that breached.

The reason for resignation

5. My starting point therefore, before I look more specifically at the list of issues, is to establish the reason for the resignation, which is what I am principally concerned with. What was in the mind of the claimant on the morning of 12 March that led her to resign? Not what she has identified subsequently in going through disclosed documents and identifying matters of concern of which she knew nothing at the time, nor what she has alleged after that event, raised in her appeal or otherwise. What actually was the reason why she resigned and was it a fundamental breach?

The last straw

6. So far as the alleged last straw is concerned she says specifically:

> "This meeting to hear the outcome of her grievance was unfortunately cancelled due to adverse weather on 8 March. I was then told that I would be sent the result through the post with contravention of company policy and for me this is the last straw. I cannot take anymore of this unfair treatment where management believes t can abuse company policies to persecute staff and break company policy when it suits. My grievance is not being treated seriously".

7. She says specifically that in her mind the last straw is alleged breach of company policy, and that breach is the undertaking to send through the results of her grievance by post.

8. The claimant had originally been invited to an outcome meeting to hear the results of her grievance fixed for 27 February. That followed the completion of the investigation report by Mr Winters which he signed off on 14 February. The claimant postponed that meeting and it was rearranged for 8 March. The intention then was that the manager, Helen White, who was conducting the grievance, but having delegated the investigation to Mr Winters, would disclose his report and announce her findings.

9. Unfortunately, 8 March of last year was in the middle of adverse weather conditions ("the Beast from the East") and that bad weather meant that Helen White could not travel from her home in Harrogate to Clifton Park Hospital where the claimant worked. The meeting was therefore cancelled.

Helen White communicated that to the hospital manager Mr Ceri Morgan and he in turn passed on that information onto the claimant who had managed to get in.

10. Although there has been dispute as to what was said on that occasion, some of it relatively acrimonious, evidentially the issue now appears to be clear. The claimant accepts that Mr Morgan informed her that because Helen White was unavailable there were two options. One was that she could reconvene the meeting to hear the outcome in person. Alternatively, and this was Ms White's preferred option, the results of the grievance enquiry could then be communicated by post. The claimant now accepts that after that discussion with Mr Morgan she agreed to accept the outcome by post, having satisfied herself that that would not in any way prejudice her right to raise an appeal if she disagreed with the decision. The undertaking was that the claimant would receive a letter from Helen White rather than receive the outcome directly from her in person. That letter was not drafted immediately but it was sent out the day after the claimant had in fact resigned. She resigned on 12 March but she had not then yet received the promised outcome letter.

11. When she says, "I was told the results would be sent through the post which again is contravention company policy for me is the last straw" that does not take account of the fact that she had herself agreed to this course of action. In any event it is not, as is now conceded, any breach of company policy. Although the original intention, and still the preferred option, would have been to announce the decision in person this is not expressly provided for in the policy. And I also note that, applying the minimum standards of the ACAS Code of Practice, the requirement is simply that the outcome of any grievance be communicated in writing.

12. On that basis the alleged "last straw" specified within the resignation letter is not made out. There was no insistence, without the consent of the claimant, that she received the outcome in the way that she did not wish, and in any event that was not in breach of company policy.

The claimant's knowledge

13. I am also satisfied on the evidence that at this stage, although she may well have had her suspicions as to what the outcome would be, the claimant did not in fact know. I do not accept her evidence that she had in fact received a hard copy at least of the body of Mr Winter's investigation report at the hands of Sarah Brown, the In-house HR Administrator at Clifton Park. The claimant says that Ms Brown handed her that document in a brown envelope on the morning of 8 March after the meeting had been cancelled. She says that arose as a consequence of the discussion with Mr Ceri Morgan where she had agreed to have the grievance outcome letter in writing. She claims that she also asked Mr Morgan if she could then have a copy of the investigation report in advance and says that he told her to make enquiries with Ms Brown, whom she alleges then brought her the document.

14. That version of events is denied by both Mr Morgan and Ms Brown. This is not an easy matter to determine. As is cogently argued on behalf of the claimant by Mrs Datta it would be a somewhat extraordinary thing to make

up, and I have commented in the course of the evidence that it is clear that it would have been practicable for Ms Brown to provide that document because she had been emailed a copy of it on 7 March in anticipation of it being provided to Ms White for her use at the meeting and no doubt for it also to be communicated to the claimant.

15. However, all the internal documentation suggests that this did not happen and corroborates the account of the respondent's two witnesses. Firstly, and most significantly in my mind the claimant's resignation letter does not say that she had had sight of that investigation report four days before she resigned. If she had been aware of Mr Winters' findings, to which she took exception as is evidenced by later correspondence, I would have expected her to have at least alluded to that fact and to have said something along the lines of "it is clear that Mr Winters has not taken my grievance seriously". Rather the phrase she actually used in her letter is "my grievance is not being taken seriously", suggesting it was still an ongoing process of which she was as yet unaware of the outcome. I also observe that in a subsequent letter from her on 22 March, she specifically states "I have *now* read both the grievance outcome letter and the investigation report" (emphasis added).

16. Also, all the internal emails relating to Sarah Brown at this point indicate that she only sent the investigation report out with the grievance outcome letter on 13th. There were emails from her on this issue because she had been the personal assistant to Ms White as well as to Mr Morgan. Emails from her indicate that that was what she was doing: "I am now sending out the final version of the report". It would be somewhat extraordinary if those emails were sent when in actual fact the report had already been disclosed by her and there had been no mention of it. All the internal evidence points to the fact that the report was only sent out as an enclosure with the outcome letter, which was in the course of being drafted over the 12 and 13 and finalised after the claimant had resigned.

17. For those reasons I conclude on the evidence that the claimant had not in fact seen the investigation report at the point of her resignation.

18. In any event looking at the tone and terms of her letter of 12 March, it is quite clear to me that the content of the investigation report formed no part of the reason for her resignation. That reason is spelt out in her letter and there is no reference to any dissatisfaction with the way Mr Winters had carried out the investigation or with his conclusions. The reason is set out contemporaneously at the point of notice of termination, and is in that letter. She refers specifically to alleged "bullying, harassment and victimisation" which she says that she had "suffered over the last eighteen months or so"; treatment which she said had "adversely affected her mental, emotional and physical wellbeing". She then refers to the alleged last straw.

Fundamental breach

19. Having established that there is no last straw in this case I am looking now at the substance of the earlier allegations that are said to constitute, cumulatively, a fundamental breach of contract. I refer to the list of issues.

20. Did Donna Thornton, the previous hospital manager who had left her post at Clifton Park in July of 2017

    (1) Reprimand the clamant unfairly in that she instructed her not to give the respondent's staff telephone numbers to the local NHS Trust for the purposes for supplying staff for work at the Trust.

21. It is not in dispute that when she took up her position Ms Thornton changed what appears to have been a previous practice whereby the claimant was permitted to facilitate members of her staff working other than for the respondent and doing work for the local NHS Trust. This I am told is a relatively common practice for those who work in the health service. The claimant accepted in evidence there was nothing incorrect in Ms Thornton giving that instruction.

22. Ms Thornton has given an entirely plausible reason as to why she thought that inappropriate. It is common ground, and indeed a major plank of the claimant's case, that there was a diminution in work at Clifton Park Hospital. That was partly as a result of logistical and organisational changes within the local NHS providers and commissioners and the establishment or alternative routes for surgeons working independently. In that context Ms Thornton gave cogent evidence that she considered that, although there was a necessary symbiotic relationship between the two, in this context the private healthcare provider Ramsey was in fact a competitor of the NHS. Therefore, for one of its own managers, the claimant, to be involved in any way as facilitating staff working elsewhere and supporting a rival was inappropriate. That did not mean that staff with appropriate approval could not make their own arrangements to work when they were not contracted at Clifton Park. It simply meant the claimant, as a manager, an employee in a senior position of the respondent, was not to be seen to be endorsing or facilitating that process.

23. The substance of what is said is unobjectionable. The claimant says however that she thought it was said in an inappropriate tone. I am not able to say on the evidence I have heard that the claimant is right on that. I am well aware of her perception of how she was treated I am equally well aware that she takes exception to the reference to only "her perceptions" as set out in the outcome of the grievance. I am nonetheless driven to the conclusion, and this is all I have before me, that I know the claimant said that she perceived this to be an inappropriate tone but that the actual content was unobjectionable. And of itself therefore it certainly is not capable of constituting a breach of the implied term as to trust and confidence. Ms Thornton had reasonable and proper cause for giving this instruction, however the claimant perceived her tone in so doing.

24. Did Donna Thornton

    (2) Crticise the claimant in relation to the number of staff in the recovery room?

25. That is because, when she first arrived at Clifton Park, Donna Thornton questioned the need to have two staff available in recovery, particularly if only one theatre was operating. It was pointed out to her that national guidance in relation to anaesthetics indicated that was the correct practice: when that was pointed out it was accepted.

26. I prefer Ms Thornton's evidence that this was not a matter that she directly raised at any form of criticism of the claimant. It was in fact a query she raised with a number of staff and in particular she raised it with the matron at that time. The information as to the appropriate practice was provided to her by Pat Noble. The claimant necessarily would have been involved in these discussions if she was allocating rotas and staff to the recovery room and it would affect her, but it was not a direct and personal criticism. I am unable to accept there was anything inappropriate in the tone of Donna Thornton in raising her queries as to whether this was an appropriate use of resources. As I have said once it was established that this was what should happen, as good practice, there is no further raising of the issue.

27. Did Donna Thornton,

    (3) Instruct the claimant to accept trays of instruments returned to Clifton Park Hospital in a contaminated state?

28. I am somewhat at a loss to understand the significance of this matter. The respondent operates a number of sites. Again, I prefer Donna Thornton's evidence that these items were returned from a site which did not have itself a decontamination unit. That appears to be corroborated by the claimant who refers to such a unit having been purchased specifically for use at the Clifton Park site. This was an internal arrangement as between two of the respondent's hospitals. I am unclear why the hospital manager, who has responsibility for both those sites, should not dictate the policy and why the claimant takes such exception to these matters being returned.

29. In any event I can see no ground for saying that that again, of itself, constitutes any breach of the fundamental term as to trust and confidence. It is a matter of administrative practice within the hospital raised at management level and even if the claimant and Ms Thornton were in dispute about how things should be done the ultimate responsibility lies with the hospital manager, not with the claimant as head of department, Theatre Lead, and therefore it is not undermining her position in any way for her superior to dictate policies and practices within the hospital.

30. As I indicated in the course of discussion during submissions I had understood from the evidence that those three matters I have just dealt with are in fact now raised simply as an explanation as to why the claimant believes that Donna Thornton did not like her, indicating that Donna Thornton resented being challenged and therefore that is why Donna Thornton then went on to commit acts of bullying and harassment towards the claimant. They are again now specified as being themselves alleged acts of such bullying.

31. The one allegation against Donna Thornton which does follow subsequently is number 4. Did Donna Thornton bully and harass the claimant,

(4) in circumstances where the claimant was given informal performance counselling she was given the target of producing toil time off in lieu when reduction of toil was unachievable by reason of factors beyond the claimant's control?

32. This reference to informal performance management is to a process that commenced on 20 and 21 June 2017 and was managed not directly by Donna Thornton but by Heather Martin, the claimant's line manager. It therefore was very shortly before Donna Thornton herself left in July.

33. The actual content of the objective set by Heather Martin at the first of those meetings was in relation to the managing of TOIL (time of fin lieu) and not to its total reduction. Again, I am unclear what specific allegation of bullying on the part of Donald Thornton this entails.

34. The use of TOIL is a highly contentious matter in this case. The claimant was clearly in disagreement with her employer as to its use. I have a great deal of sympathy with her position. Primarily TOIL is to be used, where staff have been forced to work over, as an alternative to paying them overtime. In a clinical situation it would often be the case that theatre procedures may well over run and of course staff cannot simply then leave at their contracted departure time if that is the case. Or there may be an increase in demand that requires them to attend additional procedures. If that is the case TOIL would ordinarily work to allow them to take time off from other contracted hours to compensate. That is not the issue here. This, which I understand to be the primary purpose of TOIL is referred to as "negative TOIL". The alternative which will then be "positive TOIL" is when staff owe hours back to the respondent employer because they have not worked their full contractual hours for whatever reason. That is the controversial area.

35. Ordinarily, if an employee has fixed contractual hours and they are available to work within those rostered hours they are entitled to be paid without having to owe back any time.

36. The respondent used this accrued TOIL owing back to the company as a means of managing slack times of work. So in addition to the situation where an employee might use it as a form of "flexitime" and be able to voluntarily take time off on the understanding that they work it back in due course, it was used as a management tool. If there was no work available, rather than simply accepting that the employee was entitled to be paid, irrespective of whether that work was offered to them, the respondent would seek to recoup that slack time by way of TOIL, either working it back or paying it back financially. I am not impressed by the suggestion that if an employee has agreed contractual hours, a variation to their terms and conditions of employment can be affected simply by including a reference to "positive TOIL" in a subsequent unilateral declaration in a so called "statement of written terms and conditions" without expressed agreement with the employee as to the extent of their working hours.

37. There are clearly issues arising from this management practice, particularly due to the decline in work. If staff therefore were not being afforded their full

contractual hours this was being regarded as time off in lieu which they therefore were under an obligation to pay back.

38. I have a degree of sympathy with the claimant objecting to the way this was used by her employers. However, that is the difference: I am not an employee of the respondent and the claimant is. I share some of her concerns about the policy and the way it was implemented, she however is under an obligation as a manager to seek to implement the policies of her employer so far as they are reasonable. She is therefore under obligation to seek to manager her staff, to allocate their rosters, to ensure they work as many of their contractual hours as possible and to make appropriate arrangements if those hours are not available within the original rostered times, to rearrange their shifts or arrange shifts to work elsewhere or however to ensure that their accrued TOIL owed back does not accumulate.

39. Within the theatre department, more so it seemed than in any other area of work at Clifton Park, a large number of staff, the claimant included, accumulated excessive amount of time off allegedly owed back to the respondent. As that matter had not been addressed, in so far as she was able, by the claimant properly managing the rosters of her team she was placed on performance review as of June 2017. That is not, as she purports to set it out in the list of issues, that she alone was given the task of reducing TOIL when it was unachievable because of business factors. What she was given was the task of managing TOIL within her team so far as it was practicable within her remit. I accept, as I have indicated many times in the course of this hearing, that that would have been a very difficult task. There were obviously other factors which she could not control but she did have a degree of autonomy as to how she managed her team. Maybe because of her objections in principle to the use of repaid TOIL, it appears that she did not do as much as she might have done to minimise the accumulation of those hours owed.

40. I am afraid to say that it has appeared to me at the course of the 4 days of this case that there are clear levels of inadequate performance as a manager. That is not of course in any way to criticise the professional competence of the claimant as a nurse, but her department did suffer excessively from staff being under used and she did not it appears take appropriate steps to address that as she might have done. This was an ongoing issue, the respondent was raising that and making the claimant subject to a performance review to seek to manage the situation. This was done in incremental stages; firstly, by requiring her to send out letters to her team alerting them to the problem; then by holding specific 1-2-1 meetings, rather just generalised discussions, with a view to coming up with realistic proposals as to how an individual might address the issue. This was to be done before referring the matter back to HR if there were to be any steps to recoup money from salary or to change the terms of the contract, things which were outside the claimant's remit. Those various incremental stages by which she was to be encouraged, in the process of the performance review, to do her job of managing seem to me to be entirely reasonable and not a fundamental breach of contract. And in any event, all these matters, in so far as they relate to Donna Thornton, had ended therefore by the implementation that performance review on 20 and 21 June 2017 nine months before the claimant resigned. If there had been a fundamental

breach on the part of Ms Thornton, it appears to me that that lapse of time and given Ms Thornton had herself then left the Clifton Park site in mid July amounts to a clear waiver on the part of the claimant.

41. The next allegations are against Ms Thornton's replacement as hospital manager Neville Croft. It is said that he bullied and harassed the claimant,

    (1) by having declined her request to take two weeks' unpaid leave and having allowed her one week's unpaid leave, threatening her that if she didn't turn up for work for the second week there would be consequences.

42. Again, on the face of it whatever Mr Croft said appears to be largely unobjectionable. The claimant had hoped to take, commendably, two weeks leave to work on a voluntary project in Ghana. That was not afforded to her but she would have been allowed to take one week. That clearly was not practicable, because she had already booked the flights and stood to lose out even more if she tried to rearrange. Mr Croft therefore made a comment that having afforded her one week if she were to go and simply not return and take the full two weeks that she wished there would be disciplinary consequences. Of course, that is right.

43. The objection is again to the tone in which that was allegedly said and once more the onus is on the claimant to establish that this happened. On what I have heard, even though in this context I have only received evidence from the claimant and not for Mr Croft, is not a sufficient calibre that I can safely in my view accept the claimant's account of what is now her obviously genuine perception that this was unnecessarily hostile was in fact how it was delivered to her. Mr Croft did have reasonable and proper cause for making this observation.

44. The next allegation against Mr Croft is that

    (2) he was focusing on the claimant's attendance in that she had to check in with the SMT (the senior management team) every time she left for the day.

45. I simply can see no evidence this has actually happened. The documentation relating to the claimant's weekly rostered hours and her interaction with SMT is simply in the context, identified within her performance management. That is that she would be expected to be on site for five days and that if she wished to change that normal working pattern (other than if she had specifically booked annual leave) she was to approve that with SMT. That is because over time the claimant had not worked every day. She had herself accumulated significant "positive TOIL". That was, I accept, because she was currently seeking to achieve a fair distribution of owed hours between her and her other staff, and therefore did not wish to be working her own full contractual 37½ hours if other staff were going home due to lack of working in theatres. There were also instances however where there had been complaints by staff that the claimant was not therefore always available on site when they might have hoped she would be. In order to regularise her attendance and to achieve

effective performance of her managerial duties, the expectation was (except with express approval for SMT) she would work a five-day working pattern.

46. I do not understand the claimant's assertion that that necessarily means she would therefore accrue yet further "positive TOIL". She was on a 37½ hour contract over five days 7½ hours a day which ought to have been achievable. That is the requirement. She had to obtain approval to go outside that five-day working pattern. I have seen no evidence that the claimant ever reported to SMT when she left. Indeed, that would be incompatible with the later allegations that she was leaving site early. Mr Croft subsequently made a report that the claimant was not actually on site at times where, according to the computerised records of shifts allocated, he expected her to be there. If in actual fact the claimant had been required to report to a member of SMT every time she left site that type of dispute could never have arisen because there would have been evidence the claimant had signed off with approval. The claimant never physically went and spoke to SMT members every time she left at the end of a shift and the documents refers only to her weekly hours.

47. The next allegation against Mr Croft is that,

    (3) on 26 October 2017 he threatened the claimant in relation to the falsification of Allocate (the respondent's time management system records).

48. He brought his concern to her attention verbally on that occasion. That is the fact that he understood from his own observations that she had not been present in theatre at times when he expected her to be there. If that were the case that would have appeared to be a breach of her contract and a matter that might lead to disciplinary action. The claimant has consistently alleged that Mr Croft would speak to her in a poor manner.

49. That was then followed up by Mr Croft actually putting in a written complaint on 27 October. That is allegation (4) against him.

50. That was referred to an investigation conducted by Judy Wright and she concluded on 27 November, a month later, that there was in fact no case to answer. The matter would therefore not proceed to any further formal disciplinary investigation of the claimant. That seems to be a perfectly proper decision but not one that necessarily leads the claimant being able to say that she was exonerated or not found guilty of anything.

51. It was determined there was insufficient evidence to warrant disciplinary procedures against her. I have observed already in the course of discussion there was no finding on the part of Ms White that the allegations made by Mr Croft were untrue. There was indeed in the course of Ms White's enquiries some limited corroboration that the claimant having been seen leaving the site earlier than allocated. I do not consider that the raising of those matters which were then properly subject to an investigative process and resulting in an outcome which led to no further action can be said to amount to bullying on the part of Mr Croft.

52. The next allegation is that the respondent failed adequately to investigate the claimant's grievances dated 6 November 2017 and 6 February 2018.

53. When Mr Croft put in his report on 27 October for investigation the claimant submitted her response on 6 November. That was not expressly at that stage said to be a grievance. Indeed, what she said at the conclusion of that document was that *if* the matter went to a formal disciplinary she would *then* reserve the right to raise a grievance in the future (emphases added). However, the respondent having received that document elected to treat it as a grievance the claimant was provided with a copy of that grievance policy and Mr Winters was allocated to investigate. That investigation was at that stage running in tandem with Ms White's enquiry into the disciplinary matters. He therefore wrote to the claimant on 21 November inviting her to a meeting to discus what was being treated as a grievance, although not formally raised as such.

54. The claimant said she needed more time to prepare for such a meeting and therefore the scheduled attendance for 27 November was postponed to 5 December. In the meantime, on 27 November the claimant put in a further document which was elaboration of the grievance and those two documents together from the 6th and 27th therefore formed a substance of what Mr Winters investigated. He properly carried out that first investigation meeting with the claimant and it was conducted at some length, it lasted five hours in total.

55. I see no reason to doubt that the claimant was given every opportunity to explain and elaborate upon her concerns and that Mr Winters was taking those seriously. There is an optimum time scale within the respondent's policy for dealing with the grievances and that ordinarily requires the outcome to be given within fourteen days. Clearly the matter was of such complexity that that was never going to be particularly realistic, and even if Mr Winters had wished initially to have the report out by Christmas that did not prove possible. He had a number of enquiries to make. At the same time as he had met with the claimant on 5 December he had also spoken, relatively informally, to two other heads of department at Clifton Park. He also wished to raise questions with Donna Thornton, who has then moved on, and also with Mr Croft.

56. There was criticism made that he should have held 1-2-1 interviews with both of those people the subject matter of the grievance rather than address questions in writing. However, there was nothing in the policy that dictates that and the claimant was fully aware of Mr Winters' intention to deal with this by written question and answer. There was a delay in sending out those questionnaires but the claimant was kept informed and at no point did she raise an objection during that process saying "I think this is an inappropriate way of dealing with my grievance. These people should be questioned in person".

57. Objection is now made that Mr Winters did not seek to speak to the claimant's former line manager, Heather Martin, who had by that stage left the respondent's employment. Although there is reference to Ms Martin potentially to deal with some matters in the letter of 6 November the content of that is defence to the allegations that were brought against the claimant

by Mr Croft, and there was no specific request ever made that Ms Martin's potential evidence should be further investigated, even though it was something Mr Winters clearly at one stage considered a possibility. However, in the event as is made clear in his evidence and report he determined that this was not so significant that he needed to seek to approach an ex-employee. Having looked at the matter in the round I agree that there is no direct relevant evidence I can see that Ms Martin might have given.

58. It is clear to me that Mr Winters was seeking to conduct a thorough enquiry. As well as addressing the written questions to Ms Thornton and Mr Croft I also note that, through Sarah Brown, he also asked further clarification from the claimant which she sought to provide and he made clear to her that he was seeking to carry out a full enquiry before concluding.

59. I am quite satisfied in the circumstances and having looked at his report, even though the claimant disagrees with his findings, that it was a genuine and thorough investigation of her concerns so far as he was able to ascertain the substance of them. There was a delay, I have already referred to this in part. The report was then finalised on 14 February and I have indicated why there was then a further a delay in disclosing the outcome. Shortly before that the claimant had raised a second grievance. This is principally a complaint about the time that had been taken, although it does raise some ancillary matters. It is right that was never expressly addressed as a further grievance with a further meeting or further investigator appointed to deal with that. However, it was addressed in terms of the delay within the body of Mr Winters' report when it came out, and indeed that was very shortly after her raising that matter on 6 February.

60. The claimant was informed that the first grievance had now been concluded and she was invited to the meeting originally scheduled for 27th February. She did not at that stage either herself nor through her union representative seek to raise any question that there should then be a further independent enquiry into her second grievance. The immediate object of raising her concerns about the timing had been addressed because she now had a fixed date and she had received the outcome. She did not pursue the matter any further.

61. So far as the respondent failed to allow a grievance hearing for the 6 February grievance to take place I conclude there is no fundamental breach of contract in failing to deal with it separately and outside of the process which was still ongoing and reasonably ongoing. It was proportionately and fairly investigated in my view.

62. The next ssue is: Did the respondent fail to provide the claimant with her contracted hours?

63. This goes back to the issue about a diminution in work and the way TOIL was used to regularise that position. There clearly were shortages of work in theatre but I can see no evidence in fact that the claimant was told that she should not work her full hours. And as I have indicated her evidence to me was that it was effectively her own decision as the manager to take time off in lieu. And in recognition of that fact the claimant also, as of the end of

January 2017, volunteered to reduce her pay to 30 hours whilst nominally maintaining her full 37½ contractual hours in order to repay any time that she had not worked over the previous months. It is to be observed that the claimant having been allocated to other duties until September/October 2016 where she had accrued "negative TOIL" because she was working well in excess of her contract, having returned solely to theatre management at that point by the end of January a period of some four months later has built up a total of 100 hours accrued "positive TOIL" owing back to the company from a position where they owed her. Although I have said I sympathise with the claimant's objections to how TOIL was used I cannot see that this particular issue in relation to her constitutes a fundamental breach of her contract. Insofar as she was not working her full hours up to the point of her voluntary reduction in pay, she was still receiving her regular salary.

64. Did the respondent as alleged insist the claimant take time in lieu for hours which she was contracted to work?

65. It was the respondent's policy that it would expect employees, including the claimant, who had "positive TOIL" accrued and owing back to take steps to reduce that or pay it back in some way. The actual decision to change the claimant's paid hours from 37½ to 30 was at her instigation. Therefore, from the end of January until the end of that arrangement, 31 October, when the claimant went back to full hours and full pay that was her agreed contractual variation. And if she was acceding to that change it cannot possibly be said that the respondent employer did not have reasonable and proper cause for that agreement that she voluntarily made with them.

66. Did the respondent deduct money from the claimant's salary to recoup the negative time off in lieu?

67. No it did not. What this is really getting at is the arrangement that I have already referred to whereby the claimant would only be paid for 30 hours. Again, as I have indicated that was voluntarily agreed with her and it cannot therefore be without reasonable and proper cause that the respondent honoured that contractual variation.

68. The final alleged breach I have effectively dealt with already in relation to the "last straw". Did the respondent fail to allow the grievance hearing of the grievance date of 8 March to take place?

69. It was unable to hold it because of adverse weather conditions and agreed an alternative means of communicating the decision to the claimant.

Conclusion

70. I find that there is no proper complaint about the way the investigation into her grievances was conducted. Although there was some delay it is not such as amounted to a fundamental breach of a right to have those matters pursued. The claimant in fact resigned before knowing the outcome of the grievance. Prior to that, all the allegations against Donna Thornton ended as of the end of June or early July at the latest, and in relation to Neville Croft the last allegations is also 27 October. That is a considerable time

before the claimant elected to resign. In my view, notwithstanding the raising of her grievance, she would therefore have acquiesced in those alleged breaches, if breaches they had been.

Breach of contract

71. The final matter therefore to deal with the contract claim. I cannot see as a matter of contractual construction that there is any breach. The claimant up to the point that she accepted the variation at the end of January was paid her full contractual hours whether she worked them or not. From that point on the reason why she was not paid for 37½ hours was because she had expressly agreed a reduction, and had given her consent in writing signed by her to that variation. There is no actual breach of contract, whatever the rights and wrongs of the implementation of the TOIL policy.

72. For those reasons, as said at the outset both these claims are dismissed.

Employment Judge Lancaster

Date 30th April 2019