EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs Wendy Rundle	AND	Royal Cornwall Hospitals NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 28 May 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mr D Dyal of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claim for unfair dismissal is dismissed.

REASONS

1. In this case the claimant Mrs Wendy Rundle claims that she has been unfairly constructively dismissed. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.
2. I have heard from the claimant. For the respondent I have heard from Ms Chris Ellis, Miss Simone Girdham and Mr Mark Wolf. The claimant also referred me to a number of references and letters in support from persons for whom she used to work and from previous colleagues, but I can only attach limited weight to these because they were not here to be questioned on that evidence.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent is an NHS Hospital Trust and the claimant Mrs Wendy Rundle was employed from 1 September 2019 until her resignation which took effect on 22 October

2018. At that time the claimant was employed as a medical secretary within the oral and maxillofacial surgical department. She worked about 25 hours per week and usually worked a three day week on Tuesdays, Wednesdays and Thursdays. As a medical secretary the claimant's duties comprised a variety of tasks including the typing of dictated letters following patient consultation; typing dictated patient discharge statements; receiving and processing telephone calls; and other administrative tasks. One core aspect of these duties remained at all times the timely and efficient typing of dictated letters. The claimant worked in a small team and usually had about three colleagues. Any delays or efficiencies in carrying out these duties could have a direct impact on patient safety, and was always likely to have a knock-on effect on the efficiency of the team as a whole.

5. As is to be expected from a large public employer, the claimant had a written contract of employment, and the respondent had a number of policies and procedures which applied to the working arrangements. This included a Capability Policy Procedure, which in paragraph 6.2 set out an Informal Procedure which provided: "Where possible, issues about unacceptable performance (capability) will be handled informally between the manager and staff member" and "The manager should arrange to meet with the staff member at the earliest opportunity and determine if the matter is one of capability or some other reason …" This informal procedure also envisaged the possibility of a Performance Development Action Plan or PDAP the aim of which was to identify any performance deficiencies and if possible to identify the learning and development needs which might assist in meeting a required improvement in performance. It was then up to the relevant managers to decide whether or not to instigate the Formal Procedure under paragraph 6.3, and in that event there was then a requirement for Human Resources to be consulted for advice and support, with the possibility of advice needed from Occupational Health.
6. The respondent also had a Grievance and Disputes Policy and Procedure. Under paragraph 6.5 Informal Resolution of any grievance or dispute was recommended under Step One in the hope that the grievance or dispute could be resolved through informal discussion between the manager and the staff member on a one-to-one basis. This did not normally involve the attendance of a trade union or other representative save in exceptional circumstances, because of the very informal nature of that process. However, an employee was always entitled if he or she wished to raise a formal grievance under Step Two.
7. This case involves the initial stages of informal performance management of the claimant, her objection to the same, and her subsequent resignation. The circumstances in more detail were as follows.
8. By email dated 28 June 2017 Jess Davies, the respondent's Clinical Admin Lead in that department, wrote to the claimant to say: "You currently have 63 letters set within your work list on WinScribe waiting to be typed, as per our previous conversations I expect this work to be prioritised, and I expect to see a progress by the end of today please. This is now starting to affect patient care. I appreciate you prioritising this matter." On 30 June 2017 she sent a further email to the claimant stating: "Today I found a number of cancer patient letters that haven't been typed. Please could you make sure these are a priority before anything else. These need to be typed within 48 hours, anything on a tape can be left until you have caught up with all Zarina's clinics on WinScribe. This is now affecting cancer patients targets/treatment". The claimant received these before the end of the working day, but there was no requirement that the position had to be remedied in full before the end of that working day. The claimant accepted in evidence today that the respondent was raising an important issue in an appropriate manner and it was acceptable for a manager to behave in this way.
9. There was then a meeting on 11 July 2017 between the claimant and Jess Davies, which resulted in a PDAP. The claimant suggests that there was no explanation as to what this was for or why it was needed. In fact, the claimant had earlier submitted a reply to the respondent's notice of appearance during these Tribunal proceedings in which she states: "I was told it was to monitor the amount of typing of letters I was doing as this was considered a low number by my line manager and I needed to type more letters as I did not type as many as others in my office and I was behind." I find therefore the claimant was well aware of the reasons for this meeting and the respondent's concerns about her

inadequate typing. A PDAP was prepared dated 11 July 2017 which set out the objectives required by the respondent, the criteria for successfully meeting these requirements, and the target date. The claimant conceded during this hearing that the various details in the form were discussed with her, and that she was asked if she needed any training or support and confirmed that she did not. The claimant now complains that no specific training was identified or offered, but it is clear that a generic offer of training and support was made, and the claimant confirmed that she did not require any.

10. There was then a further meeting on 29 August 2017 between the claimant and Jess Davies at which the PDAP was amended slightly, and which was again discussed in detail. The claimant was asked again if she required any additional training or support, and again she confirmed that she did not.
11. The claimant now complains that there was a failure by the respondent to make contact with Human Resources before the PDAP was put in place, and that when she made contact with Human Resources there was an inadequate response. As can be seen above from the relevant procedures, there was no requirement under this informal procedure for the respondent to make contact with Human Resources. The claimant did however make contact with Human Resources herself on 29 August 2017 seeking advice as to how to proceed, and stating that she felt that: "I am being bullied and singled out within my office set up by my manager". The HR Department responded with a copy of the relevant Dignity at Work Policy and Procedure which set out the guidance in the circumstances, and also recommended that the claimant made contact with one of the Independent Listeners which the respondent provides to enable employees to talk about concerns. I find that this was an appropriate response from the HR Department at that time.
12. Unfortunately, the respondent's concerns about the claimant's poor level of performance continued and this included an exchange of emails during early November 2017 to the effect that there were too many letters waiting to be typed and that this caused delays. At the same time there were concerns about the time spent by the claimant on Internet usage. The respondent checked the claimant's Internet usage for the month of October 2017 and discovered that the claimant had spent more than 22 hours browsing the Internet and that this time included online shopping and social networking. Although the claimant says that this was in her own break time, and that webpages might have been left open even when she was working, the claimant accepted in evidence today that this was an unacceptable amount of usage.
13. Ms Chris Ellis, from whom I have heard, was the respondent's Deputy Directorate Manager and line manager for both Jess Davies and the claimant. The claimant had previously raised an informal concern to Ms Ellis and she now became involved. They had a meeting on 28 November 2017. Although there was no PDAP prepared as a result of this meeting, Ms Ellis confirmed the result of that meeting in a three-page letter dated 1 December 2017. That letter confirmed that the purpose of the meeting had been to address three areas of behaviour which the respondent considered to be inappropriate and which had caused difficulties for the respondent in meeting its service provision and dealing with other staff. These three areas were: "Internet usage in working hours; low number of letters typed and work completed; and poor attitude." The claimant now asserts that the respondent "did not listen" to any of her concerns, but it is clear from that contemporaneous letter that the respondent set out its areas of concern in detail, and that the claimant had had every opportunity to give a detailed response. That letter confirmed exactly what the claimant was now required to do, and that the consequences of failing to adhere to these requirements might lead to more formal action. The claimant conceded in her evidence today that this letter had set out perfectly reasonable management requests.
14. The claimant has also raised the concern about the time taken to assist in the training of new staff, but confirmed today that this involved "showing the ropes" to a new colleague and it was a normal part of any employee's duties to assist peer learning with a new colleague. In any event this was only for a short period of time from May 2017 and the claimant confirmed today that it was not really a problem for her to help a new colleague. I do not find that therefore that this had any impact on the claimant's ability to carry out her normal duties.

15. Immediately following this meeting at the end of November 2017 the claimant commenced an extended period of certified sickness absence. This ran from the end of November 2017 until the beginning of May 2018. The claimant suggests now that the respondent failed to keep in contact with her, but had previously mentioned in her reply to the respondent's notice of appearance that she had had a number of brief telephone calls with the respondent during this period. In addition, the respondent's Occupational Health Department became involved: first because the claimant had made a direct enquiry herself, and secondly at about the same time the respondent had also made its own referral. The Occupational Health Department discussed the matter in detail with the claimant, and the claimant was supported by the provision of free counselling by the respondent.
16. There was a suggestion that there should be a subsequent sickness review meeting under the respondent's policies but this did not ultimately take place. An initial meeting had been arranged on 13 February 2018 but had been cancelled at the claimant's request. The claimant was then invited to another meeting on 20 February 2018, which she attended, but unfortunately it had been cancelled that morning at short notice without informing the claimant. That meeting was not rescheduled because it was superseded by the claimant's grievance.
17. The claimant then raised a formal grievance by letter dated 20 February 2018 complaining of bullying and harassment at work by Ms Chris Ellis and Ms Jess Davies. That grievance was acknowledged by Mr Mark Wolf, the respondent's Service Lead Ophthalmology, from whom I have heard. After further consideration the claimant confirmed by email dated 29 March 2018 that she wished to change her formal grievance to an informal grievance, in the hope of reaching a resolution and arranging a return to work. As result of this Mr Wolf decided to adopt a pragmatic approach in the hope of facilitating the claimant's return to work, and between them they agreed that there should be an informal conciliation meeting which eventually took place on 24 May 2018.
18. In the meantime, the claimant had exchanged emails with Mr Wolf and they had agreed between them the terms of a phased return to work. There was effectively a four-week period during which an initially reduced workload was increased to the claimant's previous normal duties. The claimant complains that when she returned to work "no one welcomed her back", but it is clear that she had a return to work meeting with Ms Ellis on 1 May 2018, on her first morning back. As noted, she also been exchanging emails with Mr Wolf and they had agreed between them the phased return to work schedule.
19. The informal conciliation meeting then took place on 24 May 2018, and the claimant attended with a colleague for support, and Ms Davies and Ms Ellis also attended, and the meeting was chaired by Mr Wolf. The minutes report that it was an informal meeting which discussed the claimant's performance, her Internet usage, and her sickness absence. The minutes also record that although the claimant's secretarial colleagues were typing between 20 and 40 letters per day, the claimant would have a much-reduced target of 15 to 20 letters a day, and that this was agreed between the parties. The minutes also record: "Wendy felt that this resolved her queries and she was happy to close the informal grievance". The claimant confirmed in evidence today that she was happy to close the grievance process on that agreed basis, and that the reduced target of 15 to 20 letters a day was reasonable.
20. Unfortunately, the respondent remained concerned about the claimant's performance. They prepared a "Typing Log" between 29 May 2018 and 2 August 2018 from which it was clear that the claimant was not typing the number of letters as agreed, and on average was only producing 10 each day. In addition, there were a number of emails from the claimant's colleagues in her small team to their line managers which in short complained about the claimant's lack of efficiency and her attitude towards them. Ms Ellis then called a meeting on 9 August 2018 and a further PDAP was discussed and put in place. The claimant agreed today that this renewed PDAP required her to work to targets which were entirely appropriate and that she knew that these would now be monitored again.
21. On 12 September 2018 the claimant then met with the Deputy Associate Director in the Surgical Division (namely Helen Williams). Further meetings were offered to the claimant, although in fact none happened.

22. Meanwhile Ms Ellis left the respondent's employment to pursue her career elsewhere. At no stage did Ms Ellis, or anyone else from the respondent, inform the claimant that she had failed any PDAP, nor that the informal discussions and PDAPs had been escalated to a more formal performance related procedure.
23. The claimant then resigned her employment by letter dated 22 October 2018. She stated in that letter: "I feel that I am left with no choice but to resign in light of my recent experiences regarding the pressure of bullying, harassment and victimisation that has taken place over several months without a resolution being made by yourselves after working for 18 years without any issues." Mr Wolf acknowledged that letter on 24 October 2018, and offered the claimant an opportunity to retract her resignation after a period of reflection. The claimant did not wish to do so and her resignation was processed by the respondent.
24. Following her resignation the claimant had a meeting with the respondent's Chief Executive which was arranged by Miss Simone Girdham, from whom I have heard. After that meeting the claimant emailed Ms Girdham to pass on her thanks to the Chief Executive to which Ms Girdham responded words the effect: "it is just unfortunate that support was not available earlier …" I accept Mr Girdham's evidence that she had no knowledge of the previous discussions and arrangements involving the claimant, and this is not to be taken as an admission by the respondent that it had failed in some way to support the claimant appropriately.
25. Having established the above facts, I now apply the law.
26. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
27. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
28. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR 833 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT .
29. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
30. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without

giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

31. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
32. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.
33. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
34. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will the be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
35. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
36. In this case the claimant asserts that there has been a fundamental breach of her contract of employment, namely a breach of the implied term of her contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner

calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The claimant relies on the following seven matters, which I deal with in turn.

37. The first allegation is that the claimant's line manager Ms Davies sent her emails regarding her typing deficiencies at inappropriate times, namely towards the end of the working day or on non-working days. The two emails in question are referred to in paragraph 8 above. However, there is no requirement for the claimant to deal with these matters immediately, and the claimant accepted in evidence today that the respondent was raising an important issue in an appropriate manner and it was acceptable for a manager to behave in this way. I do not accept that the respondent acted in breach of contract in this respect.
38. Secondly, the claimant asserts that the respondent failed to give any explanation as to the need for any of the PDAP's referred to above (11 July 2017, 29 August 2017, the letter following the meeting on 28 November 2017, and August 2018). I do not accept that criticism, and in each case it is clear that the respondent discussed the reasons for the performance concerns in each case, and agreed with the claimant a reasonable way forward to assist the claimant to address her performance deficiencies. Throughout this process the claimant was offered training and support, but declined this offer on the basis that she did not need any.
39. Thirdly, the claimant complains that Human Resources were not contacted before the PDAPs were given. However, there is no such requirement in the informal stages of the relevant procedure and the respondent cannot be said to have acted in breach of contract in this respect.
40. Fourthly, the claimant now complains that other members of staff did not have a PDAP and were not required to report daily on what work had been completed. However, I have heard no evidence today, and certainly none was adduced by the claimant, to suggest that she had been treated differently or more rigorously than any other employee in similar circumstances. I cannot conclude that there has been any breach of contract by the respondent in this respect.
41. Fifthly, the claimant now complains that her performance was affected by the requirement to train and assist new members of staff. However, as set out in my findings above, I find that the claimant did give assistance to a new colleague in about May 2017, but only for a short period of time, and within her normal duties. She confirmed that it was reasonable for her to be asked to do so, and that she was able to accommodate this request. I do not accept that this obligation had any significant impact on the claimant's ability or otherwise to carry out her normal duties during a significantly longer period of time. I do not accept that the respondent has acted in any way in breach of contract by asking the claimant to do this, or otherwise in pursuing the informal capability process once she had done so.
42. Sixthly, the claimant complains that after a meeting with Helen Williams in September 2018, further meetings were offered, but did not happen. That appears to be true as a matter of fact, but in my judgment this cannot be said to amount to any behaviour which is calculated or likely to destroy or seriously damage trust and confidence between the parties. In her resignation letter the claimant complained of bullying and harassment, and what appears to be an inadvertent oversight in connection with a further meeting with Miss Williams cannot be said to meet that description.
43. Finally, the claimant complains that either the Chief Executive or Miss Girdham had apologised for the treatment which the claimant had received, thus indicating a lack of appropriate support. I accept Miss Girdham's evidence that there was no such apology to that effect, and in any event this all took place in mid-November 2018, which was after the claimant had resigned, and it cannot therefore be said to have formed any part in her reason to resign.
44. In conclusion, I find that from May 2017 onwards the claimant failed to carry out her duties as effectively and efficiently as she should have done. This had a direct impact on the respondent's ability to carry out its service provision, as well as having an adverse effect on the claimant's colleagues, and potentially on patient safety. The respondent clearly had reasonable and proper cause to address the claimant's obvious performance deficiencies and to seek improvement in her performance. It was within the discretion of the managers

to do so on an informal basis with PDAPs and conciliation meetings, or alternatively with a more formal capability procedure. It has been argued on behalf of the respondent that it chose to manage the performance deficiencies with very much a “light touch”. I entirely agree with that analysis. The respondent sought to discuss the matter with the claimant, and agreed objectives and targets which the claimant now concedes were entirely reasonable. The claimant consistently failed to meet these targets as well as having been caught wasting time on Internet usage. Although the claimant raised a formal grievance, which then changed to an informal grievance, she has accepted then and now that her grievance was dealt with appropriately and resolved to her satisfaction. At no stage did the respondent ever confirm to the claimant that she had failed any PDAP, nor that she would progress to a formal disciplinary or capability procedure. Nonetheless the claimant chose to resign her employment. When notified of the same, the respondent acted entirely responsibly by offering the claimant a cooling off period during which she was invited to retract her resignation. She chose not to do so.

45. I cannot find that the respondent has acted in any way which can be said to be calculated or likely to destroy or seriously damage the implied term of trust and confidence between them. Even if that were the claimant’s mistaken perception of the same, the respondent clearly took what action they did with reasonable and proper cause.
46. Given that there was no fundamental breach of contract, the claimant’s resignation cannot be construed to be her dismissal, and I find that the claimant resigned her employment. In the absence of any dismissal the claimant cannot be said to have been unfairly dismissed, and I therefore dismiss her unfair dismissal claim.
47. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 24; a concise identification of the relevant law is at paragraphs 26 to 35; how that law has been applied to those findings in order to decide the issues is at paragraphs 36 to 46.

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Employment Judge N J Roper
Dated 28 May 2019