



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4123229/18

Held at Aberdeen on 20, 21 & 22 August 2019

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Employment Judge N M Hosie

Ms D Watt

**Claimant
Represented by:
Mr M Briggs,
Solicitor**

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Grampian Health Board

**Respondent
Represented by:
Mr K McGuire,
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is dismissed.

REASONS

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Introduction

1. The claimant, Diane Watt, claimed that she was constructively and unfairly dismissed by the respondent. The respondent denied the claim.

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The Evidence

2. I first heard evidence from the claimant.
3. I then heard evidence on behalf of the respondent from:

E.T. Z4 (WR)

- Jane Lloyd, Assistant HR Manager;
- Andrew Garden, Customer Services Manager.

5 4. A joint bundle of documentary productions was lodged (“P”) along with a
“Agreed Chronology of Events”.

The Facts

10 5. Having heard the evidence and considered the documentary productions I
was able to make the following material findings in fact.

15 6. The claimant commenced her employment with the respondent as a
Switchboard Operator in relation to the respondent’s computerised telephone
switchboard on 19 January 2015. The Supervisor was Susan Fraser, her
Line Manager was Philip Chalmers and Andrew Garden was the Manager of
the Communications Department.

7. The claimant was a trade union member and a Steward.

20 **Complaint about Susan Fraser**

8. On 1 October 2015, the claimant submitted a complaint to the Department
Manager, Andrew Garden about her Supervisor, Susan Fraser (P141/142).

25 9. Mr Garden arranged to meet the claimant that day to discuss her complaint.
He requested further information from the claimant which he confirmed in a
subsequent letter (P143) and this was provided by the claimant (P144-146).

30 10. Mr Garden raised then raised the matter with Philip Chalmers and also Susan
Fraser and Mr Garden advised the claimant that he had spoken to Susan
Fraser and that, “he was keeping an eye on the situation”.

11. Mr Garden arranged to meet the claimant and Philip Chalmers on 31 March 2016 when he explained the outcome of the investigation. Mr Garden was advised that there had been an improvement. The matter was resolved. The claimant continued to work as normal and the remainder of 2016 was uneventful.

February 2017

12. Mr Chalmers referred the claimant for support from the Occupational Health Service on 27 February 2017. She commenced a period of sickness absence on 1 March. There were various OHS referrals in the following months and the claimant continued to be signed off by her G.P. with "depression".
13. The claimant returned on work on 30 May 2017 (P159-161) and she said that her Supervisor Susan Fraser had been "helpful" when she was off.
14. However, the claimant was signed off again on 19 June after her first full week back. She claimed in evidence that this was because Susan Fraser had refused to allow her to attend an appointment with the Psychologist and also because she was unable to visit her father in Prison on Father's Day, as she had planned, as Miss Fraser had required her to work that day. However, she did not inform the respondent of this.
15. The claimant continued to be signed off by her G.P. and provided fit notes which gave the reason as "moderate depressive episodes". The respondent also arranged to obtain regular OHS Reports until matters came to a head in October 2017.
16. On 13 October the respondent made another referral to OHS (P173/174) in which they provided the following "update":-

"Thank you for the most recent communication from Dr. Fummey dated 10/10/17 – regard Diane Watt (P171).

I have an update for Dr. Fummey.

I am sorry to hear about Diane's continuing health issues.

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Sadly Diane has been absent from the workplace for a large part of this year from 1 March; due to a significant Family issue. Diane did return to us for a period of time between 30 May and 20 June but unfortunately was unable to sustain this return to the workplace.

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Diane's half pay sick pay sustain expires on 24 November 2017 and SSP expired 12/10/17.

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I remain concerned for Diane's health and ongoing welfare and as Diane's sickpay will exhaust soon, this is a natural figure point for a review of whether the post can remain available."

17. The respondent also asked for an indication when the claimant was likely to be fit to return to work before the end of November.

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18. However, on 16 October the claimant's trade union representative sent the following e-mail to Phillip Chalmers (P176):

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"I write with deep concern about the questions you ask in your recent re-referral of our Unison Steward, Diane Watt, to Occupational Health (P173). As you will be aware Diane is currently off work, due in large part to the way she has been treated by Management. Therefore, I am disturbed in your last referral you state your intention to use the point at which her sick pay expires (24 November) as "a natural trigger point for a review of whether the post can remain available".

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Given that her absences related to her treatment at work, and given that we are acutely aware of the legal obligation on NHS Grampian not to treat a trade union activist detrimentally, I am urgently seeking your clear assurance that my concerns (above) are misplaced.”

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19. This came as a shock to Mr Chalmers and indeed Carol Lloyd and Andrew Garden as until then they had not been alleged by the claimant or anyone else that her absence from work due to ill health was “related to her treatment at work”. They believe that her absence was “due to a significant family issue” (P173, for example).

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20. Accordingly, Ms Lloyd replied to Mr Watson by e-mail the same day. It was in the following terms (P175):-

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“On receipt of your e-mail reproduced below, Mr Chalmers was quite taken aback and has asked for my assistance in responding. He was surprised as he believes that this is the first indication that Diane’s current absence differs from today what was understood to be a continuation of her distress over the family situation she experienced earlier this year.

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Now that you have alerted us to the suggestion her absence pertains to matters in the workplace, we would very much wish the opportunity to discuss these with Diane, accompanied by yourself as she wishes, so that we can begin to address and hopefully overcome whatever these issues are.

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Had it been known to Mr Chalmers the reason for absence was as you notify him below, I am sure he would have discussed it with HR and we would have sought opportunity to engage on these matters sooner. Believing it to continue to be personal response to a distressing situation out with the workplace, we had no reason to act other than we would normally would in respect of an approaching sick pay change.

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I have copied Diane in to this reply in the hope that you can both indicate some dates and times when you would be available to speak with us in the next few weeks.”

5 21. In light of this new allegation the respondent sent a further referral form to OHS with an “update” (P178/179).

22. OHS then reviewed the claimant by telephone on 8 November and reported to the respondent (P180/181). The following is an excerpt:-

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“Thanks for your update. I reviewed Mrs Watt today by telephone. She remains absent from work due to an underlying condition exacerbated by difficult personal circumstances. She is receiving appropriate treatment and support for this. She has also discussed some perceived person difficulties within work place. She is aware of the appropriate policies to deal with these perceived difficulties and is making contact with employee representation to help with this.

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Mrs Watt has been signed off by her G.P. until 12 Dec and remains unfit for work. She is however fit to engage with management processes/meetings. She advised that management considered mediation/facilitation to resolve some of the perceived difficulties. Alternatively, Mrs Watt may be considered for redeployment to a different area within the Trust if possible.”

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25 **Meeting on 24 November 2017**

23. In accordance with the OHS guidance the respondents arranged a meeting. In attendance were the claimant and her trade union representative Simon Watson, Andrew Gibson, Jane Lloyd and Philip Chalmers.

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24. At the meeting the claimant explained that her concerns related to her treatment by her supervisor Susan Fraser. We accepted the evidence of

Jane Lloyd, in particular. She gave her evidence in a measured, consistent and convincing manner and presented as credible and reliable that the respondent wanted to support the claimant with a return to work and it was agreed that she would return with certain “adaptations/adjustments” in place.

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25. Accordingly, on 8 December 2017 the respondent made a further referral to OHS with an update on what had been agreed at the meeting with a view to facilitating a return to work in the week commencing 11 December. The following is an excerpt from the referral form (P182):

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“Having listed to Diane’s concerns we are able to put the following supportive adaptations in place:

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Identified single supervisor: Diane would be supervised exclusively by Mr W Massie with no need for interaction from or with Mrs S Fraser for as long as may be considered necessary.

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Work Location: Diane working her shifts in her Switchboard Contingency room (this is a different location away from the main Switchboard area) where she would be accompanied by a Supervisor who could equally work from there. It would also be possible over a phased basis to have other staff work alongside Diane in this location to help manage her re-orientation with her colleagues on a smaller number at a time.

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Naturally this arrangement would be short-term and kept under review as normalisation is optimal as soon as practical.”

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26. Advice was also sought from OHS as to whether the claimant would be sufficiently fit to resume work on 11/12/17 and if so the hours which would be recommended for a phased return.

27. The claimant was reviewed by OHS by telephone on 12 December and the Occupational Health Physician advised in her report that the claimant was fit to return to work with certain adjustments which were specified (P185).
- 5 28. The claimant returned to work on 18 December, the adjustments were put in place and the respondent made a further referral to OHS with an update on that date (P187/188).
- 10 29. The only difference was that the claimant did not work in the "Switchboard Contingency room" but chose to work in the "Training Office" which was directly opposite the Switchboard room and closer and after working a week or so full time the claimant moved back into the Switchboard room.

Investigation in Susan Fraser's conduct

- 15 30. In the meantime the respondent commenced their investigation (P184). As part of its investigation the claimant was interviewed on 25 January 2018 (P190-197).
- 20 31. The claimant continued to work as normal apart from an incident which occurred on 16 February 2018 when Susan Fraser joined a meeting which the claimant was having with her Supervisor Willie Massie.
- 25 32. Andrew Garden dealt with the claimant's complaint over this. As with the respondent's other witness Jane Lloyd, Mr Garden gave his evidence at the tribunal hearing in a measured, consistent and convincing manner and also presented as credible and reliable.
- 30 33. He met with the claimant to address her concern and on 1 March he reported to her trade union representative Mr Watson by way of e-mail in response to an e-mail which he had received from Mr Watson (P199/198).
34. The following are excerpts:-

“As you’ve mentioned I met with Diane on Monday Afternoon to discuss what had happened over the last couple of weeks and to look for a way forward in continuing to support Diane.

5 We initially discussed the incident that occurred on Friday 16 September when both Supervisors (Susan Fraser and Willie Massie) were in the meeting room with Diane. I’ve spoken with both Supervisors about this and it is a situation that won’t be repeated. As for your point about being criticised. This is perhaps an unfair judgment of what happened during the conversation as
10 Willie was undertaking his duties as a Supervisor. I appreciate the situation that Diane found herself in didn’t help. Based on feedback from Willie, the discussion was mainly to provide reassurance to Diane as the call that Diane was involved in wasn’t an easy call to deal with.

15 We also discussed the situation that Diane found herself in last week, which I agreed was which I agree wasn’t what was agreed and certainly wasn’t meant to cause any discomfort to harm Diane. It was a situation that we ended up in due to unfortunate personal circumstances and a conflict in diaries. I apologise to Diane for this situation and provide reassurance that
20 we are trying our utmost to provide the support that’s required.

On Monday I offered Diane a couple of options until we reach an outcome of the investigation which are:-

- 25 1. Continue as is with additional support being in place with Willie as Supervisor, Philip Chalmers, client service centre manager or myself being present during times where Diane and SF are on shift and at the same time.
- 30 2. Diane would be offered alternative work within eHealth during the shifts where Diane and SF would normally be together, but to continue to undertake shifts (3pm-11pm, 11pm-7am or weekends) where Diane and SF won’t be together.

I had initially mentioned to Diane a third option which was to take Diane out of the Switchboard altogether until we had an outcome but unfortunately I don't feel this is a viable option at this time, but this is something we can discuss further if required.

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Perhaps it's best to meet face-to-face again to discuss the options and look for a way forward, bearing in mind that there is an ongoing investigation that concerns the welfare of both staff members concerned."

10 35. As it transpired, the claimant accepted Mr Garden's reassurances. She continued to work as normal albeit at times in the same room as Susan Fraser but the incident was not repeated.

15 36. In cross-examination the claimant accepted that the respondent had considered the incident and addressed it properly.

20 37. The claimant continued to work in the main Switchboard room supervised by Willie Massie with Mr Chalmers and Mr Garden on hand to go to if required. While Susan Fraser also worked in the same room from time to time the claimant always worked with a colleague at the Switchboard. This meant that the claimant was rarely alone in the room with Miss Fraser.

38. The claimant was also afforded time off to attend to trade union duties.

25 **Meeting with Mr Garden on 14 June 2018**

30 39. Mr Garden arranged to meet the claimant to update her on the investigation into Miss Fraser's conduct. He had received the investigation report in April 2018 (P208-219). The investigation was ongoing. He advised her that the recommendation from the investigating officers was that no disciplinary action should be taken in respect of the claimant's complaints about Ms Fraser's behaviour (P218).

40. This disappointed the claimant as she anticipated that the outcome would be Ms Fraser's dismissal. She told Mr Garden that she wasn't happy and that she would only stay at NHS Grampian if Ms Fraser was no longer there.
- 5
41. The claimant raised with Mr Garden the possibility of redeployment. However, as an operational manager did not know whether that was a possibility in these circumstances and he advised her that he would have to refer the matter to HR. However, he expressed the view that he would prefer her to stay in the communications department as she was an excellent member of the team and he understood that if an employee was redeployment there was a time limit so far as finding suitable alternative employment was concerned.
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42. However, the claimant did not give Mr Garden any serious cause for concern so far as her working in the communications department was concerned. The claimant said in evidence that she "loved her job".
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43. Mr Garden duly sought advice from Jane Lloyd the Assistant HR Manager concerning the possibility of redeployment. Ms Lloyd advised him that in the circumstances this would not be appropriate.
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44. When she gave evidence at the Tribunal hearing Ms Lloyd explained why it was not appropriate to redeploy the claimant.
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45. The respondents have a redeployment policy (P50-68). However, as she put it "redemption is not a personal choice".
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46. While there can be redeployment due to ill health, that was not her understanding of the position with the claimant. So far as she was concerned the claimant had raised concerns about her treatment by a colleague. These concerns had been investigated and dealt with. She was capable of continuing in her role. She had been able to do her job and had continued to do so since 18 December 2017. She had also been able to carry out her

duties as a trade union representative. As Ms Lloyd put it, “redeployment is not a personal choice”.

47. The claimant went on leave after her meeting with Mr Garden on 14 June. On her return she sent an e-mail on 8 July to Mr Garden, copied to Jane Lloyd and her trade union representative Simon Watson, headed “Redeployment”. It was in the following terms (P222):-

“After a discussion with Mr Andrew Garden on 14/06/2018, I discussed about redeployment as circumstances within the department are still not acceptable.

My major concerns were explained and having to self medicate with Anti-anxiety medication before coming to work was not what I wanted to continue doing and since the problem is not going to go away the only other option is to find alternative employment.

It was explained that I will lose my post on Switchboard if a position is not found within six months. I feel angry and frustrated that I have to be the one that needs to make this decision through no fault of my own, also with redeployment there will be a huge loss in wages.

I would like to receive help from HR to find a suitable position within NHS Grampian and have the support to be able to take this forward.”

48. As Mr Garden was on leave at the time Ms Lloyd replied by e-mail on 10 July as follows (P225):-

“I see your Senior Manager is on leave so is unable to assist further until his return.

Unfortunately, the outcome of investigations in your Dept have not resulted in a decision to place you on the Redeployment Register. You can however apply for any job which appears in the vacancy bulletin (linked to its location

below) and I can arrange for you to have some assistance in making the best written application and preparing for an interview if you would find that helpful.

Please also don't hesitate to e-mail me if you see a post in the bulletin but are unsure if you might be suitable as I can give you a view if you would find that helpful."

49. Ms Lloyd said that this offer of support was more than the HR Department would normally offer.

50. The claimant's trade union representative, Simon Watson, replied by e-mail later than day (P224/225). In his e-mail he alleged that when the claimant returned to work on 18 December 2017 it had been decided that "she would have no contact with Susan". I was not persuaded that that was so. There was no reference to there being "no contact"; it was clear that the respondent endeavoured to keep contact with Miss Fraser to a minimum; and in any event it would have been impossible in the circumstances having regard to the fact that the claimant and Miss Fraser worked in the same room (which the claimant chose to do) to ensure that there would be "no contact".

51. Ms Lloyd replied to Mr Watson by e-mail later than day. She expressed some difficulty in dealing with matters relating to the meeting which the claimant had with Mr Garden on 14 June when Mr Garden was on holiday. However, her understanding was that the meeting had been arranged primarily to advise the claimant of the outcome of the investigation. She also said this in her e-mail:-

"In terms of how Diane feels I am extremely sorry to hear that the interim (pending the outcome of the investigation) non-supervision remit by SF has now always been complied with – if you provide specific details I will arrange for Phil Chalmers to respond to that aspect in Andy's absence."

52. On his return from leave Mr Garden sent an e-mail to the claimant and her trade union representative (P223). It was in the following terms:-

“Apologies for the delay in replying, I returned to the office this morning.

5 I can only apologise that the outcome of the investigation has not been sent, I will ensure that this is addressed this week so Diane has a full response in writing.

10 I am very concerned again that it is mentioned that Diane has been left alone with S Fraser. There would've due to leave been times where the other supervisor W. Massie has been on leave, but in this situation there wouldn't have been a time where only S. Fraser and Diane were alone together with no other individuals in the room.

15 It still remains as it was previously that W. Massie is the sole supervisor for Diane and in his absence the next point of contact should be Phil Chalmers and in his absence it would be myself.

20 I'll be in touch later again this week with a response based on the outcome of the investigation.”

Resignation

53. When Mr Garden met the claimant on 27 July she handed him her letter of
25 resignation (P229/230).

54. In her letter she gave the following reasons for her resignation:-

30 “I feel mentally drained not only by Susan Fraser and the issues that has not only caused me a breakdown on my mental health but also poor health over the last 3 years and this has been prolonged with the recent investigation on

complaints against Susan Fraser. I understand that it was not only myself that was part of the investigation but others within my department.

5 After my meeting with you on 14 June 2018 it was my understanding that my complaint against Susan Fraser was dealt with so on that my request of redeployment may not be accepted.

10 It was Jane Lloyd that confirmed that redeployment was no longer available via e-mail to me. I had promptly to rethink my time within SW Switchboard.”

55. She also said this in her letter:-

“At this moment I have no control in my life and my working future!

15 I need to take back control and end my employment within NHS that includes my Union Work and try and find alternative employment.

- **No work notice:** As a steward I understand the implication of having to work the notice required but I feel this would only worsen my health if I continued working in a department even for a short time.
- 20 • **Self Medicating:** At present I have to take quantity of medication to sustain a normal day at work, removing anxiety and treating depression, with the anxiety comes the symptoms of IBS which worsens substantially to the point of being physically sick and on occasions after work and during days off and annual leave is spent being ill as my body relaxes. This is not acceptable; it has caused
25 distress not only to me but to my family as I spend my days sleeping and/or in pain.
- **Management:** I have been let down by management and HR, not feeling supported and managers coming across condescending as
30 though I am child (sic) and not wanting to believe there are issues with Susan Fraser and unfortunately Mr William Massie is supporting and conforming to Susan’s behaviour also.

- Failure to follow through, putting plans in place and not implementing what was discussed and agreed with.
- Segregated from my colleagues when I first returned to work, it felt as though I was the one being punished.

5 I can go on but I just don't see the point as I think you already understand. Any offer of redeployment now would not be accepted if offered.

10 I feel relieved that I am now at the end of the stress and frustration within the Communications Dept.”

56. Mr Garden replied by letter dated 27 July in which he expressed disappointment at the claimant's resignation. He said in evidence that at the Tribunal hearing that he was disappointed as the claimant was a very good employee. The following are excerpts from his letter:-
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“I also discussed what made you feel let down by management and your main point was that you felt segregated from colleagues when you first returned to work. As we discussed I was disappointed that you felt this way, as we had given you that location to work in as part of the supported return discussed with you and your Union Representative to accommodate your request not to be working in proximity with a particular person. Once you were back at work my recall is that you soon indicated a preference to be back in the main work area which then occurred. Willie Massie was to be your allocation Supervisor for any work matter and during the period, you were in the initial location he conducted your refresher training until your decision to relocate back through to the main office.
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As discussed on Friday 27 July the offer is still open for you to take up a bank contract to support you financially when there are shifts available. If this is something you are keen in pursuing please get in touch with myself and I'll get this set up.
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Once again I'm sorry to note your reasons for feeling unable to stay in the role and would like to thank you for your service and wish you the very best of luck for the future."

5 **Claimant's submissions**

57. In support of his submissions the claimant's solicitor referred to the following cases:

Western Excavating ECC Ltd v. Sharp [1978] ICR 221;

10 *Waltons & Morse v. Dorrington* [1997] IRLR 488.

58. He explained that he relied on two implied terms:

(i) The implied duty of trust and confidence; and

15 (ii) The implied duty to provide a safe working environment, with reference to *Waltons*.

59. He said that he did not maintain that the claimant was constructively and unfairly dismissed following a so-called "last straw incident". He explained that he relied on the events from the meeting between the claimant and Mr Garden on 14 June 2018 until the claimant's resignation on 27 July.

60. He relied on the same facts in support of his submission that there was a breach of these two implied duties.

25 61. So far as the "duty to provide a safe working environment" was concerned he referred to paras 22 and 23 in *Waltons* and the requirement "that the employer will provide and monitor for his employees, **so far as reasonably practicable**, (my emphasis) a working environment which is reasonably suitable for the performance by them of their contractual duties."

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62. He submitted that from at least November 2017 what was contributing to the claimant's illness was her working relationship with Susan Fraser.
63. So far as the occupational reports were concerned the claimant was signed off initially for "family reasons". She returned to work but only for a short period before being signed off again. The claimant's solicitor accepted that it was "perhaps reasonable" for the respondent to assume that that was because of "family reasons" again. However, on 16 October 2017 her trade union representative advised the respondent that the reason she was off work was "due in large part to the way she has been treated by management" (P176). He accepted that this was the first time that the respondent had been made aware of this. He accepted that there was no breach of contract at that stage as the respondent took reasonable steps to protect her well-being when she returned to work.
64. Mr Garden dealt with an issue in February 2017. The claimant's solicitor accepted that that issue was addressed properly and the respondent was still not "in breach".
65. However, he submitted that that changed in "mid June" when the investigation into Susan Fraser's conduct "concluded" the claimant's desired outcome – the dismissal of Susan Fraser – was "not going to be achieved".
66. At her meeting with Mr Garden on 14 June the claimant wanted redeployment. That related to health matters.
67. The claimant's solicitor accepted that the claimant's reference to "having to self-medicate" in her e-mail of 8 July 2018 to Mr Garden (P222) was "perhaps misleading" as her medication was prescribed.
68. Mr Garden then took advice from Jane Lloyd about redeployment on 10 July Ms Lloyd communicated that the claimant would not be placed on the redeployment register.

69. While the claimant's solicitor submitted that the outcome of the investigation into Susan Fraser's conduct was "of no real relevance", as from 14 June 2018 the claimant was still maintaining her contact with Susan Fraser was making her unwell.
- 5
70. The claimant's solicitor submitted that the respondent "had the tools to deal with this by redeploying the claimant in terms of its policy" (P53).
71. He submitted that "the evidence of Jane Lloyd lacks reliability about the way in which the policy was applied".
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72. He submitted that "no serious consideration was given to redeployment".
73. He submitted that the respondent was in breach of contract in respect of its failure to redeploy the claimant.
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74. He submitted that this failure had to be considered in the context of the implied duty to provide a reasonably safe working environment.
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75. If after six months, in terms of the policy, the respondent had not been unable to find suitable alternative employment the claimant was then dismissed, he accepted that the respondent would have complied with its duty. However, the failure to "consider" redeployment was a material breach. The claimant should have been put on the redeployment register.
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76. He submitted that it was "reasonably practicable to put her on the register". There was no good reason not to put her on the register.
77. The claimant's resignation was because they failed to do so. It was because of that "breach".
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78. The claimant's solicitor invited the Tribunal to "analysis the scope of the implied duty" and he reminded the Tribunal that the claimant's trade union representative has "insisted on redeployment" (P224).
- 35
79. He submitted that the test in ***Western Excavating*** had been satisfied.

80. He rejected the contention that the claimant had “affirmed the breach” as the breach was a refusal to redeploy.

5 81. The claimant’s solicitor relied on the same facts in support of his submission that there was also a breach of the implied duty of trust and confidence. He accepted that the respondent’s conduct was not “designed” to destroy trust and confidence, but submitted that “it was likely to”. He also submitted that it “was without good and proper cause”. He submitted that there was a
10 “misunderstanding of the policy” that Jane Lloyd “had taken a prescriptive view of how the policy should be interpreted”.

82. Finally, the claimant’s solicitor submitted, that there was “no fair reason for the dismissal”.

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Respondent’s submissions

83. The respondent’s Counsel spoke to written submissions which are referred to for their terms.

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84. He referred to the following cases:-

Western Excavating;

Waltham Forrest v. Omilaju [2004] EWCA Civ 1493;

25 ***Kaur v. Leeds Teaching Hospital NHS Trust*** [2018] EWCA 978, CA;

Dutton & Clark Ltd v. Daly [1985] ICR 780.

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85. Counsel did not concede that there was an implied term in the claimant’s contract of employment that the respondent should provide her with a safe system of work. However, if there was such an implied term he submitted with reference to ***Waltons*** that it is a “fairly restricted term as the legation on the employer to provide a safe working environment “so far as reasonably practicable” and which is reasonably suitable for the performance by them of

their contractual duties. He submitted in the circumstances the refusal to put the claimant on the redeployment register was not a breach of either implied term advanced by the claimant's solicitor.

5 86. He submitted that it was necessary to look at the respondent's decision not to put the claimant on the redeployment register in the context of the history and the OH referrals and sick notes.

10 87. Further, the claimant had been working in the Switchboard Department from 18 December 2017 until her resignation on 27 July 2018. "Importantly during that time with the exception of the first couple of weeks" the claimant was working in the main Switchboard room where Susan Fraser was also working. The claimant was able to perform her job and there was no indication to NHS Grampian that she was not being provide with a safe system of work.

15 88. The one occasion in February 2018 when the claimant found herself in the same room as Susan Fraser and Willie Massie (her agreed supervisor) was addressed by the respondent and "resolved quickly" (P198). Andrew Garden made further suggestions to the claimant at that time of arrangements that could be made but she did not respond. She did not take any time off work as a result of the matter complained of and continued to carry on working until her resignation.

20 89. Counsel then went on in his written submissions to say this:-

25 "12. It appears to be suggested by not placing C on the redeployment Register a breach of the implied term to provide a safe system of work occurred. In my submission that argument is wholly without merit and should be rejected. Jane Lloyd gave evidence as to why it was not appropriate for NHS Grampian to place C on the Redeployment Register. C indicated in an e-mail of 8 July 2018 (P222) that she had to self-medicate with anti-anxiety medication before coming to work. Jane Lloyd in an e-mail of 10 July (P225) informed C that she would not be placed on the Redeployment Register but

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that she would be given assistance if she wanted to apply for other positions. Jane Lloyd included in her e-mail a link to the “vacancy bulletin” and highlighted two positions that C may have been interested in exploring. C did not however apply for either position.”

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90. Counsel also submitted that at the time of the claimant’s resignation the respondent only had an assertion that the claimant was “self-medicating”. The respondent did not have an opportunity of obtaining a further OH Report and there was only a “mere assertion” by the claimant that health issues were as a consequence of the conduct of another employee.

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91. Counsel rejected the contention by the claimant’s solicitor that a “mere assertion” in this manner meant that an employer would be in breach of the implied duty if it refused a request by an employee to be put on the Redeployment Register. He submitted that if that were the case “it would lead chaos.”

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92. In any event, Counsel submitted, with reference to *Dutton & Clark* that an employer is not obliged to do everything in its power to provide a safe system of work. It need only take reasonable precautionary steps. Also, the test is an objective and it was submitted that in the present case it was clear that “objectively speaking NHS Grampian acted reasonably in relation to the claimant.”

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93. Counsel reminded the Tribunal that the claimant worked as normal from December 2017 to July 2018. She was not off work due to ill health at any time. Her evidence was that she “got her head down and got on with her work and did her trade union duties”.

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94. She also continued to work and to carry out her trade union duties after her meeting with Mr Garden on 14 June. On her return from leave she was advised on 10 July that she would not be put on the Redeployment Register. Nevertheless she continued at work for two weeks before she resigned.

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95. Counsel also submitted that there was not a breach of the implied duty of trust and confidence. In support of his submission in this regard Counsel said this in his written submissions:-

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“16. C’s argument should not be accepted. First of all, it is evident that NHS Grampian in its relationship with C acted at all times with “reasonable and proper cause”. NHS Grampian communicated with C in relation to her return to work in December 2017 and agreed with C measures that should be put in place to facilitate her return to work. Those measures were agreed with C and it is beyond dispute that C returned to work and worked successfully in her post until her resignation.

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17. Secondly, in any event, the actions of NHS Grampian cannot be said to be calculated or likely to destroy or seriously damage the relationship of trust and confidence with C. On the contrary NHS Grampian took steps to help C to return to work in December 2017 and to enable her to return to work.....

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In the present case the decision not to place C on the Redeployment Register was reasonable and proper as explained by Jane Lloyd in her evidence.”

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96. Counsel referred to Jane Lloyd’s e-mail of 10 July (P225) in which she offered support and assistance helping the claimant to find alternative employment. In doing so she went further than she would normally do. Counsel submitted “what’s that if not trying to create a safe working environment.”

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97. In any event, so far as the Redeployment Register was concerned will only guarantee an interview. There is no guarantee of work and if suitable work is not obtained within a six month period the employee is likely to be dismissed.

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98. Counsel also submitted, in the alternative, that the claimant did not resign in response to any breach of contract on the part of the respondent. She

delayed for a period of two weeks after she was advised that she would not be put on the Redeployment Register. The reason she resigned was that she had secured alternative employment.

5 99. Counsel submitted that “it was “beyond dispute that what the respondent did it had reasonable and proper cause to do”.

100. Further, so far as the mention by the claimant’s solicitor that the Redeployment Policy had been “misinterpreted” was concerned, Counsel
10 submitted there was no evidence that the policy could reasonably have been applied in a different way. The respondent could not be criticised for the decision not to place the claimant on the Redeployment Register.

101. In the alternative, Counsel submitted that if there was a breach of contract on
15 the part of the respondent the claimant did not resign in response to the breach. She resigned because she didn’t get the outcome she wanted namely, Susan Fraser’s dismissal.

102. It was only when she was advised that there was to be no disciplinary action
20 against Susan Fraser that she resigned. Counsel submitted that “that fits in terms of chronology.”

103. Finally, Counsel submitted that if there was a dismissal it was fair and that
25 the reason was “some other substantial one namely, a “breakdown in working relationships”. The claimant had made her position clear that she was not prepared to work any longer if Susan Fraser was there. The respondent had decided not to dismiss Susan Fraser. In other words, the claimant was saying “it’s Susan Fraser or me”.

30 **Discussion and Decision**

104. Having resigned it was for the claimant to establish that she had been constructively dismissed. This meant that under the terms of s.95(1)(c) of the Employment Rights Act 1996 she had to show that she terminated her

contract of employment (with or without notice) in circumstances such that she was entitled to do so without notice by reason of her employer's conduct. It is well established that that means that the employee is required to show that the employer is guilty of conduct which is a fundamental breach going to the root of the contract of employee, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

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105. The correct approach in determining whether or not there has been a constructive dismissal was discussed in ***Western Excavating***, the well-known Court of Appeal case to which I was referred by both parties. According to Lord Denning, in order for an employee to be able to establish constructive dismissal, four conditions must be met:-

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“(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;

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(2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous interpretation of the contract by an employer will not be capable of constituting a repudiation in law;

(3) He must leave in response to the breach and not for some other unconnected reason; and

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(4) He must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.”

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106. Accordingly, whether an employee is “entitled” to terminate his contract of employment “without notice by reason of the employer's conduct” and claim constructive dismissal, must be determined in accordance with the law of contract. It is not, accordingly enough to establish that an employer acted

unreasonably. The reasonableness, or otherwise, of the employer's conduct is relevant but the extent of any reasonableness has to be weighed and assessed and a Tribunal must bear in mind the test is whether the employer is guilty of a breach that goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of its essential terms.

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107. So far as the present case was concerned the claimant's solicitor relied on two terms which are implied in every contract of employment.

108. There is a well-established implied term in every contract of employment that an employer must provide a safe working environment. This theme was extended in **Waltons & Morse** to which I was referred by the claimant's solicitor. In that case it was held that an implied term to the effect that an employer must provide a working environment that is reasonable intolerable – including the quality of the air – for the performance of its employee's duties. Given that the dangers of passive smoking are substantial, an employee who is exposed to smoke in the workplace and whose employer does not respond to his or her concerns could rely on this implied term to found a constructive dismissal claim.

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109. The other implied term relied on by the claimant's solicitor was that employers will not, 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 employer and employee. Browne – Wilkinson J in **Woods v. W M Car Services Ltd** [1981] ICR 666 described how a breach of this implied term might arise: to constitute a breach of this implied term it is not necessary to show the employer intended any repudiation of the contract: to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

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110. In **Malik v. Bank of Credit & Commerce International** [1997] IRLR 462 Lord Steyn stated that, in assessing whether or not there has been a breach of the

implied obligation of mutual trust and confidence. It is the impact of the employer's behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively.

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111. When I considered the authorities, I recognised that a wide range of behaviour by employers can give rise to a fundamental breach of these implied terms.

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112. Turning now to the present case, the claimant's solicitor submitted that the failure by the respondent to place the claimant on the Redeployment Register was a breach of the implied duty to provide a safe working environment" in as much as having to continue to work in the Communications Department along with Susan Fraser was affecting her health.

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113. However, Jane Lloyd explained why she made that decision. She presented as entirely credible and reliable. So far as the respondent was concerned apart from the incident in February 2018 the claimant had continued to work as normal and had not been signed off due to ill health. She had requested a move back into the Communications Room knowing that Susan Fraser worked there from time to time. The claimant's allegations about Susan Fraser's conduct had been investigated and no disciplinary action was recommended. The claimant had also been able to carry out her trade union activities apparently without any difficulties.

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114. In these circumstances there is no basis for the claimant to been put on the Redeployment Register. I accepted Ms Lloyd's evidence that in such circumstances this was not something she had ever done.

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115. Nor was it "reasonably practicable to put the claimant on the Register. As Ms Lloyd put it "redeployment is not a personal choice" and I had no difficulty rejecting the submission by the claimant's solicitor that a mere assertion by an employee that his or her health was being affected by another employee imposed a duty on an employer to redeploy.

116. I arrived at the view, therefore, that the respondent was not in breach of the implied duty to provide a safe working environment.
- 5 117. So far as the implied duty of trust and care was concerned, I am bound to say that throughout the claimant's employment in my view the respondent was hugely supportive. As soon as any concerns were raised by the claimant these were responded to and addressed in a satisfactory manner. The respondents also obtained regular Occupational Health Reports and were
10 consistent in their application of recommendations from the Occupational Health physicians.
118. Further, although Ms Lloyd rejected the claimant's application to be put on the Redeployment Register, indicative of that ongoing support was her offer
15 to assist the claimant in obtaining alternative employment.
119. The claimant's complaints about the conduct of Susan Fraser were investigated by the respondent and a decision was taken that there be no disciplinary action. There was no evidence to suggest that the claimant's
20 complaint had not been treated seriously and the respondent's investigation was other than comprehensive and included a lengthy meeting from the claimant when her statement was obtained.
120. I had little difficulty, therefore, arriving at the view that the respondent was not
25 in breach of the implied duty of trust and confidence.
121. Accordingly, as there was no breach of contract the claim falls to be dismissed.
- 30 122. However, for the sake of completeness I wish to record that even if I had been of the view that there was a breach of contract of either of the implied terms I was not persuaded that the claimant resigned in response to any breach on the part of the respondent.

123. I did not find favour with the submission by the respondent's Counsel that the claimant resigned because she had obtained alternative employment. I accepted her evidence in that regard that it was always her intention to resign but for financial reasons she wished to obtain alternative employment before she did so.
124. However, I did find favour with the submission by the respondent's Counsel that the reason for the claimant's resignation was that the outcome of the respondent's investigation into Ms Fraser's alleged misconduct did not achieve the outcome the claimant desired, namely her dismissal.
125. She did not resign in my view because the respondent was not prepared to place her on the Redeployment Register. It was significant that as soon as she was advised of the likely outcome of the investigation by Mr Garden at the meeting of 14 June that she became insistent on being redeployed. It was also significant that she failed to take up Ms Lloyd's offer of assistance in securing alternative employment as if successful there would have been no prospect of the claimant having to work on occasions in the same open plan office as Ms Fraser. Indeed, arguably Ms Lloyd's offer of assistance was a better prospect for her as being on the Redeployment Register only guarantees interview. There is no guarantee of work and if no alternative of employment is found within a period of six months the employee concerned is likely to be dismissed.
126. For all these reasons, therefore, the claim is dismissed.

Employment Judge:	Nicol Hosie
Date of Judgment:	02 September 2019
Date sent to parties:	03 September 2019