EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Strohm	**v**	**NHS Blood & Transplant**

Heard at: Watford **On**:14-16 & 19-20 August 2019
Before: Employment Judge R Lewis

Appearances
For the Claimant: Ms S Bowen, Counsel
For the Respondent: Mr B Uduje, Counsel

RESERVED JUDGMENT

1. The claimant was not constructively dismissed by the respondent, and his claim of unfair dismissal fails.

REASONS

1. This was the hearing of a claim presented to the tribunal on 22 March 2018, by the claimant then acting in person.

2. Day A was 5 March and Day B was 21 March. In May 2018, the claimant instructed solicitors, who continued to represent him and briefed counsel for this hearing.

3. A preliminary hearing took place before Employment Judge McNeill QC on 9 July 2018; her order was sent on 6 September. A listing was given, and the issues confirmed.

4. Judge McNeill's listing could not be maintained. A short telephone preliminary hearing took place on 29 April, when the present listing was confirmed.

Case management at this hearing

5. There was an agreed bundle of some 800 pages, and the following case management matters arose in the course of the hearing.

6. Although at paragraph 4.1 of her order, Judge McNeill referred to eleven headings on a two-page document (13-14) as constituting the repudiatory

breach, the parties proceeded on the agreed basis that a particularised version, (15-19) was that relied upon. It was in turn further amplified by the allegations of loss of job responsibility (35-37). However, both parties reiterated that the eleven headings of repudiatory conduct identified by Judge McNeill remained the fundamentals of the case.

7. It was agreed that the tribunal would deal with liability only at this stage. Mr Uduje invited me to deal with contribution at this stage. It seemed to me right, at the end of the case, to leave over to a remedy hearing any issue as to Polkey.

8. No provisional remedy dates were set at the end of this hearing. It was instead agreed that after judgment was sent, and if a remedy hearing was required, a short telephone hearing would take place.

9. The parties agreed that the early background matters referred to in the claimant's witness statement, raising issues going back many years before resignation, were not before the tribunal. I indicated that Mr Norville's evidence of pure opinion could not assist.

10. The parties agreed to timetabling, such that the public hearing concluded within four days, leaving the fifth allocated day for deliberation.

11. The claimant's case was heard first, and the claimant gave evidence from 2pm on the first day until 12:30pm on the second day.

12. The claimant called one other witness, Mr Gus Norville, Assistant Quality Manager who had accompanied him to meetings, and who had substantial experience as a Unite representative. Mr Norville's evidence lasted about 30 minutes.

13. The respondent's longest witness was Ms Fidelma Murphy, Assistant Director, who had been the claimant's line manager since 2015. Her evidence lasted a total of just over four hours.

14. The respondent's other witnesses were: Mr Richard Rackham, Assistant Director, who had conducted the review in mid-September 2017; his evidence lasted about two hours; Mr Ian Bateman, Director of Quality, and Ms Murphy's line manager, was the author of letters of 13 October 2017 and 23 November 2017, and his evidence lasted about 30 minutes. The respondent's final witness was Mr Andrew Yeatman, who had heard and rejected the claimant's grievance. He gave evidence for about an hour.

15. There were helpful written and oral closing submissions from both sides.

General approach

16. Before making my findings, I set out matters of general approach.

17. First, I record my gratitude to both Counsel for their highly professional conduct of the case, in which I include the effective use of time, and their

calm presentation of a claim in which there was strength of feeling on both sides.

18. In this case, as in many others, the tribunal heard reference to a large range of matters, some of them in detail. Where I make no finding about a matter which was mentioned; or when my finding is given in less depth than the parties followed, that should not be taken as oversight or omission, but as a true reflection of the extent to which the point was truly of assistance.

19. The tribunal was faced with the issue of hindsight. That is often an issue, but was a particular problem in this case.

20. The tribunal's task is to make findings based on the events as they took place at the time. It is trite that a dismissal is fair or unfair on the day when it takes place. In constructive dismissal, the question is whether at date of resignation (8 December 2017) the claimant had been constructively dismissed. It is equally trite that only information which was in the mind of the claimant at the time of resignation can have contributed to his decision to resign.

21. This hearing took place 20 months after the date of resignation. The parties' interpretation of events up to 8 December 2017 was influenced by a number of subsequent events: the outcome of the claimant's grievance appeal; the disclosure process; the exchange of witness evidence; and the process of reflection. Reflection may include the application of hindsight in the light of the greater accumulation of knowledge since the events.

22. When witnesses were asked about what they knew and understood, it was, on occasion, necessary to be clear about the time focus of the answer. Ms Murphy in particular said that she could not in evidence truthfully recollect precisely when each discrete piece of knowledge which she now had was in her mind.

23. It is right to record that I intervened in Ms Murphy's cross examination to express concern about questions based on knowledge acquired subsequent to the events in question. Having reflected on the matter overnight, I realised that I had not fully understood Ms Bowen's approach, and before she resumed cross examination of Ms Murphy on the third morning, I acknowledged that I had been mistaken.

24. It was common ground that facts not known to the claimant on 8 December 2017 could not have been part of his reason for his resignation. However, it was correct that Ms Bowen cross examined on those points (most of which had come to the claimant's knowledge through the disclosure process) because they could be relevant to other components of a claim for constructive dismissal, notably whether the actions complained of were undertaken for proper cause, or were calculated to destroy or seriously damage the relationship of trust and confidence.

25. A large part of this case turned on interactions between the claimant and two colleagues. As agreed with counsel, I refer to them in these reasons as

A and B. A was the author of a grievance e-mail of 4 January 2017. There was reference in the evidence to personal events concerning the claimant's family members and personal life. I use the umbrella term domestic circumstances to refer to those items.

26. In writing this judgment, I have been concerned that a reader might mistake careful use of language for euphemistic language. I record therefore, for complete avoidance of doubt, that there was before me no evidence whatsoever of sexualised language or conduct. I heard the case on that agreed basis.

27. Ms Bowen's closing submissions set out a careful and detailed analysis of the evidence, focussing on procedural errors and shortcomings, which, she submitted, individually and cumulatively, showed such a want of fairness as to make good the claimant's belief that his removal from the respondent was after the January complaint a predetermined objective. I make no criticism of counsel whatsoever in rejecting the claimant's general approach.

28. I do so first because the approach came close to applying to the respondent a standard of perfection. That is not right or fair; a better formulation is the standard of a fair and reasonable employer, addressing the material before it. It was, for that and other reasons, an artificial approach, which applied to a real management issue the standards of litigation. An employer is not duty bound to manage as if every decision were to be scrutinised by counsel; where litigation for example places a high value on disclosure, expediency in management may reach the view that discretion is the better part of candour. In litigation, the claimant was entitled to disclosure of A's first written complaint; but as the respondent's long-term objective was for them to resume a professional working relationship, litigation-style disclosure during employment was not necessary or desirable.

29. Counsel's approach disregarded the reality of the respondent's approach. I find that its management objective was to contain a conflict, not inflame it. The language of the respondent's Dignity at Work (DaW) procedure (see below) was that of mutual respect and problem-solving. Containment of the conflict pre-supposed enabling A, B and the claimant to continue working as colleagues. The respondent was at no stage following a procedure which carried the risk of express dismissal. If I agree that there is an underlying criticism to be made of how the respondent managed the claimant, it would be that it was too emollient, over-reliant on the spoken word, and that it shied away from clear, robust written language. While I accept that that may be in keeping with the spirit of the DaW policy, its effect may have been to leave the claimant unclear about the respondent's requirements of him.

30. Thirdly, the respondent could not predict how matters developed, nor did it have control over the reactions of any of the three main individuals. Its duty was to manage as events proceeded. Individual managers commented, at the time and in evidence, on the claimant's lack of insight, and on the management challenges which followed from that. A stark example was the claimant's return to Colindale on 21 November; the inadequacy of the

explanation which he then gave for having done so; and his lack of insight into the impact on his own standing of both the return and the explanation.

31. The claimant's approach adopted a flaw which is common in conspiracy theories, namely that of assuming that which was to be proved. The claimant assumed that the sequence of events from 4 January 2017 onwards evinced an intention to remove him. He therefore took it that any management input which he challenged was explicable on that basis. I find that that underlying intention has not been shown. I accept that in one email A asked for the claimant to be removed from post. There was no evidence that A (at no more than Band 5) made any material decision in these events. Her views were respected, and I have dealt elsewhere with the issue of her unwillingness to mediate. What has been shown is a process where managers dealt with a changing sequence of events, seeking to contain conflict and solve a problem; recognising that management decisions cannot please everyone; working within their own procedures and subject to advice; applying judgement and exercising discretion; and generally doing so to a fair and reasonable standard.

The legal framework

32. The question for me to decide is whether the claimant was dismissed in accordance with section 95(1)(c) Employment Rights Act 1996 which provides that a dismissal occurs if,

> "The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

33. Ms Bowen's submission helpfully reminded me of the fundamental statement of Lord Denning in Western Excavating ECC Limited v Sharp 1978, ICR 221:

> "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 …."

34. Ms Bowen pointed out correctly that in that early case the Court of Appeal rejected a test of unreasonable behaviour, and adopted the contractual test which still holds good.

35. The test has been developed through a series of authorities, notably Malik v BCCI 1997 ICR 606, to embrace the situation where an employer,

> "without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties".

36. I emphasise two points. The first is the importance of proper cause. Conduct which might otherwise be repudiatory in the Western Excavating sense may nevertheless not constitute constructive dismissal if it is for

reasonable or proper cause. Secondly, the test in constructive dismissal is objective. No matter how strong the claimant's feeling that he has been constructively dismissed, it is a question for the tribunal to decide whether the tests of Western Excavating and Malik have been met.

37. Counsel also referred to Kaur v Leeds Teaching Hospitals NHS Trust 2018 IRLR 833, and the discussion of "last straw" constructive dismissal claims. Both counsel referred to the head note, from which I summarise,

> 'An employee who is the victim of the continuing cumulative breach is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation: provided the later act forms part of the series ….. in the normal case where an employee claims to be constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> 1) What was the most recent act or omission on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> 2) Has he or she affirmed the contract since that act?
>
> 3) If not, was that act or omission by itself a repudiatory breach of the contract?
>
> 4) If not, was it nevertheless a part of the course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence?
>
> 5) Did the employee resign in response (or partly in response) to that breach? None of those questions is conceptually problematic.'

38. Counsel agreed that no issue of affirmation arose in this case.

Setting the scene

39. The tribunal was not concerned with events before 2016.

40. The claimant was born in August 1957. His continuous employment with the respondent dated from April 1980. He had given a lifetime of loyal and distinguished service, in the field, broadly of maintaining the integrity and quality of systems applicable to blood and tissue usage within the NHS (I apologise to all witnesses on both sides for what will no doubt appear a gross over-simplification, in which no discourtesy is intended).

41. His substantive post since 2011 was Lead Quality Specialist (LQS), Group Services. The claimant's witness statement summarised concisely:

> "Group Services are IT, facilities, transport and all the support services that support the blood service business. This involved national procedures, but was based at Colindale. It also involved local responsibilities".

42. The claimant was at Band 8C. His line manager from 2015 was Ms Murphy, who reported to Mr Bateman. The claimant was one of four LQS, who were among the total of seven quality managers who reported to Ms Murphy (116-117).

43. The claimant's contract (72) stated so far as material "You will be based at NHSBT Colindale Blood Centre." The contract was supported by a job description and person specification (83-92). His role was a national role.

44. The respondent had a Dignity at Work policy (DaW) (38-45) which counsel agreed was non-contractual. Much of it was made up of statements of principle and aspiration. In sections headed "Early resolution" and "The Process" the policy encouraged early communication, so that anyone who felt troubled by a colleague's behaviour should try to deal with it personally or informally. It stressed the need for full co-operation, and confidentiality in any formal process. In a section headed "Subjected to inappropriate behaviour?" it advised four steps, which were designated Self care; Talk to your manager; Contact HR Direct; and Raising a formal complaint.

45. If a formal complaint were raised in writing, the policy provided that (41),

> "The person receiving your written complaint will carry out an initial 'fact-finding' process to establish the key facts and issues about the case".

46. The fact finding is followed by a fifth step, described as "Case conference and investigation". A summary is (41),

> "HR Consult will follow reporting procedures to a joint panel of senior HR management and a National Senior staff side representative to recommend an alternative way of resolution or to commission a detailed investigation.
> Where a full investigation is recommended, this will be conducted by an independent manager…
> Following the formal Dignity at Work investigation the manager will have a conversation separately with both parties, to advise them of the outcome. Should they find that there may be a misconduct case to answer, then the Disciplinary Policy will be instigated at the recommended sanction or panel stage, so that any necessary appropriate action can be followed".

47. The fifth step concludes with the following two paragraphs, emphasis added:

> "In addition, the person you have raised concerns about may need support. Their behaviour may have been unintended, so any fact finding or investigation will need to fully understand any personal and/or work-related issues affecting their behaviour.
>
> However, if the behaviour has caused personal offence to anyone on such grounds, it cannot be ignored. The investigator will meet with you to advise you of the outcome of the investigation in terms of their key findings and recommendations such as discussion, facilitation, or mediation, between you <u>to ensure that you are both able to move on positively together</u>. Any action, informal or formal taken against the person causing you concern will remain confidential and will not be shared with you."

48. Some of the seeds of this dispute can be seen in this well-intentioned wording. In particular: the policy is unclear on the division of responsibility between HR and operational management, and unclear on aspirational timelines (and on where and with whom the initiative lies to ensure timeliness). The policy appears to allow for three separate forms of enquiry

into a single complaint (which could be an initial fact find; a detailed or full investigation; and a disciplinary policy further investigation).

49. More important to the present case is the tension within the policy between, on the one hand, respecting the rights of complainant and complainee, including rights of confidentiality; while managing the information flow and use of formal writing, so as to help avoid open conflict, and achieve practical resolution.

The initial complaint

50. The events in this case were triggered by an e-mail from A to HR Direct on 4 January 2017, subject heading "Harassment from Jonathon Strohm in 2016" (118-119). A was a Band 5 female employee, who was not in the claimant's reporting line, although there was some area of overlap in their work. She was said (in reply to my questions) to be thought to be some 15-20 or so years younger than the claimant.

51. A's email should be read in full. It opened:

> "I need your help as to what to do next.
> I am experiencing harassment from Jonathon Strohm …
> This has been going on since March 2016. I hoped it would stop but now need your help as I have tried an informal approach but this has not worked.
> I need this harassment to stop."

52. After a page of narrative, it concluded,

> "I believe that this comes under the Dignity at Work policy and I wish as a resolution to this situation that [he] does not contact me again. I believe that this is not detrimental to my role or his. I believe that this resolution will help me move on and continue to function in my role."

53. In the intervening page, A set out a series of events from 17 March to 29 December 2016 inclusive. The main events may be summarised as including conversations in spring 2016 when the claimant spoke about his domestic issues; a conversation in May 2016 when he said to A, "I hope you don't mind but I have developed romantic feelings towards you;" a complaint about a specific event in August, when A and the claimant had an argument about a work-related matter; and a general complaint about unwanted attempts to "create opportunities for us to work together." The most recent event was said to be that,

> "His latest visit was yesterday, 29 December 2016, telling me I have to invite him on a workshop I am attending as someone has asked him to attend. He was not asked and he does not need to attend."

54. A asserted further that following reorganisation of accommodation, the claimant could see into her office from his office, and was 'staring' at her; that a female Band 5 colleague, B, also 'feels uncomfortable' in the claimant's presence; and that the impact of these events on A was such that she required counselling.

55. It is right to record that the claimant agreed at all times with much of the factual basis of the complaint. He agreed that A was one of a small group of colleagues whom he thought of as friends with whom he could share his domestic life issues. He agreed that he had once made the 'romantic feelings' remark, and said that he had not repeated that remark, or words to that effect, in light of A's response (which A agreed was the case). It was common ground that the August row had taken place and that the claimant had apologised for it. The claimant did not accept that he had stared at A, or had endeavoured to create situations where he unnecessarily came into work contact with her, and he denied harassment.

56. HR passed the complaint to Ms Murphy, who met the claimant with a view to early informal resolution. It was agreed that the claimant was not told before meeting Ms Murphy on 10 January 2017, what he purpose of the meeting was. It was agreed that he was not shown or given a copy of A's e-mail of complaint.

57. Ms Murphy's e-mail to the claimant of 11 January set out the outcome of their meeting the day before. It was the first indication to him in writing of the existence of an issue with A. In light of the subsequent dispute, the final paragraph should be quoted (148):

> "Jonathon, I want to thank you for your open and honest approach to yesterday's meeting, please remember I am available to discuss or clarify anything you may wish. We will review this situation at our 1:1s as appropriate."

58. Ms Murphy recorded outcomes "in order that both of you can move forward with your working life … and prevent formal investigations". These included an absence of contact with A by any medium; relocation of the claimant's desk in Colindale; and removing the claimant from projects or events to be attended by A, with review of any further possibilities.

59. Ms Murphy also wrote:

> "You also requested that at some time in the future, mediation would take place to improve the working relationship between you and your colleague. I pointed out that currently this was not advisable; however, we would look towards some mediation in the future."

60. In his witness statement the claimant wrote that this outcome was "very punitive" and that the situation was "very poorly handled". He denied that he agreed the actions set out by Ms Murphy.

61. It was a general feature of this hearing that the claimant, through counsel, challenged notes, documents and records, stating that they were not accurate or agreed, even if there was no record of his having done so at the time. In general, I approach the notes and correspondence which I have seen as accurate summaries, not full transcripts. I accept that the claimant was on unfamiliar territory, and I do not expect an employee dealing with an unfamiliar conflict to adopt the lawyer's reflex of challenging everything

which he disagrees with in writing. Accepting that the claimant on 10 January was too shocked by the allegations from A to do himself justice in the meeting, I would have expected him to reply to Ms Murphy to make that point, and if need be correct any misapprehension on her part.

62. I find that the references to mediation were important. I accept that the claimant's immediate first response to A's complaint was to suggest mediation. I accept that this was consistent with his understanding that a friendship had in some way gone wrong, and that things could be resolved by sitting round the table. That was understandable, as he had not seen the language of A's original written complaint.

63. There followed a period of several months, during which matters were at a lull. The claimant appears to have worked in accordance with Ms Murphy's instructions, and Ms Murphy thought that matters were calming down. There was no evidence that during that period HR raised the possibility of mediation with A or B. As the claimant pointed out, the period of calm was some indication that these events were capable of resolution.

64. In late May 2017, A made further contact with HR about the claimant's interaction with her. On 26 May Ms Murphy told the claimant that further complaints had been made, as a result of which there was to be a 'formal HR investigation' (377).

65. I accept that there had been a period between January and May when it appeared that matters might have dampened down without need of any further management action. I accept that it was a reasonable response to an apparent recurrence to treat the question as having reached step four of the DaW policy, requiring a fact-finding process.

66. The evidential trail about B was not fully clear. A had named her in her 4 January email. It appears that by the end of the same month, January 2017, B began to keep personal notes of interactions with the claimant, consistent with the Dignity at Work policy advice to that effect, and with an employee anticipating trouble (153). It was not clear to me how precisely she became involved in the fact-finding in this matter, for which she was interviewed on 21 June (259).

The fact finding

67. Ms Ranson and Ms Kwenda were jointly appointed to conduct the process. They were respectively National Retrieval Manager and Senior HR consultant. I understand the premium placed by the DaW policy on informality. It would nevertheless have been good and fair practice if A, B, the claimant and their line managers had been told in writing of their appointment, their remit, and the step of which procedure under which they operated. The claimant was invited by e-mail dated 13 June from Ms Ranson to a meeting to be held on 23 June about 'concerns have been raised about you by A' (716).

68. On 23 June, A sent Ms Ranson and Ms Kwenda an update of her 4 January complaint (293), in which she set out further events which had occurred since January, some of them involving B. I note with concern the first line of her email, of which there was no other evidence or indication (emphasis added),

> "January 2017 – I am informed by HR that Jonathan has been spoken to and we will have a review of the situation in 6 months time."

69. The general drift of the 23 June complaint was that the claimant had not been fully compliant with the separation requirement imposed by Ms Murphy in January, that he continued to find ways to associate his work with A's and that there continued to be an impact on her. She concluded,

> "This is a horrible situation to be in."

70. Ms Ranson and Ms Kwenda interviewed the claimant, accompanied by Mr Norville, on 13 July (219). The note of the interview should be read in full. Much of it concerned the detail of office interaction and the reasons for it. The bundle also included notes of interviews with A and B (respectively 283 and 259). While all should be read in full, it is worth noting A's reply to the question 'What is your relationship with the claimant now?' (285),

> "I have no interaction with him now as his behaviour has had a profound impact on me. I can't trust him and there is no way back."

71. B was not asked precisely the same question. She told Ms Ranson and Ms Kwenda (262-3),

> "[His] visits would become more frequent, he invades your personal space and sometimes comes in 3 times on the same day and there is no reason to …. I am wary of him …. He moans a lot and you can't get a word in edgeways. If you try and talk he just interrupts you so what is the point. I am very busy and he distracts me."

72. B also commented about inappropriate management in sharing information to which B was not entitled and about the volume of e-mail traffic between them, which she said showed that the claimant had sent her five times as many e-mails as she had sent him. She agreed that he had never said anything inappropriate to her.

73. By mid-September, Ms Ranson and Ms Kwenda had finalised their report (242-255, with 32 Appendices, 256-347). The version in the bundle was not dated, although it was clear that it had been 'issued' by 15 September (350). They passed it to Mr Rackham and Ms Elder of HR, presumably as step five of the DaW procedure.

74. Little would have been lost had A, B and the claimant been told in writing that in accordance with step five, a report had been passed to a joint panel of Mr Rackham and Ms Elder, whom the DaW policy empowered to 'recommend an alternative way of resolution or to commission a detailed investigation'. It would also have been helpful if the report itself expressly acknowledged and adopted the DaW steps procedure. It was not right that

the report was issued under cover stating (242) 'Management statement of case in line with the disciplinary policy.' The report was not that, although that is how it might have been used if matters had proceeded differently.

75. Neither Ms Ranson nor Ms Kwenda gave evidence. After summaries of the interviews with A, B, the claimant, and their line managers, they set out a conclusion (251-2):

> "It is evident there are a number [sic] concerns that are substantiated and a number that are understandably perceptions based on the breakdown in communication between the individuals. A states that 'she never wants to talk to JS again', and is seeking alternative employment to remove herself from the situation. Mediation needs to be voluntary so it can be recommended to her but is unlikely to be successful if it is not agreed.
>
> It is evident the informal meeting that was held between the claimant and Ms Murphy was held with a letter being issued to the claimant, however, the outcome was not communicated to A formally as she confirmed she received verbal feedback only.
>
> Throughout the meetings with B and A, it is clear that they are both visibly distressed by the circumstances and there have been no signs of malicious behaviour on their behalf. Several of the concerns raised appear to be perceptions that have been misunderstood ….. It should be noted that the claimant is band 8C whereas A and B are band 5s so he is a lot more senior to them so there was an element of what they feel is appropriate to broach with him.
>
> However, there is evidence to confirm that the claimant has overlooked his seniority within the organisation to B and A, particularly where he has no line management responsibility, he has forwarded information he has received as part of the NHS BT Leadership Team communication route directly to B and A without considering the ramifications or if their line manager feels the information should be received or how it should be communicated. It appears the boundaries between the conversations as what is acceptable to share with work colleagues has been breached, and he has not considered the impact this has on others. It is clear this was not intentional …"

76. A summary and recommendations section should also be read in full (253-254). The recommendations are largely common sense. They included individual feedback with the main parties to be confirmed in writing; mediation to be considered; transfer of some of the claimant's responsibilities "so that he longer interacts with A / B;" however, Ms Murphy had flagged potential service problems. The claimant was to be told that he "needs to be mindful about discussion" about work with colleagues well below his banding; and there should be 'agreed structured meetings'. Recommendation 4 in full reads,

> "Looking at moving either where the claimant sits or A / B because it is awkward and uncomfortable that they can see through into each other's offices, especially when there is the perception of the claimant deliberately peeping. Asking A to consider if she was willing to move base because there is not enough evidence to ask the claimant to and Ms Murphy is in agreement that he should stay at Colindale unless there is a valid reason not to."

Mr Rackham's decision

77. On 15 September Ms Elder wrote to the claimant (and Ms Murphy) to tell them that the report had been received and that the claimant was invited to a meeting on 22 September with all three of them to discuss the findings and for feedback. Mr Rackham's evidence was that he received and read the report but not the Appendices; and that he understood that Ms Elder had received and read the Appendices as well. (Mr Yeatman later recorded Ms Elder as saying that she had not received the Appendices, 453). The claimant did not receive the report at any time before disclosure in these proceedings.

78. Mr Rackham was firm in evidence, that the claimant had no right to be consulted about a next step. I agree that there is no such express right in the DaW policy. The respondent was also correct to say that the DaW policy does not provide for a copy of a fact-finding process outcome to be given to any party, complainant or respondent.

79. Before the meeting, Mr Rackham had a telephone conference with Ms Elder and Ms Murphy. His evidence was that the outcome of their conversation was accurately caught by Ms Elder's e-mail of 21 September (356). That is an important document. It set out, in seven bullet points, how matters were to be taken forward. The over-arching analysis is in the first point,

> "Following the review of the investigation report, concerns from [Mr Rackham and Ms Elder] but not enough to take it to a hearing, nor would it be necessarily beneficial for all the parties involved to go through that route."

80. The over-arching response was to continue with systems for long term separation of the claimant from A and B, concluding,

> "By end of next week move away from attending Colindale unless in exceptional circumstances … visits must be authorised / run past [Ms Murphy];
> May need to be firm and force his hand if he says he doesn't want to move away from Colindale."

81. The claimant attended the meeting of 22 September accompanied by Mr Norville. He did not agree that the subsequent outcome confirmation by e-mail (363) accurately captured what was said.

82. The outcome of the fact-finding process was an overwhelmingly important incident in this sequence of events. It is therefore important to bear in mind that the DaW policy gave Mr Rackham and Ms Elder a choice of two routes. The first choice was "to commission a detailed investigation". It appears that the policy envisages that at that stage "should they find that there may be a misconduct case to answer, then a disciplinary policy will be instigated at the recommended …. stage" (41). In other words, the primary question for Mr Rackham and Ms Elder was, should there be a disciplinary procedure. They decided not, for the reasons given above.

83. I find that Mr Rackham and Ms Elder did not consider that the fact find exonerated the claimant. They identified the situation as troubling and

ambiguous. They were, in my judgment, reasonably entitled to form the view that a formal disciplinary procedure, carrying with it the likelihood of open dispute, entrenching conflict, and enhancing the risks of resignation on the part of any one involved, or of dismissal of the claimant, was not in the interests of the organisation or of any individual.

84. The DaW policy does not offer a single alternative to the disciplinary route, but instead offers "an alternative way of resolution". I take it that that form of wording is open-ended, subject only to a reasonable interpretation of the facts, in light of the individual case.

85. The outcome advised by Mr Rackham and Ms Elder was a range of options which they reasonably understood would ensure the separation of A and B from the claimant, in a manner which was consistent with organisational need and with the employment interests of all.

86. I accept that in reaching that conclusion, Mr Rackham and Ms Elder understood two matters which remained in dispute at this hearing. One was that a major piece of project work had begun, or was about to begin, which would involve the claimant in working in Birmingham, possibly for three days a week or even more; the other was that he had in general terms expressed a possible intention to retire in April 2018. I find that that was their understanding. I make no finding about whether either point was well based.

87. Mr Rackham understood that there were in practice other locations where the claimant could work. One was the respondent's premises in central London, for which an offer of travel cost was to be made, and which Mr Rackham considered was accessible in a direct journey on the Northern Line from Colindale (where the claimant then lived) to Tottenham Court Road.

88. As stated, there was a meeting on 22 September at which Mr Rackham communicated this outcome to the claimant. It was his decision and nobody else's. I accept that it was not a consultation, but communication of a decision. I accept that the claimant was told that there was to be no formal disciplinary hearing.

89. Mr Norville's interpretation of the decision not to hold a formal disciplinary was,

> "To me that this meant that effectively Jonathan had been vindicated and no grievance had been upheld and he was not to face any disciplinary charge at all".

90. I can see that if the claimant had been given the fact-finding report, he might have appreciated immediately that its outcome was a great deal more subtle and nuanced than that. It is more difficult to see how he, or Mr Norville, maintained that view at this hearing, in light of disclosure. The report was not a binary "not guilty". It was not a vindication. As it was not a grievance outcome within the grievance procedure, there was no question of anything

being upheld or not. Its approach was far more in keeping with the spirit of DaW, namely that of resolution and problem solving.

91. The claimant asked about mediation, and I accept that he was frustrated to be told that mediation with unwilling parties was not an option, and that A and B remained unwilling to mediate.

92. Mr Rackham wrote to the claimant to confirm the outcome (363) on 27 September. It was a subtle piece of drafting. I do not fault Mr Rackham if, at that stage, he failed to realise that more direct language might have helped the claimant understand how matters really stood. Mr Rackham avoided the language of direct management instruction, when perhaps that was what was required. I accept that the claimant was troubled to read that he had agreed to matters which, certainly by the time he read Mr Rackham's e-mail, he did not agree. A critical portion was,

> "It was suggested to you that, as your work frequently took you away from Colindale, you could manage your remaining work time so that you did not come to Colindale, working instead from another NHSBT location. You raised a concern that this might be seen as you being pushed out, and sending a signal that a persistent complaint, even if unfounded, would result in the subject of that complaint being removed. [We] reassured you that this could be managed in such a way that your work pattern had simply changed and so prevent this being implied and on this basis, you agreed that this was a workable solution ...
> It was also agreed that Fidelma would work with you to arrange your diary such that you only visited Colindale when you had a specific need to be there."

93. On the same day, Mr Rackham and Ms Elder had meetings with A and B and sent confirmation letters to them on 27 September (365 and 366). They were told that:

> "We would not be taking the matter through to a hearing because the nature of the issue was such that a firm conclusion was unlikely to be reached and that it would cause unnecessary stress to everyone involved. We did try to emphasise that we had taken the matter very seriously …
> We felt that two actions needed to be put in place. Firstly, we felt that you needed to feel secure in your working environment. The work pattern of the other party has changed such that they will not routinely be in Colindale as part of their work; this will facilitate you being more secure in your work place. Secondly …. we recommended that mediation takes place between you and the other party. At this time you felt that you were not ready to take part in mediation, but you did agree that a member of staff from HR would contact you in a week or two to investigate this possibility further.
> We also agreed to ask the line manager of the other party to be in contact with your line manager so should the other party have a specific need to come to Colindale you would be aware."

94. Mr Rackham did not tell A and B what management instruction had been given to the claimant, if any, simply that his work pattern had changed. He made clear to A and B that the claimant would return to Colindale with management consent if required and was not excluded from Colindale. He might perhaps have been firmer in explaining the necessity of mediation.

95. Ms Bowen cross examined on what steps were taken to pursue mediation with A and B. It was thought that HR had contacted them after 27 September but that they remained unwilling to mediate. The only specific reference in evidence to the point having been pursued was in the outcome of the claimant's grievance appeal on 23 February 2018 (ie well after the events before the tribunal) in which Mr Kevin Price, Regional Operations Manager, expressed himself more pro-actively (645),

> "The [appeal] Panel view is that a review of the temporary arrangements and progress towards mediation should have been undertaken and at that point introduce a time scale for resolution by which time, A and B would need to have committed to undertake mediation. If this could not be agreed, A and B would need to understand that the temporary arrangements for you to work flexibly from other centres would end and that you would have returned to work from Colindale, unless there were any other alternative arrangements or agreements reached with you during the mediation process."

96. That was the only evidence to suggest that the respondent would have made clear to A and B that the decision about progressing to mediation was not theirs alone. Mr Price's wording strongly suggests that this did not happen.

97. The claimant replied to Mr Rackham on 29 September to say that he had not agreed to relocate his work base and to raise concerns about a failure to comply with the DaW policy.

The claimant's grievance

98. On 5 October the claimant had a meeting with Ms Murphy and handed her a formal grievance (371). He complained that the DaW policy had not been followed correctly and gave, as his preferred outcome,

> "A review of the case and where there is evidence that the allegations are malicious and in collusion with others these are investigated under the disciplinary policy".

In his supporting evidence he wrote that the issues included matters that were "trivial and unsubstantiated" and "malicious" (375). The claimant was plainly unaware, both at the time and at this hearing, that that language captured precisely what Mr Rackham and Ms Elder had decided to avoid, namely zero-sum confrontation, which could lead to dismissal.

99. The FAQ attached to the respondent's grievance policy includes (57),

> "Where possible, if both parties are unable to agree a solution in the informal stages, NHSBT will maintain the status quo or keep any proposed changes the same until an issue is resolved."

100. The claimant considered that the status quo was that his working base was Colindale, and that that should have remained the position until a resolution of his grievance.

101. Ms Murphy at some point reported to her line manager, Mr Bateman, that there were concerns about the claimant's response to the meeting of 22 September. As a result, and on HR advice, Mr Bateman wrote to the claimant on 13 October. He told him that his grievance would be formally investigated, and wrote (396-396A),

> "I am instructing that with immediate effect you adhere to the request not to work out of Colindale until such a time as the outcome to the investigation is reached and communicated".

102. The claimant agreed in evidence that there could be no lack of clarity about that language. He worked away from Colindale, mainly at home, for a period. He was not directed where to work, only where not to work, and he did not have to work at home. There were facilities for him at any other NHSBT workplace, including central London. The claimant asked for his home to be assessed as a potential work station; it was common ground that that was delayed.

103. The claimant came to Colindale on 21 November. He attended a training event at which he gave a presentation. He had no interaction with A or B, but A reported having seen him (421) and was described as 'distressed' that what she understood to be the procedure, namely that his line manager would tell her line manager that he was coming to Colindale, had not been followed. When challenged about this, at the time and in evidence, the claimant referred to an e-mail which he had sent Ms Murphy on 18 September (351) 'For info' to notify her that he would be delivering training at Tooting on 16 November and Colindale on 21 November. Ms Murphy accepted that she had received the e-mail but had not registered its possible importance at the time, or its significance in light of events since 18 September.

104. The claimant said that he had reminded Ms Murphy in conversation on 16 November that he would be at Colindale on 21 November. Ms Murphy denied this. I accept Ms Murphy's evidence that she was not made aware of the claimant's intentions for 21 November. The claimant may, in conversation, have referred to an existing training commitment or a previous email. I do not accept that he said in terms that he would be on site at Colindale five days later on 21 November, such that he was asking Ms Murphy to communicate through A and B's line manager.

105. I accept Ms Murphy's evidence because she had no reason whatsoever to be complicit in a clear breach of the written instruction of 13 October, and of her undertaking to co-operate with A and B's line manager. The claimant, furthermore, given his experience and seniority, could reasonably be expected to have drawn to Ms Murphy's attention that an agreement that she may have given on 18 September to his attendance at Colindale might have been changed by the circumstances of 27 September and 13 October. He was an assiduous user of email, and a one-line email would have sufficed. I find that he did not do so. His action in coming to Colindale on 21 November was at best ill judged.

106. The claimant's unexpected presence at Colindale triggered a flurry of e-mails (421-3). On the morning of 22 November, Ms Elder e-mailed Ms Murphy to say that A had 'contacted us distressed' as she had not known that the claimant would be at Colindale. I accept the integrity of Ms Murphy's reply, which was that she had not been made aware that he would be at Colindale. Ms Murphy reported the matter to Mr Bateman the same morning.

107. She also spoke to the claimant, whose e-mail that evening captures much of the thoughtlessness that he brought to the event (423). There was at once a primary dispute of fact between them as to whether the claimant had specifically drawn to Ms Murphy's attention on 16 November that he would be at Colindale on 21 November. The claimant wrote to Ms Murphy:

> "I said that I was not aware of restrictions that prevented me from visiting Colindale after making you aware of a specific need to be there."

108. The claimant might have thought out the sequence of events and the letter of 13 October as emphasising the need for clarity. He might have considered the use of e-mail to create a timed written record of his notification to Ms Murphy. He wrote further:

> "I mentioned that there is an ongoing grievance and the procedure states that status quo should prevail…."

109. The claimant might have given thought as to whether that unilateral interpretation could not more prudently have been discussed with management.

110. Mr Bateman wrote to the claimant the following day to tell him that (429),

> "Should you not adhere to this clear instruction [to not attend Colindale until such a time as the outcome to the ongoing investigation is reached and communicated] on a further occasion this may result in disciplinary action being sought which could potentially be considered as serious misconduct."

111. The claimant set out a number of matters by way of reply, and wrote (439):

> "I will comply with your instructions under protest pending the outcome of the grievance.
> I consider the breaches of my contract of employment and other events have caused the loss of "trust and confidence" in NHSBT, and puts me in an untenable position. This may leave with me no option but to resign and make a case for constructive dismissal".

112. Meanwhile, Mr Yeatman had been appointed to conduct the grievance enquiry. Mr Yeatman's notes of interviews were in the bundle (450-457). The typescripts are mistakenly dated 2018, when clearly they refer to interviews in November 2017. None of these notes was known to the claimant at the time of his resignation. Ms Bowen's meticulous and thoughtful cross examination could not therefore go to his reasons for resignation.

113. It was nevertheless useful to note that Mr Rackham described A and B's allegations as 'vague and unprovable' but made the interesting observation that he was clear on a number of points. They were that A (presumably) was 'very distressed;' that both A and B were stressed; and that he described the claimant variously as, 'unaware', 'bemused' and 'demonstrating lack of emotional maturity' (450). Ms Elder described the case as 'all about perception'. She captured the outcome well in two sentences (453),

> "I thought that if it moved to formal nothing would be proven and it would be putting all three under a stressful situation. We wondered if that was the right thing to do."

114. She commented:

> "Fidelma had concerns before we met him due to his lack of emotional intelligence."

115. On 4 December, the claimant and Mr Norville attended an outcome meeting with Mr Yeatman, who was supported by Ms Escreet of HR. I accept the grievance outcome letter of 7 December (467-470) as broadly accurate. It should be read in full. The claimant spoke to his grievance, and the outcome letter refers to a number of recurrent points.

116. It repeats that mediation was desirable, but reiterated that A and B felt unable to take part at present, a decision that the respondent wished to respect. I accept that Mr Yeatman set out his understanding of the position as it then stood.

117. At the heart of the outcome was the following (468-9), where Mr Yeatman addresses something of the tensions within the DaW policy, and the objectives sought in this case:

> "We discussed with you the process that was taken in regard to the Dignity at Work policy. We confirmed that at no point did the process move to the formal point of the policy and that it was a fact-finding exercise. Unfortunately; as you are aware some points you highlighted in the policy could not be adhered to, as the policy prefers situations such as this to initially be dealt with by speaking with the individual that may be causing you concern and to participate in mediation. However, as we discussed this is not always appropriate as each case is different and has to be dealt with on its own individual merit. We have to ensure that we can work flexibly within the policy to support individuals appropriately.
>
> We also explained that it was clear that the fact finding was approached correctly and that the investigators felt that they had gathered the evidence needed by interviewing all three individuals. We explained that it was agreed to send the case to senior managers to consider due to the complex nature of the case and due to the seniority. We felt that this was reasonable and ensured that the right consideration was given to the case …..
>
> It was clear to us as a panel that all the decisions made in regard to this case, from it being treated as informal to referring it to senior managers and then the overall outcome and recommendations were all made to ensure that it was given the right consideration and also to safeguard both yourself, A and B."

118. Mr Yeatman then went on to the issue of working away from Colindale and explained why that was considered reasonable "as an interim measure" which,

> "allowed you to have space from Colindale and to safeguard both you, A and B. The aim of this was to hopefully lead to the outcome you requested and that was to eventually undertake mediation."

119. The claimant was informed of his right of appeal.

120. The following day the claimant tendered his resignation (471-473). He cited four instances of fundamental breach of contract and six instances of breach of trust and confidence, which came to be mirrored in his constructive dismissal points to which I turn below.

121. On 12 December the claimant put in a grievance appeal supplemented with lengthy grounds later. I do not turn to those. I add for completeness that on 21 December the claimant had a meeting with Mr Bateman and an HR representative to discuss the management of the claimant's resignation. It was specifically not a meeting to discuss the outstanding grievance appeal. There was discussion of arrangements for work and handover during the claimant's 12-week notice period (451). The claimant attended a grievance appeal meeting with Mr Kevin Price on 2 February, and received the outcome in two stages, of which the more comprehensive was by letter of 23 February (644-649).

122. The grievance appeal outcome recognised two matters which Mr Price found should have been done differently. First was that the review by Mr Rackham and Ms Elder should have involved a National Senior staff side representative. That was an express breach of the DaW policy. Mr Price apologised for the error and recorded that he was "satisfied that there was no evidence presented to suggest that this oversight had negatively impacted on the progress to resolution." The second matter on which the panel commented was the absence of a backstop on the mediation process, and its findings are set out above.

Constructive dismissal discussion

123. I now turn to the eleven points identified by Judge McNeill QC (13-14) addressed in her closing skeleton by Ms Bowen.

> "(i) Unduly harsh and disproportionate treatment with regards to being excluded from my place of work as defined in my contract of employment and subsequent management instructions related to this issue, outside the formal disciplinary process."
>
> (ix) Proposing changes to my working arrangements and using these to justify the decision to instruct me not to work from Colindale"

124. Ms Bowen grouped points 1 and 9 together. They related to the decision to instruct the claimant not to work from Colindale; or, mirroring vocabulary used elsewhere in the case, to ban or exclude him from Colindale.

125. I find as fact that Colindale was the working base identified in the claimant's contract of employment. It was common ground that as a national LQS the claimant had responsibility for the respondent's locations across the country. I accept that he routinely undertook a significant amount of national travel, and stayed away from home relatively frequently. He was a respected and senior figure, who was trusted to work autonomously. I accept that the respondent's systems enabled the claimant to work remotely from any of its locations, and if need be from home. I accept Ms Murphy's observation that it would in general terms have not been unusual for colleagues not to see the claimant at Colindale for long periods of time, and I accept the common sense proposition that that time was not in a regular pattern. He might in other words have weeks of working away from Colindale and then a week based there. I accept that working away from Colindale out of personal choice or convenience would be different for the claimant from working away from Colindale because he had been told to.

126. I find that there was an escalating series of attempts to impose on the claimant a discipline of not working in a manner or pattern which would bring him into contact with A or B; and that so long as that pattern appeared effective (ie January to May 2017) it was left in place. When it appeared not to be effective, the respondent sought to manage a separation, then to express itself in terms of suggestion, and on 13 October it gave formal instruction (which was not acted upon fully).

127. I do not accept that the effect of the formal instruction was to impose on the claimant a variation of the provision of his contract of employment which identified Colindale as his base. I find that it remained his base; however, on a temporary basis, his access to it was restricted, then suspended, and his autonomy to select where he worked was reduced to that extent.

128. My finding is that the respondent pursued an informal policy, adopting the short to medium term tactic of separating the claimant from A and B with the long-term strategic view of dampening down conflict and enabling all to resume their working lives. The respondent's intention was described in evidence as that of creating space, both emotional and physical, between A and B and the claimant.

129. It is correct that the matter was dealt with outside the formal disciplinary process. The respondent was under no obligation to engage in the disciplinary process. The DaW policy gave it express discretion not to do so.

130. I invited Ms Bowen to comment on my observation that it appeared counter intuitive in a constructive dismissal case to complain of a failure to trigger the disciplinary procedure, given that that procedure inherently carried the risk of dismissal. Ms Bowen replied that the disciplinary procedure had the advantage of certainty. It would give the claimant the opportunity to

challenge specific allegations, produce his own evidence, and, he hoped, to refute them. It would demand an outcome on allegations, accepting the risk that that outcome might be unfavourable.

131. I find that the respondent had reasonable and proper cause to go through the DaW policy in the first instance, and having done so to form the view that the better management course was the non-disciplinary option offered by the DaW policy. I find that in doing so, it acted within its powers. I find that its intention was to create space which would enable A, B and the claimant to continue working for it. That is the precise opposite of the definition of repudiatory conduct in constructive dismissal. The respondent aimed to avoid the risk of termination of the claimant's employment. That was neither calculated, nor, seen objectively, likely to harm the relationship of trust and confidence.

132. I accept that the claimant was a mobile senior officer whose contractual base was Colindale. I accept that any restriction in access to his base was to be temporary and was conditional. The conditions included the claimant's strict compliance in good faith with notification obligations. It was a policy of separation and no more. I accept that A and B could not be required to work elsewhere because they were not national officers. I accept that my own questions about whether the location was not big enough to accommodate all three of them were misplaced.

133. In the context of seeking to avoid binary confrontation, I find that the respondent had reasonable and proper cause for its decisions and actions, with the view to creating space, and facilitating a period without confrontation, after which mediation might be possible. I accept that greater reassurance and clarity in writing might have been given to the claimant.

> "(ii) Not following the DaW and disciplinary policies by dealing with the issues informally outside the agreed procedures, leading to an unfair outcome and failing to resolve concerns in a timely manner.
>
> (v) Causing me to suffer undue stress by the failure to resolve dignity at work issues in a timely manner."

134. Ms Bowen grouped points 2 and 5 together as breach of the DaW policy. I accept that between A's complaint of 4 January 2017 and a fact-find process outcome of mid-September 2017 appears long. I also note that there appears to have been some discontinuity of HR advisors.

135. The respondent was entitled under the DaW policy to proceed informally in the first instance. I am sceptical that the claimant and Mr Norville were uncertain or misled about this, and confident that both understood that a disciplinary policy was not being followed.

136. I accept that the DaW policy places a high value on each of: informality; the absence of the written language of management; and problem solving, (perhaps even expediency); at the expense of formality, prescriptive writing, binary outcome, and rigid adherence to principle.

137. I find that from January 2017 until the claimant resigned A and B had refused to engage in mediation. I have found above that there was no evidence that this was pursued by HR after 27 September 2017. I have quoted Mr Price's comments on what might have happened.

138. It was common ground that although a blank cover sheet from the disciplinary policy was used for the investigation report (242) the formal disciplinary procedure was never triggered.

139. In broad terms, I find that the DaW policy was followed. I find that the disciplinary policy was not in play and was therefore not followed. I repeat my above findings about the respondent's choice of informal resolution over formal disciplinary action.

140. I agree that the matters were slow to resolve. However, it should be borne in mind that the process was effectively on hold from 4 January until late May 2017, during which it appeared to the respondent that the informal separation agreement between A and B and the claimant was working. After that, the matter came to Mr Rackham after just under four months, including delays inevitably caused by summer holidays and some caused by sickness. I do not find that there has been a breach of procedures and I do not find that there has been such delay as to constitute repudiatory conduct.

141. I do not accept that the outcome was objectively unfair or calculated or likely to destroy the relationship of trust and confidence. I accept, inevitably, that there may have been a communication issue. However, objectively underlying the outcome was the desire of the respondent to find a mechanism for maintaining the employment and employment relationship of all three individuals, A, B and the claimant. That was ample proper cause for its actions.

> "(iii) Failing to maintain the status quo"

142. The claimant here relies on the requirement (set out in the FAQ appended to the non-contractual grievance procedure) that pending resolution of a grievance, the status quo be maintained. The claimant's case was that by presenting his grievance on 5 October, he had an overriding right to preserve what he identified as the status quo, which was having his base at Colindale.

143. I find that the position after 11 January, and at time of presentation of his grievance in 5 October, was broadly that the claimant would in good faith adhere to management requests and instructions to avoid contact with A and B; which included working away from Colindale, and attending there only after prior notification, even if it remained his contractual base. The position was not set in stone, and was liable to be revisited if circumstances changed. I find that the status quo at 5 October was that Colindale remained the claimant's contractual base, but that he had been instructed to follow conditions set by the respondent before going there.

144. It seems to me that there are two flaws to the claimant's approach to this point. One is that he has taken the status quo to imply an unconditional right of attendance at Colindale; the other is that he has plucked one sentence out of the grievance procedure FAQs as if it were a trump card. The policies are silent on the relationship between a grievance and the outcome of a related DaW fact finding. The request to work away from Colindale was the product of the reasoning and processes described above and therefore, in my judgment, was made for reasonable and proper cause. The claimant's return to Colindale, in the circumstances prevailing at the time of his grievance, had the potential for triggering more serious conflict. The respondent had a reasonable and proper cause to avoid that.

> "(iv) Was being "constrained to work from home".

145. I find that in light of his seniority and experience, and of filling a national role, the claimant had the right to work largely autonomously, as would be expected of any senior and trusted colleague. This included the right to work from home.

146. In instructing the claimant not to work at Colindale, the respondent understood the following: that in general he filled a national role which took him away from Colindale for over half his working time; that anticipated project work at Birmingham was on hold in August 2017, but liable to re-open at any time; that the claimant's options for working in London when not in Colindale included central London, which was reasonably accessible from Colindale and for which travel expenses would be payable; and that his options included working at his temporary home, which was a small flat in Colindale itself. I accept that it took some time to arrange an assessment of the claimant's homeworking facilities.

147. I do not accept that the claimant was required or instructed to work from home. I do not consider that it was unreasonable that the respondent asked him, at its travel cost, to work at another location, particularly as one was reasonably accessible from his home. I accept as a matter of flexibility that the claimant was offered the opportunity to work from home, subject to issues of safety and isolation being resolved.

148. This portion of the claim fails on its factual basis. I repeat that my finding is that the claimant had options for working away from Colindale, one of which was home. I repeat that the requirement to work away from Colindale was imposed for reasonable and proper cause and was not in repudiatory breach.

149. This item ends with the words "and not being able to attend events at Colindale". I reject the factual premise. Until 21 November 2017 the claimant had the facility of arranging with Ms Murphy for attendance at Colindale. All that was required was for the claimant to notify Ms Murphy, and for her in turn to notify the line manager for A and B.

> "(vi) Failure to protect me from harassment by work colleagues and creating a hostile work environment and not taking a 'zero tolerance' response to bullying and harassment."

150. It was difficult to be clear what precisely was the complaint against the respondent. The respondent had no reason to believe that the claimant had been harassed by A or B. The claimant had not disputed the primary trigger event, in which he had spoken of his romantic feelings, B's complaint of email traffic was based on numbers alone, a matter which could be verified. The claimant had admitted having had a row with A in August 2016, for which he had subsequently apologised to her.

151. I accept that the DaW policy on its face appears to offer support to a complainant: that is not unusual in a harassment procedure. It recognises that offensive conduct may be unintentional.

152. In submission, Ms Bowen relied on occupational health referrals made by Ms Murphy in the summer of 2017. It was common ground that Ms Murphy had made occupational health referrals, which referred to the claimant's "erratic behaviour" (a phrase used initially by B when interviewed in June) and to her concerns about the claimant's mental health, a matter which the claimant found offensive, and which the occupational health service found unevidenced.

153. I accept that the occupational health referrals were made; that in making them Ms Murphy relied in good faith on information and concerns expressed by others; that the claimant objected to the first referral and was re-referred; and that the outcome was that there were no underlying health or mental health issues found.

154. Every employee had access to the DaW policy. It was not open to the respondent to impede access to it. The respondent was entitled and duty bound to manage the complaints from A and B in the circumstances set out above on the basis on which it did so. When faced with an allegation of 'erratic behaviour' the respondent faced Hobson's choice: if it did nothing, it could be criticised; if it dealt with the allegation as a misconduct matter, it might be thought to disregard the realities of workplace stress, and out of character behaviour of a long-serving colleague; if it asked for health guidance, it risked giving offence to the claimant. It is not for me to say which was the right response; it is sufficient to find that the option of seeking health guidance was legitimately open to the respondent, as a possible explanation for what Ms Murphy had been told. I find that the referral was for proper cause.

> "(vii) Removing key responsibilities from my job"

155. This was referred to at the hearing as 'job erosion.' The pleaded allegation was "removing key responsibilities from my job" (13). When asked to particularise this, the claimant produced a three-page document (35-37). The first eight matters which he set out took place between 2011 and 2016. It follows that they cannot have been caused by A's complaint of 4 January

2017. Further, they are consistent with a wider pattern of change and restructuring, unrelated to the events in this case.

156. The claimant wrote (36),

> "Since 2011 there has been a continuing and cumulative removal of roles and job responsibilities from the Claimant."

157. Ms Bowen limited her reliance to nine matters said to have taken place in 2017 after A's complaint. She put the point as,

> "In 2017 the claimant experienced job erosion. This coincided with the complaints and investigations. It is averred that the two matters were linked."

158. Ms Murphy's witness statement answered each of the nine points; Ms Bowen cross examined on them for about 45 minutes. I make a number of general findings before dealing with the points individually.

159. I accept that despite the claimant's seniority and experience, he had limited insight into management processes; and that Ms Murphy brought to these events the broader vision of more senior management. I accept also that the claimant's perspective was shown throughout these events, and this hearing, to have been clouded. I find that witness' comments on his lack of insight were, in general, well made. I find that one aspect of this was that he often took chronology as proving causation.

160. I accept, as a matter of general experience, that the respondent, as a public sector employer, has in recent years been called upon to provide more and better services with fewer resources. I accept that reorganisation and restructuring, often on a short-term basis, are common techniques for doing so: indeed, I accept Ms Murphy's evidence that during 2017, at a time when the claimant alleged that he was suffering job erosion, he was allocated additional responsibilities consequent on the retirement of a colleague.

161. I accept Ms Murphy's evidence that much of the work of her team, including her own and that of the claimant, has been based on individual projects. I also accept that the projects may prove uncertain or unpredictable in their development, which may include periods of intense demand followed by periods of lull. In that context, I accept in particular Ms Murphy's evidence about the CSM Programme; and that it was thought for several months until about June 2017 to be a large scale project which would require the claimant to spend a lot of time in Birmingham; but that unexpectedly the position changed in the second half of 2017, when the programme was 'reset.' That led to a reduction in the requirement for the claimant's input, although Ms Murphy understood that the reduction was itself likely to be temporary.

162. Within that framework (all of which I find was within the knowledge and experience of the claimant) I find as follows.

163. Following the claimant's numbering (36-37), point 9 related to stopping his involvement in January 2017 in projects in which A was involved. I accept

Ms Murphy's evidence that this was addressed as part of the claimant's separation from A. He retained his responsibilities and roles, but was required to avoid working with A. The reason was for the reasonable and proper cause of achieving a period of separation between them, as previously discussed.

164. Points 10 to 17 were all in the period June to September 2017. The claimant made no complaint of job erosion in the period from early January to the end of May. That was the period when the separation arrangement appeared to be working. The absence of alleged job erosion in that period seems to me evidence that the matters before me were part of proper management processes, and not related to any consideration arising out of A's complaints.

165. Point 10 was that in June 2017 the claimant was deprived of the role of line managing a direct report. I prefer Ms Murphy's analysis, which was that the line management role was undisturbed, but that a more senior manager (Assistant Director) sat in on the team in which both worked. Under point 11, I accept Ms Murphy's evidence that the claimant's role in Continuous Improvement was undisturbed until his resignation. I accept her evidence on point 14, which was the same point about a different area of responsibility. The common thread of these three points was, I find, that I reject the complaint that there was a removal of roles from the complaint, even if there were short term expedient arrangements to deliver them.

166. Point 12 raised a matter of professional judgement. The claimant complained of loss of responsibility in a project which he called 'Tissue and eye services supply chain modernisation.' Ms Murphy's evidence was that the project (as its name suggested) involved a 'Tissue' element and a logistics element. It had originally been discussed as a logistics project; but had later been identified as a project with its core in Tissue and eye services and had therefore been led in that service. That was the reason why the claimant had lost lead responsibility for it. I accept that evidence, consistent with Ms Murphy's vision of the bigger management picture.

167. Ms Murphy agreed and explained the factual basis of point 13, which related to the transfer of health and safety responsibilities. She attributed this to part of a larger development, when the respondent's Senior Management Team had been slimmed down, and its work supported by a larger Leadership Team. The claimant had been one of the managers who had been on the large SMT, and then transferred to the Leadership Team. He had therefore been one of a number who experienced a loss of status, and a restructure of responsibilities. Her evidence, which I accept, was that this was part of wider developments affecting senior management, unrelated to any individual issue affecting the claimant. It follows that I accept that the transfer was unrelated to A and B's complaints.

168. Point 15 illustrated well many of the faults in the claimant's analysis. His complaint was that his involvement in hospital audits was questioned and reduced. Ms Murphy's evidence was that an Assistant Director introduced a

review of the historical process of offering audits to other NHS locations, which applied 'Directorate wide.' It came about as a result of concerns about the use of the respondent's resources. I accept that the substance of this complaint relates to a wider decision affecting the claimant and others, which must by definition have been unrelated to any individual, specific issue affecting the claimant.

169. The factual basis of point 16 (that Ms Murphy herself took over a responsibility for non-clinical issues) was agreed. Her evidence was that this was a responsibility which the claimant took over in March 2017, ie at the very time when, on his case, his responsibilities were being eroded. The reason he did so was reorganisation following the retirement of a senior colleague. Ms Murphy's evidence was that this area was later realised to require a technical expertise in which she was superior to the claimant, hence it was allocated to her. Point 17 raised a similar point. It related to a second responsibility which was allocated to the claimant on the same retirement, and which, after management review, was then re-allocated. I note the common thread in these two points: contrary to his case that his role was systematically eroded during 2017, he was temporarily assigned additional responsibilities when Mr Moore retired. That of itself is consistent with the wider picture of restructuring of management responsibilities within the respondent. When the respondent reviewed the position, it concluded that those responsibilities sat better elsewhere.

170. I find that taking each of these nine points separately, it has been shown that each step or decision was taken for reasonable and proper management cause.

> "(viii) Removing access to manufacturing and logistics areas in Colindale for 4 weeks in May 2017."

171. The claimant referred to an episode on May 2017 when his pass access to the manufacturing area at Colindale was withdrawn.

172. The evidence on this was not fully clear. The claimant reported that his access had been barred and remained barred for some weeks. When told of this, Ms Murphy immediately tried to have it reinstated. The matter was looked into by Ms Ranson during the investigation, and A and B's line manager stated (503):

> "I asked for his access to be removed temporarily as I received anecdotal evidence that he was entering the department and removing documents, inspecting areas and interrupting staff. After speaking with his line manager… I asked for his access to be reinstated. This was slightly delayed as there was a problem with the system."

173. The source of the line manager's anecdotal evidence appears to have been B. B told Ms Ranson and Ms Kwenda that the claimant's "name badge was blocked from entering hospital services so that he could not go in there wily nily" (265). It is unclear from that record whether B is speaking from personal knowledge, or simply passing on information. It is also unclear whether the claimant had actually entered the area without warning, or

whether B was concerned that he might do so: I have some confidence that if he actually had done so, B would have given the time and details.

174. I find that A and B's line manager asked for the claimant's access to be taken down because she understood that he was or might be interrupting work and possibly causing distress to A and B. When a protocol about this was clarified with Ms Murphy, there was a request to reinstate access, which was delayed by IT issues.

175. I accept that the evidence on this is muddled. It is not sufficiently clear to me that the complaint of entering the area indiscriminately originated with B or was reported by her, or when or to whom, or if it happened at all.

176. The line manager's response, written over three months later, is a vague recollection. I accept it so far as it goes. The line manager of A and B understood that A and B wished and were entitled to be protected from unwanted contact, not necessary to work, from the claimant. I agree entirely with the claimant that her correct course would have been to notify Ms Murphy, line manager to line manager, at the time that the claimant's access had been removed, giving specific reasons, so that the claimant could at least be spared the embarrassment which he must have suffered when he found that it had been done.

177. I accept however the line manager's statement that she acted for reasonable and proper cause and that her intention was to continue the separation arrangements which were understood to have been in place since January. In a sense, her action was an extension of that separation, although carried out unilaterally, and in what seems to have been a thoughtless way. It is to the credit of all that the matter was resolved promptly. I accept the explanation for delay being caused by an IT failing.

> "Suggesting that because of my age and possible retirement in the future that this would resolve the concerns."

178. I accept that Ms Murphy and Mr Rackham understood the claimant to intend to retire in April 2018. I make no finding as to whether their understanding was accurate. I accept that in light of that understanding they gave consideration to whether any interaction issues involving the claimant might be short-term.

179. Ms Murphy's evidence was that it was "common knowledge" that the claimant planned to retire in April 2018. The claimant could not give evidence of common knowledge, but denied that he planned to retire in April 2018. He said that he had considered it, looked at the financial implications, and realised that he should defer his retirement until his pension position improved.

180. I accept that the respondent's managers who dealt with this matter genuinely understood in good faith that the claimant's retirement was a possibility. I accept that that was a legitimate consideration. I do not accept that it was causative and I do not accept that it was repudiatory. It was

reasonable and proper to have regard to the possibility that the issue of separating workers in conflict might resolve itself through natural wastage within a short time frame.

> "(x) Suggesting that as a senior manager I should accept the exclusion from working from the Colindale site rather than move the individuals who were harassing me contrary to the dignity at work policy."

181. Ms Bowen submitted in short that the parties should have been treated appropriately regardless of seniority. Using seniority as a way of justifying the response to the investigation outcome was to disadvantage and undermine the claimant's position. It was unreasonable to rely on seniority to achieve that inequitable outcome. This contributed towards a breach of the implied term.

182. In disagreeing I accept the caution of both counsel. During submissions I asked whether relocating A or B was feasible, as A certainly and B perhaps had done a protected act within the meaning of s.27 Equality Act 2010. Both counsel hastened to remind me (although I was well aware) that no witness on behalf of the respondent had given evidence that this was a consideration in their decision making. I therefore disregard it, while adding the comment that it seems surprising after many months of advice from a succession of HR specialists.

183. The most cogent reference to seniority which I have seen was in the outcome report (252). The claimant was seen to appear unaware of the impact on others of differences in status. Putting it simply: if a band 5 colleague interrupted his work, he had the status and authority to ask the colleague not to. If he interrupted the band 5 colleague, she had neither status nor authority. Added to the differences in banding were the factors of age, experience, profile with colleagues, status within the respondent, and gender. The claimant seemed unaware of the many power imbalances in his relationships with A and B.

184. The respondent maintained the position that it was not feasible, in the short term at least, for the claimant and A and B to work together at Colindale. The claimant was the obvious person to relocate because his seniority carried with it autonomy in a role which in any event took him away from Colindale. There was no evidence that A or B could feasibly work away from Colindale, and no evidence that either should work away from her existing team and line management. The respondent was not under an obligation to treat the claimant equally with A and B, and Ms Bowen carefully submitted that the respondent was duty bound to manage all three 'appropriately;' she did not use the word 'equally'.

185. I find that there is and was no obligation to treat complainant and person complained against on equal footing; and that any disparity in treatment was due to the claimant's greater flexibility and autonomy, of which his seniority was part. If and to the extent that seniority was in fact a consideration, I do not fault the respondent on that basis

Conclusions

186. In considering the matters relied on by the claimant, whether individually or cumulatively, I must approach the matter objectively. It is easy to see with hindsight that matters looked to the claimant potentially worse than they were. It is also easy to see with hindsight that the claimant manifested throughout these events qualities noted at the time by senior colleagues: lack of insight, naivety, a quality which they called lack of emotional maturity. It is also easy to see how entrenched his views have become.

187. I add a further overarching comment which I hope does not read as a discourtesy: this was a sad conclusion to a lifetime in public service, and probably an avoidable conclusion.

188. When I approach the matter through the traditional framework of Western Excavating, I find that it has not been shown that the respondent's conduct, viewed through the individual points, or cumulatively, was in any respect without proper or reasonable cause. I find that it has not been shown that the respondent's conduct, viewed objectively, was in any respect calculated or likely to destroy the relationship of trust and confidence. I therefore do not find that his employment was terminated in accordance with ERA s 95(1)(c).

189. Although it is strictly not necessary for me to find why the claimant resigned, I find that he did so because he interpreted the grievance outcome as leaving him locked into a permanent limbo of exclusion from Colindale, with an unresolved sense of injustice. While I can understand aspects of that perception, my finding is that objectively it was unjustified.

190. Finally, I turn to the 'last straw' questions in Kaur. I answer them as follows.

191. What was the most recent act which triggered resignation? I accept that it was the failure of his grievance, as a result of which the claimant perceived that there would be no short-term resolution of his desire to return to work at Colindale.

192. It was not said that he has affirmed.

193. Was the grievance outcome a repudiatory breach of contract? I find that it was not.

194. Was it nevertheless part of a course of conduct or series of acts which cumulatively amounted to a repudiatory breach? I find that it was not.

195. It follows that the claimant's claim fails.

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Employment Judge R Lewis

Date: 9 / 9 / 2019

Sent to the parties on: 26 / 9 / 2019

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For the Tribunal Office