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EMPLOYMENT TRIBUNALS

Claimant: Ms N Wyatt

Respondent: Basildon & Thurrock University Hospitals NHS Foundation Trust

Heard at: East London Hearing Centre

On: Tuesday 17 September 2019 to Friday 20 September 2019
– (Friday 20 September Tribunal only)

Before: Employment Judge Prichard

Representation

Claimant: In person, accompanied by Ms E Wyatt, daughter
Ms C Logie, friend

Respondent: Mr S B Sudra (counsel instructed by Capsticks Solicitors,
London SW19)
Ms E Stokes, solicitor
Ms Z O'Neill, paralegal

RESERVED JUDGMENT

It is the judgment of the Employment Tribunal that the claimant's complaint of constructive unfair dismissal fails and is dismissed. The claimant resigned and was not constructively dismissed.

REASONS

1 The claimant Nicola Wyatt worked for the respondent from 10 October 2012 until her resignation with effect from Monday 21 May 2018 when she resigned claiming, at the time and since, that she had been constructively unfairly dismissed. Her role was as Audit Clerk assigned to the Essex Cardiothoracic Centre. The role of an audit clerk involves audit collection for the critical care department recording admissions, discharges, blood results, surgical interventions, the number of organs supported, and bed days.

2 Clerks would enter this information onto the critical care electronic database known as medICUs. This record relates to the Intensive Care Unit office which was situated around the corner, a few steps away from, the clinical area and the patient bays. That layout has been studied in great detail. Much of the focus of the case has been upon the demarcation between the clinical areas and the more office based non-clinical area which has no patients in it.

3 It is easiest to explain at the start here the focus on the clinical and non-clinical areas. The greatest theme in this case has been the application of the staff uniform policy which was a matter of great controversy between the claimant and management. It is common ground that in the clinical areas everybody is required to have their hair up above the collar, not just tied back, but up. They must also be bare from the elbows down in order that hand and arm washing is effective within the clinical area, to prevent infection. I shall further develop this theme in the narrative below.

4 The claimant originally worked under the Ward Matron as her line manager, Ms Sian Morgan. They had a good working relationship. Indeed, Ms Morgan provided a statement for the claimant for these proceedings but has not attended. When the claimant started she shared her office with Noel Watson who at the time was the Critical Care Outreach Lead in the CTC. Ms Morgan interviewed and appointed the claimant to her post. Colne Ward is a 22-bed ward which currently only has funding for 14 beds.

5 I was referred to the claimant's job description which contains the following phrase

"The post holder will work an integral member of the Cardiothoracic Critical Care Team liaising with all members of the multi-disciplinary team on a daily basis to ensure comprehensive and accurate data collection analysis and reporting."

It also contains the following under "Duty of communication":

"Attend bedside of each patient on a daily basis to collect and distribute audit forms and discuss any queries with individual nurse".

I am told in practice that is not what happened, but that the claimant would collect the audit forms from the Ward Sister's office but she might have had to make individual queries about those forms and the data with individual nurses in the clinical area. Anyway, the claimant accepted that going to collect forms from the Ward Sister would involve entering the clinical area, even without going to a patient's bedside.

6 The claimant states that from the start of her employment she experienced problems with Noel Watson. She stated that his demands were excessive and that he had a brusque and curt communication style and I was shown a number of emails from late 2012 to January 2013. These emails were in the tribunal bundle with the claimant's handwritten comments on them. Mr Watson provided a supplementary witness statement going through these emails one by one explaining in some detail why he needed to send these and that some report deadlines were urgent. All these emails related to the claimant's core duties as an

Audit Clerk. I examined the emails carefully to see if the tone was curt or the demands were oppressive. I must admit I could not see that curt tone from the emails.

7 I appreciate that the claimant had a busy family domestic life. She also helped her husband to run an office refurbishment business from home - she completed his VAT returns, for instance. She had young family aged 14, 19 and 22. The claimant's 22-year old daughter has attended this hearing and has been supportive to her mother. She has in fact just graduated with an LLB from Bournemouth University where she elected for employment law as part of her course.

8 One of the emails I spent some time discussing was over the claimant's apparent refusal to take minutes of an acute emergency meeting. I do not find that this was anything other than a reasonable request for a manager to make of the claimant. The claimant refused on the grounds that it was not one of her competencies. Mr Watson and the tribunal expressed surprise at this. In the end, after questioning, the claimant informed the tribunal that she was a touch-typist and if Mr Watson had proactively offered her a laptop she would have been able to do it because she can type fast. The claimant states he did not proactively, and unprompted, offer her a laptop, which therefore made it an unreasonable request on his part.

9 The tribunal was ultimately puzzled that the whole issue had taken on such a great significance in the claimant's mind, in the context of this tribunal complaint. It is hard to see this individually or cumulatively as any part of a breach of contract.

10 Nothing in the earlier emails seemed exceptional, reading the emails themselves, even without also reading Mr Watson's detailed comments in his supplementary tribunal witness statement.

11 Mr Watson stated that he did not agree that he set her unreasonable and unachievable targets. Furthermore, the claimant never made this complaint at the time. She had actually cut back her hours at her own request admitting that she did not have enough work. Mr Watson commended her. He said she was very efficient at her job. There has been no suggestion from anybody in these proceedings that the claimant was other than good at her job. However, everyone had some problems, not intolerable problems, but problems with the claimant's communication style. Generally they accused her of precisely what she seemed to accuse Mr Watson of.

12 On 17 January 2013 the claimant made a complaint to Sian Morgan about her working relationship with Mr Watson:

"I have been reluctant to discuss with you my working relationship with Noel hoping that with time it would improve. However, I am really sorry to tell you that I find working for him at times intolerable. I find him unfairly blunt intimidating and temperamental. He is unapproachable at best so I am unable to have discussions with him about matters concerning me."

13 She then commented on her curious perception of the minute-taking:

“The minute-taking was a typical example of this Noel had asked me 6 weeks into my job whether I could take minutes and I told him then I could not, he then emailed me asking again last week and I spoke with him expressing my concerns about taking them. He still thought I was going with him to the meeting and my concerns were left, hence the need for the email to him copied to you.”

14 The claimant states that Sian Morgan spoke to Noel Watson and it had the effect of his behavior improving dramatically. Whatever the cause, some of the correspondence I saw between 2013 to 2016 some of which was positively cordial. There were SMS texts too e.g. 10 March 2014

“I hope you had a great holiday! Welcome back to warm and sunny Essex”

and 29 April

“Good morning Noel, happy birthday to you!! Hope you have a happy sunny day gardening .. make sure you sink a few tinnies later on 😊. Best wishes Nicola”

15 It therefore came out of a blue sky when the claimant tendered her resignation on 7 July 2014 stating:

“Please accept this letter as my notice of resignation.

Although I have really enjoyed working on Colne Ward I feel lately my extra workload is increasing. Some of the work given to me of late is difficult and complicated and although I managed to complete it I feel it is beyond the parameter of a Scale 3 employee.

As you are aware I am busy mom outside of work too and after discussion with my family I have decided to spend more time at home working on our business and spending more quality time with my daughters and my parents.”

16 What was significant about this letter is it mentioned nothing at all about dissatisfaction with Noel Watson’s behavior, even though she had said orally that occasionally the old Noel would “... rear its ugly head”.

17 The response was Ms Morgan would not accept the resignation, and she came to an agreement with the claimant. The claimant had originally started on 25 contracted hours every week, by working short days. The change then to 20 hours per week helped to further balance work and life. This was evidence that Ms Morgan, and Mr Watson, wanted the claimant to stay on, as she was valued.

18 The emails between the claimant and Noel Watson continued to be cordial. In July 2015 I was shown an email correspondence where the claimant undertook to help Noel Watson with a traffic fixed penalty notice he had received from Southend Magistrate’s Court. It was unfortunate because he was offered a driver speed awareness course but was too busy to attend it and so incurred the fixed penalty points, but then he was out of time submitting his driving licence. A letter needed to be drafted to ensure he was not going to be further prosecuted or surcharged on the financial penalty. The claimant drafted this for him. (Mr Watson is a New Zealander and therefore not as familiar with these processes as

someone who has grown up in the UK might be). Correspondence between him and the claimant about the draft of the letter is cordial ending with a ☺ from the claimant. Just looking at these emails in the bundle, they are testament to a cordial management relationship.

19 Unfortunately, Ms Morgan gave notice to leave the Trust late in 2015. Her last working day was 22 January 2016. After she departed she was replaced as the matron of Colne Ward by Gill Adams. She had been a Band 7 nurse and was then promoted to Matron, Band 8A. She has been a witness at this tribunal hearing, (unlike Noel Watson who had left the Trust shortly before this hearing, having prepared his witness statement. It is understood he has returned to New Zealand).

20 It is agreed by Ms Adams that she was a personal friend of Noel Watson, both in and out of work, although that fact has not been significant in the tribunal's determination. The claimant's perception of the years that followed is that once Sian Morgan was not there to keep Mr Watson's behaviour in check it reverted to the bad state it had been in before the claimant first asked Sian Morgan to intercede in January 2013.

21 Like Ms Morgan, Ms Adams has been complimentary about the claimant as a worker and as an Audit Clerk. During this period the claimant states that Ms Adams was supportive towards her. However, there was one occasion when the claimant stated that Ms Adams subjected her improperly to a sickness absence review meeting in June 2016. I need not spend too much time on this. In short it transpired that the respondent at this hearing was relying upon the wrong sickness absence procedure, one which was not issued until November 2016. In fact, when considering the correct procedure which was then current, issued in December 2015, it relied on Bradford factor triggers which the claimant had not breached at that stage.

22 The background to this is of some relevance. The claimant's mother died in February 2015. It affected her badly at the time, but what affected her worse was that about one year later the claimant's father took up with another woman. It was sooner than the claimant would have liked. She reported that she felt a second intense wave of grief about 15 months later, which caused her to have certified absence from work. It was initially diagnosed as migraine with stress and anxiety, and later simply stress and anxiety. The evidence was very muddled on this. It is possible that the change in diagnosis involved a change in category on the respondent's drop-down menu in e-rostering for classification of illnesses for absence. It was recorded as two periods of absence rather than one, with a broadly similar diagnosis, although migraine was not on the second MED3 sick note. This therefore counted as 2 separate absences for the Bradford factor.

23 At the time of the proposed absence-review meeting the claimant had been off sick for 2 weeks but she had no prospect of imminent return. Overall all I have found, for the purposes of this claim is this was not oppressive management such as would found a case for constructive dismissal. It seems routine management by Ms Adams, as a conscientious manager. The wrong procedure was used but no harm was done at all, and no substantive action resulted.

24 As part of that process, she claimant complained she was unreasonably required to have a reference to Occupational Health but I cannot see how that was even unreasonable. Such a reference is staple management practice, not least with a stress and anxiety diagnosis. That particular diagnosis gets a special mention in the later sickness absent management policy, for understandable reasons.

25 In July 2016 the claimant applied for a Band 4 role at the hospital. It would have been based on the floor above where she then worked in Colne Ward. She was an existing Band 3, (and ultimately remained so). Now in a subsequent job, since she left the respondent, she has returned to the NHS now working in a Band 4 role.

26 The claimant is happy working for the NHS. We accept her evidence she was very happy working with the respondent. Overall, she liked her job. The process of applying for the Band 4 post was protracted. She was unsuccessful in the end.

27 Seeing that the claimant wanted to progress, Ms Adams tried to get her current role as Audit Clerk upgraded to Band 4. This was always going to be a tough challenge. The claimant claims that Noel Watson blocked this advancement to Band 4.

28 The business of re-banding of jobs is a controversial one. It has to be decided, not by local management at all, but by the hospital finance section, the unions, and specialist HR with some skill in job evaluation. This process did not involve Noel Watson and never would have done. We have no hesitation in accepting the respondent's evidence that Mr Watson had no part, or even influence, in this process. The Audit Clerk role is recognised across the whole NHS. Making an exception for the claimant would have been a departure from the usual practice. The unions would have known that. Further, we cannot think of any personal reason for Mr Watson to have blocked this, if he had had any influence whatsoever.

29 In the end Ms Adams reliably informed the tribunal that, in this case, it was the union who was most instrumental in blocking an up-grading. The claimant agrees that Ms Adams had done a great deal to promote the claimant's move to Band 4, including re-writing her job description so that it did not appear to be mere data inputting. The role, as I appreciate, is important within the hospital because the accuracy of the data she records and the promptness of the reports are an essential part of funding process for the cardiothoracic service. I cannot find that Mr Watson had anything to do with the process, and I am puzzled that the claimant had the idea that he had blocked this re-banding.

The uniform policy

30 Around August/September 2018, there commenced the problem which has been central to the claimant's constructive dismissal claim, already referred to above. This is the question of the uniform policy - hair above the collar / bare below the elbows in the clinical areas, for clinical teams.

31 I accept the background to this was a sharp increase in the rates of wound infection on Colne Ward, from having an average of 3 or 4 incidences of wound infection per month, suddenly in August 2017 this rose sharply to 18 per month. It had become a matter of serious concern.

32 The respondent took urgent action on this and NHS England became involved, itself an indication how serious the problem was. Noel Watson conducted a Root Cause Analysis investigation report dated 23 November 2017. Ms Adams later said from memory that the 18 incidences dropped to 9 infections next month, September 2017, and then 8 in October. The Root Cause Analysis in the report was described generally as:

“... failure to establish and adhere to comprehensive local policies and procedures which was multifactorial”.

So, on analysis, this increase in infection was not entirely down to breaches of uniform policy however, it was a very important factor, as I have found, and there was a renewed emphasis on it.

33 The policy itself did not need tightening up. The problem was that observance had become slack. From management’s point of view breaches of the uniform policy would have been much more conspicuous than breaches relating to disinfection procedures. They were therefore a priority for enforcement.

34 I was shown an email dated 24 November 2017 from Gill Adams to the whole CTC Colne Ward. The subject heading was “Thursday 30 November CQC visit”. Because of the obvious conspicuous nature of breaches of uniform policy, it contained the following paragraph:

“Can all staff please be aware and adhere especially to the uniform policy. There is to be absolutely no jewelry on your person that includes necklaces and diamond rings if anyone has any questions please come to see me.”

35 The claimant relies on this email to say there is no mention of hair being up and therefore hair was of no concern to the respondent. In my view the claimant is reading far too much into this email and making too fine a distinction.

36 The claimant states that she had been going into the clinical areas for some 5 years prior to that before this sudden apparent tightening of the rules.

37 One of the oddest features of this is that the claimant says she was totally unaware of the background of the sudden rise in infection rates. Ms Adams was categorically clear that that could not be right because, from the very data that the claimant was collecting as an Audit Clerk it would have been obvious. The bed occupancy had dropped to about 50 percent of what it had been. All elective surgical procedures had been suspended on account of the heightened risk. These were major statistics caused by the infection crisis. The claimant could not have missed that.

38 The shape of the claimant’s argument is that she was blindly told to follow orders without any explanation of the context in which those orders were made.

Given my understanding of the claimant's job and the data she would be handling I cannot see that she could have been unaware that something serious was going on to account for these changes, even though, as the claimant rightly says, at that stage there were no general emails explaining to the Ward staff that there was an infection crisis.

39 Both Ms Adams and Mr Watson stated that the claimant was constantly going into the clinical area with her hair down. She liked to have her hair down, she did not like putting it up, and resented it being told to put it up. Ms Adams is also perfectly sure she has seen the claimant in the clinical areas wearing a long sleeve black cardigan. The claimant is adamant that she never went into the clinical area in a long-sleeved garment. Never, ever, she insisted.

40 Given that both Mr Watson and Ms Adams had the impression that she was constantly doing this I consider it more likely than not that the claimant was consistently breaching the rule even though, as she states, it is in some ways a petty dispute. The claimant has shown that her recollection of events is often coloured and modified in hindsight.

41 She stated to the tribunal that this was not about the hair this was about the fact that she felt "singled out" and that it was a form of bullying and intimidation of her using the uniform policy. She seemed, thereby, to be distancing herself from the acknowledged pettiness of the dispute. I could not entirely understand the logic of her stance on this. She certainly felt very strongly about it.

42 There was an email dated 26 January from Ms Adams to the whole ward as follows:

"Dear All, can I please ask that all staff when in the clinical area ensure their hair is above collar level. This includes health care professionals as well as administration staff. I have attached the updated uniform policy in particular points ... which does specifically highlight this issue, like the "bare below the elbow" theme. Can you all ensure you challenge any member of staff who does not adhere to this

If anyone has any issues or questions please let me know.

Many thanks,

Gill."

43 By a separate email dated 1 February the claimant came back on this. She stated:

"Dear Gill,

Following your email to Colne Ward on 26 January could you please specify clinical areas. Is walking from my office to your office along the corridors deemed clinical? Is walking from my office to the Sister's office clinical? Just so I am clear as I would not want any threat of disciplinary action.

Thank you

Nick.”

44 In the meantime, the claimant had emailed Claire Woodley who was also a witness before this tribunal. She is the HR Adviser who was assigned to the Ward and was everybody’s first point of contact for HR issues. The claimant wrote on 5 January 2018:

“I have been working for the Trust since 10 October 2012 as a Band 3 Audit Clerk on Colne Ward in the CTC.

I wear a blue blouse, navy skirt appropriate shoes and name badge, my hair is neat and tidy and of collar bone length in a small office mainly alone which is located approximately 2 metres from the entrance door and opposite my staff room. Since September 2017 the Head of Nursing Noel Watson insisted I am to wear my hair up as I work in a clinical area. I have read the uniform policy thoroughly and refer to 5.3, 6.2 and 7.8 ...

I would also like it noted there is another member of administrative staff who works in an office on my ward with long hair worn down and she has not been asked to do the same. Your opinion on the above would be very much appreciated, and as soon as possible please.”

45 This went on for some time. It turns out, as the case has developed, that that is not entirely what the issue is. The claimant is referring to a distinction between staff and “clinical staff” as defined by the policy. However, what it has finally boiled down to at this hearing, which is not seriously disputed by the claimant, is not an issue as to the category of staff, as to the places which are considered to be clinical areas.

46 The claimant herself professed to understand that if she is a member of staff in the clinical areas including the Ward Sister’s office that she would have to have her hair up and arms bare. She would also have to do so if she was doing relief as a Ward Clerk receiving visitors to the ward. During the hearing I asked for a floor plan of the ward which was helpfully produced. I could then completely understand what the layout was, including the ICU (Intensive Care Unit) and the HDU (High Dependency Unit), and where Ms Adams office was in the heart of the clinical area, and also the claimant’s friend and ally, Clare Sumner, in Education, next to Gill Adams office, all in the clinical area.

47 Correspondence between the claimant and Claire Woodley, and also Aralola Adegunle who is a Senior Human Resources Business Partner, carried on for the month of January. On 11 January 2018 Ms Woodley asked if the claimant would like her concerns raised with management. This resulted in Claire Woodley having to review the dress code policy. The claimant chased this up. She stated on 18 January:

“I am an administrative member of staff and my understanding of the policy was correct. Thank you for confirming this.

I feel I’ve been singled out spoken to and treated unfairly since September.

I was told very recently in a blunt tone “shut your door or cut it off” this is simply not acceptable.

This morning he [Mr Watson] again pointed out and stated my hair was not up. I replied I had contacted HR and have had it confirmed my hair does not have to be. He replied in the clinical area it does and would you like me to show you the policy. Therefore, I have asked him to show me the policy and where it states this. Should I arrange a meeting.

Kind regards.”

48 Then on 18 January the claimant stated:

“Gill Adams has just come into my office with the uniform policy following my verbal response to Noel Watson this morning. Noel and Gill state that I fall into clause 7 uniform of the policy – “Clinical staff - nursing and midwifery staff and their teams, and allied professional and their teams”. Please raise this issue accordingly.”

49 She chased that up 5 days later on 23 January. Ms Woodley asked:

“Sorry for the delay in replying. In terms of taking this forward can I check you are happy for me to raise this to Noel/Gill as per my emails below.

Thanks.”

The claimant felt reluctant and stated:

“Hi Claire,

I would like it confirmed by HR first that I do not fall under clinical staff nursing and midwifery staff and their teams or allied health professionals and that I am administrative/clerical staff as per my contract, job description and original job advert.”

However, it was not going to be a simple yes / no answer under the policy. That question itself was going to have to be put to management.

50 She then had to follow it up on 29 January as Claire Woodley was quite slow in responding. It was clear from her email of 30 January that she had spoken at length to Noel Watson. She stated:

“Dear Nicola,

Further to my email of 17 January I revisited the policy and gained some feedback.

The consensus is that the policy is quite ambiguous around the term nursing and midwifery staff and their teams as it is felt that your role of ward clerk does form part of the nursing team, albeit carrying out an administrative function. Your role is very integral to the running of the ward and therefore I feel it would be difficult to suggest that ... you do not form part of the nursing team.

I have spoken to Noel at great length about this query Noel informs me you are situated at the entrance of ICU, sometimes cover reception, and that you do enter the patients' beds space to see patients and collect notes. Noel has said he is happy for you to wear your hair down in the office but the exception to that is when you are entering the ward patient areas, that your hair is clipped back for infection control purposes....

As you are aware there have been infection outbreaks and we all need to do what I can to limit the risk of these. I have asked Noel to reassure me that he is consistent with his

management of the uniform policy across his areas but he reassures me he is. I have asked Noel to take this to the head of nursing meeting to ensure that this is consistently applied across the Trust.

Noel informs me you are extremely good at your job and I hope you can both move forward if you need any further help then please let me know.”

51 In January 2016 when Gill Adams became the Matron of Colne Ward Noel Watson was promoted from Critical Care Outreach Lead to the role of Head of Nursing and Quality for Essex CTC he was therefore no longer sharing the office with the claimant.

52 This was after the group email from Gill Adams specifically on the hair off the collar while in the clinical area email which also mentioned bare below the elbow. Ms Woodley mentioned the infection “outbreak” and the claimant never enquired about that reference nor did she say that she was not aware that there had been infection outbreak.

53 The tribunal accepts that there had been serious incident (SI) over the increase in infections in August 2017, and the high level official root-cause report from November confirmed that. Further the tribunal does not accept that the claimant was unaware of this, as it was so specific to Colne ward.

54 The claimant responded to Claire Woodley, after barely an hour, once more arguing her case. She did not accept Ms Woodley’s answer. However it was not her argument to have with Ms Woodley. It is clear that Ms Woodley’s answer had come from Gill Adams and Noel Watson.

55 Subsequently the claimant elevated her concerns, such was her intense strength of feeling about this. She forwarded a long chain, unhelpfully without including Claire Woodley’s final and comprehensive response of 30 April, to Danny Hariram. It was thus a partial picture he then obtained. This represented a substantial escalation of the issue Danny Hariram was the Group Director of People Strategy and Organisational Development for the whole Trust including Southend Hospital, Broomfield Hospital and Basildon (collectively now known as the MSE group).

56 She later further escalated this, by a separate email, to Liz Edelman who was the Head of Human Resources at Basildon.

57 The claimant stated to the tribunal that, after her raising this uniform policy complaint to HR, the roles of Noel Watson and Gill Adams switched very suddenly. Noel Watson became far more courteous and kind, and Gill Adams became threatening and intimidating. I found it hard to keep track of her perceptions in this case, as they were not borne out by contemporaneous emails, either to or from her.

58 On 1 February Danny Hariram responded to the claimant stating that he had forwarded the correspondence to Liz Edelman who is the site Head of HR at Basildon hospital. Claire Woodley then involved Arolola Adegunle the HR Business Partner mentioned before, who advised that this should be treated

initially as a grievance and that as the complaint was against Noel Watson the Head of Nursing and Quality for the Essex Cardiothoracic Centre and it would have to be considered by a manager of the same or higher status than Mr Watson. In the end the investigation was carried out by Corinne Cobb a Senior Manager, Head of Integrated Care. She prepared a report on the grievance, which was considered by Pam Charlesworth, Deputy Director of Nursing.

59 On 1 February the claimant once again emailed Danny Hariram again including a long string of emails about uniform and she stated:

“Dear Mr Hariram.

Please find below further correspondence. I would like this dealt with under the bullying and harassment at work policy as this has been happening on and off since I started working here in 2012.

Regards

Nicola Wyatt.”

60 At that point Mr Hariram forwarded it to Liz Edelman and Claire Woodley, who then took the matter up with Aralola Adegunle who stated that Danny Hariram would have to appoint a manager to hear it. It seems odd, therefore, that the claimant at this hearing has been talking about breaches of the grievance policy as she is the one formally elected to have this dealt with under the bullying and harassment at work policy, which is a different policy, as she knew then, and knows now.

61 Her stance on this is therefore inconsistent. Her contention about there being no outcome announcement of the informal stage under the grievance policy not a valid point to make at all. There was no such stage under the bullying and harassment policy.

62 One of the problems about the claimant’s grievance was, upon enquiring where the claimant’s grievance would be found in the bundle, the answer was it consisted of various threads of the claimant’s emails forwarded from manager to manager. It was thus diffuse and hard, for management as for the tribunal, to get a handle on it.

63 The grievance was slow starting as the respondent has conceded. The best statement of the grievance is perhaps a 1½ page summary which the claimant sent to Lilly Brown, Pam Charlesworth and Corinne Cobb on 1 May. Lilly Brown was the new HR Advisor who took over the case from Claire Woodley. The latter had too many other responsibilities.

64 The first example of a good comprehensive email about the infection problem on the Ward came on 9 March 2018 when Gill Adams wrote to the entire Colne Ward and the registrars and other managers administrators, and Elli Gudde who was Matron of the other cardiothoracic ward on the CTC. She itemised the cases they had, identifying the infections, and attaching policies the subject heading was “Infection Increase” and it mentioned “Re-education in handwashing”. It

states:

“Colne Ward Education team along with Infection Control team within Colne Ward will be conducting teaching sessions for all medical nursing and other members of MDT staff. Could I please ask that everyone be extra vigilant in relation to infection control practices when entering the unit especially when in the clinical area. These are attached - bare below the elbows and hair and tied up off the collar. If you are not sure of anything specific please ask either myself or senior members of staff on the unit.

If you are not adhering to the above policies you will be challenged and corrected on the spot.

Mr Watson had commented to her immediately:

“Excellent email”.

65 The tribunal was confused about the claimant saying that Noel Watson improved considerably after her complaint to HR on 5 January. On 18 January she says that he shouted at her in her office about her hair saying: “Shut your door or cut it off” (which Mr Watson completely denies). I do not consider Mr Watson ever said anything quite so direct or so rude. It is unlikely. Even though his patience on this subject was running out. He appears, from other details, to have been too professional and restrained.

66 On the same day the claimant says that Gill Adams slammed the uniform policy on her desk and pointed her finger aggressively at the relevant paragraphs and also on the same day she alleges that Gill Adams had referred to her on the ward, to her colleagues, as a “stupid bitch” about the uniform policy. On 18 January 2018 she allegedly stated to the claimant “Noel always wins”. As far as those comments are concerned I accept the evidence of Gill Adams that they were not said. The “stupid bitch” comment would have been completely out of character for her, judging from the evidence of emails, her own testimony, and that of others.

67 Nonetheless I considered both managers were fed up about the claimant digging in so hard on the uniform policy issue. It had become very time-consuming.

68 I also find it hard to accept the claimant’s stance that the uniform itself did not bother her, and that it was just the fact that she considered that she was singled out. The detailed correspondence between her and Claire Woodley would suggest she did care about the uniform policy but, when elevating it as far as Danny Hariram, she did not want to come across as being petty, any more than she wanted to come across to this tribunal as petty. But, by contrast, the claimant’s emails are testament to the fact that the claimant did care about the uniform *per se*, and the tightening up of its application from August 2017 onwards.

69 Mr Watson said in his statement for this tribunal the claimant did not like her ears and therefore that was why she apparently felt strongly that she wanted to let her hair down. The claimant in evidence denied this pointing to her stud earrings and saying if she did not like her ears why would she bother to put these pretty earrings in. I really cannot make a finding on the ears, one way or the other.

70 As I know the grievance progressed slowly - Ms Edelman apologised for the continuing delay. However, matters did progress then. There was a meeting between the claimant and Pam Charlesworth as the Deputy Director of Nursing. Ms Charlesworth was trying to see if she could resolve the claimant's grievance informally. Later Ms Charlesworth reported to Claire Woodley that the claimant wished to proceed with the formal process, so that meeting was not successful. The claimant was never formally notified of the fact that it had not been resolved at the informal stage, but the fact she was not notified seems now to be a non-issue, as stated above, as the claimant asked for her complaint not to be dealt with under the grievance procedure but under the bullying and harassment procedure, apparently emphasising management intimidation rather than the uniform *per se*.

71 On the same day 28 February 2018 Ms Adams apparently removed an S99 from the claimant's E rostering record. The S99 was there Ms Charlesworth had stated that the claimant was visibly upset when talking to her and she had therefore advised the claimant to go home and she would notify HR who could then notify the ward that the claimant would not be back to work. S99 is a code for "absence various". S codes are for different illnesses and disorders. S99 is the residual "unspecified" category code. It means the day can be claimed as a day of sick leave with sick pay. It is true that Gill Adams had removed the code. There was obvious justification under the policy for doing so, and it is hard to see this as a breach of the claimant's employment contract.

72 Also on 28 February the claimant states that Gill Adams and Noel Watson came into the staff room and deliberately sat down where she was sitting and made her feel uncomfortable. Ms Adams denies having been intimidating. The claimant appears to think that just by being present there in a relatively confined space the two of them constituted an intimidatory threat. I cannot accept that was a reasonable perception. Colleagues and managers have to co-exist, and not tip-toe around trying to avoid each other in the same workplace.

73 There was a meeting about which the claimant makes a major complaint. On 5 March 2018 Gill Adams arranged to meet with the claimant and Damien McAuley who was a Ward Clerk on Colne Ward, to discuss how they were going to cover the Ward Clerk's desk, as one of the Ward Clerks had been off on long-term sick leave. Ms Adams assumed, wrongly according to the claimant, that the claimant was generally not happy to be asked to cover the Ward Clerk's desk. The claimant says she likes the role because you meet relatives and it is sort of chatty and friendly social job. However, later she said she did not want to do it at that particular stage because she had become less chatty and extroverted, and was rather down and miserable, and no longer wanted to work on the Ward Clerk's desk. Once the discussion about the Ward Clerk duties finished, Ms Adams said that Mr McAuley could leave the room. She then talked to the claimant one-to-one, directly.

74 The claimant gives an account of this which the tribunal finds quite over the top. She stated that the entire plan to have Damien McAuley there was as a ruse to lure her there because she would not have agreed to have a one-to-one meeting with Ms Adams at all, because at this stage Ms Adams had been joined to her grievance as from 15 February. Her complaints were now against Noel Watson and Gill Adams. The claimant states that Ms Adams spoke to her brusquely and aggressively asking her "How are you?" in an aggressive and angry

tone of voice. What had prompted this, apparently, was that Gill Adams had noticed that she was rather miserable.

75 The claimant also stated that she was making a complaint and was upset about Mr Watson. The claimant alleges that Ms Adams called her “childish and pathetic”. Ms Adams emphatically denies that and I find Ms Adams generally a more restrained and reliable witness than the claimant whose perceptions I have found to be puzzling, inconsistent, and at times extravagant. The tribunal considers she may have reinterpreted certain meetings, rather than reporting them verbatim and reliably.

76 On 7 March 2018 the claimant makes another strange allegation. Ms Adams was standing outside the Ward Sister’s office when the claimant was on the Ward Clerk desk adjacent. Ms Adams was talking allegedly deliberately loudly about having a meeting with HR. The claimant may have thought that this referred to the claimant’s own grievance. Allegedly Ms Adams later said in a tone of voice meant to be overheard that she had a very good meeting with HR. Perhaps the claimant was presuming that Ms Adams was simply piqued by the claimant’s grievance to HR. Ms Adams, unsurprisingly, cannot remember any of this at all. She completely denies the construction which the claimant has put upon it.

77 One of the claimant’s major complaints about the handling of her grievance was that Noel Watson was away for 4 months sabbatical on 6 April, returning the middle of September after he had taken extra leave as well in the UK. He was going back to New Zealand from where he originally comes. The purpose of the sabbatical was to complete a PHD.

78 On 8 March 2018 allegedly after the incidents of 5 and 7 March the claimant commenced a period of sick leave. She rang in sick reporting migraine although she was certified then by her GP as being unfit to work because of “migraine exacerbated by stress and anxiety at work”. I have already discussed the classification of sicknesses how the claimant’s absence might have been recorded as two separate diagnoses on the respondent’s database. Therefore, two separate absences might have tipped her over the Bradford score trigger points under the policy then in force.

79 On 19 March the claimant was then certified unfit for work, this time simply due to stress and anxiety at work. There was no mention of migraine now. The claimant did return to work on the ward. At this stage she had asked to be seconded. On 3 April he returned to a temporary role on Roding Ward which had been arranged. When she got there and the person she was covering for had already returned and therefore there was no need for her there so therefore immediately relocated to the medical short stay ward.

80 She found that intolerable and only stayed there for a day and a half. She said it consisted of older people who were waiting to be allocated residential care placements. Extremely confused older patients were groaning and shouting and the entire atmosphere on the ward was too much for her. So, she was then sent home on full pay awaiting a further placement.

81 She was then offered a placement within the bereavement office but, because of her experience with her mother dying in February 2015 and her father's taking up with another woman a year after, she said she would find this too close to unhappy experiences in her own life.

82 On 16 April the claimant commenced a placement in the Education centre which worked well. She got on well with Rachel Gray the manager of the Education service and it was on a different part of the hospital site she would not be coming across Noel Watson or Gill Adams.

83 She remained there until her resignation on 21 May 2018, the subject of her constructive dismissal complaint.

84 Because of Noel Watson's 4-month sabbatical the claimant's grievance was effectively parked. The main process took place after the claimant had resigned from employment.

85 Unfortunately, over this period the claimant's line management remained with Gill Adams. In striking evidence to the tribunal Claire Woodley stated that if she were doing this again she would have arranged to reallocate the line management responsibility. It was not good having the claimant touching in at the Education department and yet her e-rostering being the responsibility of Gill Adams. Gill Adams herself did not find it easy. She needed to classify days off / leaving early in a fair and consistent way.

86 Emails went to and from Ms Adams and the claimant, and also between Ms Adams and Ms Gray about the reasons for apparent early leaving or late clocking. On one occasion early on, the claimant completely forgot to touch in because it had not yet become part of her routine in Education. She was not sure where clocking device was. Given the background and given that the claimant had an outstanding grievance against Ms Adams it would have been the better solution to change the line management. E-rostering is a sensitive matter and particularly sensitive for the claimant with whom there were known attendance problems. All annual leave requests still had to go through Ms Adams.

87 The other thing Claire Woodley said she would do differently if this happened again is that she would not take on the duty of being a go-between in a management relationship that seemed to have broken down. She created a lot of extra work for herself, probably unnecessarily.

88 It is inconsistent that the claimant's main stance that Gill Adams was still interfering in her life that Gill Adams was then in breach of her duty to organise a return to work meeting when the claimant returned (a) to a different place of work (b) at a time when she had an ongoing grievance against Ms Adams. I can see exactly why Ms Adams did not arrange a return to work meeting. It had all the potential to be highly confrontational. There was nothing stopping Rachel Gray from doing it.

89 Complaints like that made it appear to the tribunal that Ms Adams could never do the right thing. This also seems an officious complaint to make, as if the claimant was auditing Ms Adams' performance as a manager, rather than wanting

or needing a return to work meeting (which she surely did not).

90 At this stage there were several separate grievance processes in train. At one point, Nicola Brown had to write to the claimant to state that, in the course of an investigation like this, they would not go back as far as 5 years for the Noel Watson complaint. The claimant wrote back querying even this, asking where it said that in the policy. She expected a lot.

91 It was shortly after this that the claimant submitted her good and workable complaint summary against Noel Watson and Gill Adams on 1 May.

92 At this time, the claimant had a further complaint which was about the key to the office. The claimant's office had been a Ward Clerk's office just around the corner from the clinical areas in Colne Ward. Claire Woodley had asked if she could please return her key to the office as the room was being used by the Senior Sister. This Senior Sister was also managing the ward. In Mr Watson's absence on sabbatical Gill Adams had moved up to his role of Nursing and Quality for the CTC, a role which she shared with Elle Gudde, the other Matron on the CTC. In her absence from the ward a Band 7 Senior Sister was covering those responsibilities on the ward.

93 Subsequently the claimant described this request for her key as "heartless", as this office had been the office of the job that she had always loved, (despite relentless bullying from Mr Watson then Ms Adams). She suggested that they could just cut another copy. I was informed that it is not that simple. The key was coded and a duplicate could not simply be cut. I do not make a formal finding, because I was not given full reliable evidence on this.

94 The claimant had no presence in that office. I cannot see that any harm would have been caused by her handing back her key for somebody else to use an office which was no longer being used. I cannot see this as a legitimate ground of complaint in the context of a constructive dismissal complaint. She had been on other secondment placements. It hardly seemed like "unseemly haste" to retrieve her key. The request was conspicuously polite and accommodating.

95 The claimant also made a complaint that when she looked back into her office it had been completely moved around. However, she was going to be away from it for the foreseeable long-term future. She was now in the Education department, not there in the Ward Clerk office. Other people presumably wanted the desk as they wanted it if they were spending any time at the desk. Rather than facing side face to the window wanted to face the window with their back to the door. Everybody is different.

96 The tribunal had no sympathy with this complaint. The correspondence requesting the key went on for some time, much longer than it merited. I consider it was unreasonable for the claimant not simply hand the key back.

97 I will not deal with the progress of the claimant's grievance at length in this judgment, which is already too long. Corinne Cobb carried out a comprehensive job and clearly invested a lot of time on this. She interviewed Ms Adams, and Mr Watson. She also interviewed Nicola Clarke who was one of the people whom the

claimant alleged had heard the “stupid bitch” comment. Nicola Clarke had no recollection of it. She added it was likely she would have remembered it if it had been said because it would have been striking coming from a Matron.

98 Ms Cobb also interviewed the claimant over the allegations with the key, and other later allegations prior to the resignation were included.

Claimant’s resignation

99 Now to the resignation itself. The claimant had an annual check-up at Royal Free Hospital in Hampstead for an established rare skin condition. The Royal Free is the main London hospital for such conditions. This had to be dealt with on e-rostering. Ms Adams did not know how that hospital appointment had been treated in the past. The claimant was asking for it to be treated as emergency leave. Ms Adams view was that it could not be. Apart from anything else, I have seen, under the policy, emergency leave is only approved when annual leave and sick leave TOIL etc. have been exhausted. The policy may seem tough but that is the policy. In any event a pre-booked annual appointment is not an “emergency”.

100 The claimant insisted that it had been approved previously as emergency leave. Even if that was the case under the policy Ms Adams was not wrong not to treat it as emergency leave on this occasion. It was not in accordance with the policy for the claimant’s situation. This whole email exchange concerned generic procedural advice about the policy. The claimant then, instead of starting a new thread, made a fresh enquiry about going home early on 8 May. This time Ms Adams cc’d it to her Unison representative Joyce Aldridge whom she routinely copied into such communications in order to ask her for her advice as a Union representative on routine matters like the treatment of leave and e-rostering. One can see why she might have sought advice. She did not want to be taking an unreasonable step in respect of the claimant, and at that stage had become understandably wary. Union input would have been helpful to her. It is just the sort of matter the union would have a view on.

101 The claimant on 21 May in her “first resignation letter” stated:

“I wish to report a breach of confidentiality by Ms Adams.

My personal information regarding a recent Royal Free Hospital appointment email trail was cc’d to Joyce Aldridge who is Ms Adams union representative. There is no reason why Mrs Aldridge needed to be copied into the email correspondence about this hospital appointment and the basis on how the time for this appointment is allocated. This is a breach of my personal data to an individual that has no need nor right to be aware of this.

I have to state that this for me is the final straw in a series of prolonged unacceptable behavior [tribunal’s emphasis] by Ms Adams I cannot and will not accept this breach of confidentiality from Ms Adams who is my line manager (Acting Head of Nursing) ...

I have taken the decision to resign from the Trust with immediate effect and intend to pursue constructive dismissal.”

102 This was apparently composed by the claimant on her telephone in the car

park of King John School where she was picking up her daughter. It was dashed off, and later when she was at home the claimant took 1½ hrs composing a longer email, but with the same effect, this time mentioning a number of other incidents.

103 Commenting, myself, on the breach of confidentiality and data protection. All that was mentioned was the claimant's name and a hospital it gave no details of her condition or what she was going for whilst this could and maybe should have been done on a no-names / no-hospital basis as she was only asking Mrs Aldridge for generic advice. It was mixed into correspondence with Claire Woodley who did need to know, as it concerned the claimant because she was in the middle of the correspondence between them. The tribunal is still puzzled that such a trivial and technical breach had such apparently major significance to the claimant that it caused her to resign, and I do query if that was genuinely so.

104 Later the claimant composed a longer email which was sent at 6.27, the first email had been sent at 4.28 as it took her an hour and a half to write which looks about right considering she touch-types. She talked about being left with no choice, because of today's events, presumably the email and her recent experiences of intolerable bullying and harassment. She then mentioned the office being moved around and heartless requests for the key and then she effectively listed many of the matters that were subject of the grievance and have been described above. She complained about Ms Adams remaining as her line manager. She mentioned bullying and harassment several times and the fact that Mr Watson was allowed to go on sabbatical without having given his contribution to the grievance investigation.

Claimant's new job

105 It is a fact that the claimant had interviewed for another role at this stage. That does not necessarily mean in law that her grievances were not the cause of her resignation. As a matter of law, employees who are unhappy have a right to look at alternative employment without that, *per se*, becoming the operative cause of their resignation, thereby invalidating their constructive dismissal claims (*Jones v F Sirl & Son* [1997], IRLR, 493, EAT).

106 The claimant has now found local work with an organisation in the private sector, carrying out work within the NHS, for Pathology First - iPP. She was offered a fixed term contract for 5½ months. She stated she was reluctant to take a fixed-term contract, as she was leaving a permanent post. However, she states that her position with the respondent was intolerable and that she had to take it. She apparently interviewed on 11 of May and an offer was made to her shortly after. She had therefore had that offer and was pondering it at the time she tendered her resignation to the respondent.

107 There is some force in Mr Sudra's submission that that was the main and operative cause of the claimant's resignation. The things that prompted the actual termination and the alleged last straw are so seemingly trivial compared to the earlier grief the claimant had allegedly experienced, driving home in tears over Ms Watson's alleged bullying and intimidation of her.

Grievance

108 Ms Cobb completed a grievance investigation report which was a conscientious piece of work. The data protection/confidentiality complaint was at that stage included within it. Ms Charlesworth took the report as the basis for her grievance outcome letter. The grievance outcome was dated 25 February 2019 sometime even after Mr Watson had returned in September. The bottom line conclusion was

“Having reviewed the workforce investigation reports and findings, there is insufficient evidence to support the allegations and bullying and harassment made against Noel Watson and Gill Adams.

From the investigation findings it is clear there was a disagreement about the uniform policy which led to fractured relationships between you and the management. The resulting breakdown in communication seems to have given rise to a situation where management action has been misconstrued...”

109 She then dealt with the investigation, finding that Gill Adams committed data protection breach albeit inadvertently. She clearly did not consider that to be a serious matter. (Apart from anything else the union representative received such advice in confidence as part of her duty as an accredited representative being consulted by a member. This confidentiality would clearly extend to third parties).

110 Ms Charlesworth also found that Ms Adams herself stated she can be sarcastic at times and that may not always be appropriate and that recommendations would be made that Gill Adams be made aware how to appropriately manage informal workplace issues. The claimant was given a right of appeal which she exercised.

111 Her appeal was extraordinarily comprehensive - 12 pages closely typed. I was told that the grievance appeal outcome was actually given one week before this tribunal hearing started. The conclusion was that the appeal against the grievance outcome would not be upheld. That is the end of the narrative.

Conclusions

112 On the law the tribunal's task is a simple one to decide whether the claimant was constructively unfairly dismissed under s 95(1)(c) of the Employment Rights Act 1996. She is relying upon a breach of the well-known implied term of trust and confidence, a succession of breaches over the entire period of her employment culminating in the last straw which was that email which was cc'd Joyce Aldridge, Ms Adams union representative.

113 The claimant has committed herself, in her resignation letters and her claim to the tribunal, to saying that that was the last straw. The case of *London Borough of Waltham Forest v Omilaju* [2005], ICR, 481, CA is therefore in point here, as is the more recent affirmation of it in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ, 978, CA. The alleged last straw here was so technical and insubstantial as not to amount to a significant breach such as to objectively justify any reasonable employee in resigning and claiming constructive dismissal, whatever one makes of antecedent bullying allegations.

114 Further, and in any event, I am not satisfied that the claimant herself really believed that she was bullied by Noel Watson throughout the whole period. I have seen all the friendly emails between them. They were professional, friendly and wholly unexceptional, not even giving a hint at the sort of picture that the claimant now paints of the bullying and intimidating manager that was seething beneath this benignly dissembling surface. I cannot accept the claimant's version.

115 I do not accept the claimant's perception of all the various interactions between herself and Gill Adams latterly. As I stated above consider that her perception of this account has been unreliable and that she has read far too much into small things. Essentially, I agreed with Ms Charlesworth's conclusion that "... management action has been misconstrued".

116 Further, the timing of the resignation was more dictated by having another job to go to than by the actual treatment the claimant had received at work. There is a high test for causation under s 95(1)(c) of the Employment Rights Act 1996. The employee must be "entitled to terminate without notice by reason of the employer's conduct". This is also a reiteration of the *Omilaju* point.

117 Constructive dismissal is judged from the claimant's point of view with the major proviso that that point of view must be objectively reasonable. I consider that the claimant's point of view was not. A conscientious grievance process was carried out by Ms Cobb and Ms Charlesworth. They found no bullying or harassment. They had the advantage of speaking to Noel Watson which advantage the tribunal did not have.

118 It is a general observation and judging from some of her emails remonstrating with her managers the claimant was an assertive person who would not simply lie down and comply meekly with management requests. From a manager's point of view, she might well have come across as scary at times. There is no doubt that she was good at her job. She took pride in that and, superficially, things ran well. People wanted her to stay doing that job but following her return from sick leave the claimant felt she could not. Circumstantially, it is therefore hard to accept that the claimant is the meek victim of high-handed and insensitive management.

119 The requests for the key which I saw from Claire Woodley were extraordinarily understated and diplomatic, and could hardly reasonably be characterised as "heartless". They were no less than was necessary.

120 The subsequent re-arrangement of the office could hardly be characterised as heartless either. The claimant was a Band 3 clerk. The office was being used by a Band 7 Senior Sister. Why could she not move the desk to suit her without causing the absent claimant such obviously deep hurt as she has expressed through her grievance. This was simply not reasonable on the claimant's part.

121 Under Section 95(1)(c) of the Employment Rights Act 1996 the claimant has to be entitled to resign without notice. Constructive dismissal is the mirror image of gross misconduct that is by the employer and not the employee and it is a fundamental breach of contract. Statistically it is a rare thing to find constructive

dismissal at this tribunal. This is nowhere near to that.

122 I consider that a lot of the claimant's perceptions of her treatment by management are entirely subjective and ultimately unreliable. Her perceptions may well have been dictated by extraneous strains and stresses in her life which she told us about (particularly bereavement).

123 For all those reasons the claimant's constructive unfair dismissal case fails and is dismissed.

Employment Judge Prichard

Dated: 2 December 2019