EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MS A THACKAWAY	AND	2GETHER NHS FOUNDATION TRUST

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 29TH / 30TH AUGUST 2019

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON (ASSISTED BY HER SISTER MS H THACKWAY)**

FOR THE RESPONDENT:- **MS M MURPHY (COUNSEL)**

JUDGMENT

The Judgment of the Tribunal is that:-

1. The claimant's claim that she was constructively unfairly dismissed is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings a claim of constructive unfair dismissal. The tribunal has heard evidence from the claimant, and Ms Anne Chisholm on her behalf; and from Mr Robin Newman, Mr Mark Hemming and Mr Neil Savage for the respondent. At the conclusion of the hearing the claimant requested time to present written submissions, which have now been provided by both parties.

2. The claimant was employed as a NICE Guidance Manager until her resignation on 28th August 2018. In broad terms the claimant complains that from the end of August 2017 her line manager Mr Mark Edwards began to bully her and that when she complained to the respondent she was not supported, leading to her resignation.

3. The parties have agreed a list of issues (derived from the matters set out in the claimants ET1). The claimant alleges that the fundamental breach was a breach of the implied term of mutual trust and confidence and that respondent was in breach in the following respects (this is not exactly as set out in the List of Issues but slightly expanded):-

i) The respondent “failed to recognise the seriousness” of the claimant’s allegations of bullying;

ii) Failed to adhere to their own policies and procedures;

iii) The appeal panel’s response marked a fundamental breach (this was the last straw)

4. It will be apparent that framed in that way the claimant is not alleging that the underlying events themselves constituted a fundamental breach, save in respect of the allegations of failure to comply with specific policies and procedures, but rather she complains primarily of the response to her allegations. It is for this reason that the respondent has not called Mr Edwards as the respondent submits on the basis of the agreed list of issues the tribunal is not concerned with the question of whether the underlying complaints against Mr Edwards were well founded or not, but the investigations and the processes about which the claimant complains. (However, the tribunal does have the direct evidence of Robin Newman in which he refutes at least the impression given by the claimant of Mr Edwards management describing him as “one of the best manager’s I have ever worked with.”) For the avoidance of doubt, as the claimant is a litigant in person, those allegations are directly derived from the ET1 itself and in the course of the hearing the claimant has agreed that these are the issues to be determined. However, as one of the issues is the seriousness or otherwise with which the respondent treated the allegations and in order to understand the claim it is necessary to set out the underlying complaints themselves, albeit that they can be dealt with relatively briefly.

5. In summary they are as follows. The start of the dispute are events in August 2017. The claimant had been employed by the respondent since 2002 and had joined Mr

Edwards's team in 2012. By 2017 she had therefore worked with him for some five years without complaint. In evidence she accepted that prior to this they had had a good relationship. However, she alleges that there had been a dispute in the office for some months about whether to have the radio on. Things came to a head on 29th August 2017 when Mr Newman suggested putting the radio on. Ms Chisholm said she did not want it on, and Ms Thackway supported Ms Chisholm; but Mr Edwards decided to allow the radio to remain on. Thereafter she alleges that there were raised voices between Ms Chisholm and Mr Edwards, and that afterwards she was told to get into Mr Edwards office where he reiterated that he was going to allow the radio to remain on. The claimant became tearful and was allowed to go home.

6. She alleges that the bullying followed this because she had publicly challenged his authority. She summarises the alleged bullying as verbal aggression, being singled out for different treatment around working hours, TOIL, homeworking, flexible working, exclusion from Mr Edwards wedding, and an unsupportive/aggressive response to her sickness absence. The specific events relied on are set out below.

7. On 6th September 2017 the claimant was called to a meeting to discuss the breakdown of communication in the department. At it Sharon Keveren made a number of allegations against the claimant which the claimant believed to be unfair. She complains that the decision to hold the meeting showed no concern for her welfare, as this was her first day back after two days absence following the death of her dog.

8. On 2nd and 3rd October she was asked to have a word with Robin Newman. On 6th October she reported to Robin Newman that she was struggling with having the radio on in the office. She was not aware that this was regarded by him and the respondent as a return to work interview.

9. The claimant was off sick until 13th October and did not have a return to work interview on her return on Monday 16th October. On Thursday 19th October the clamant was called into a meeting with Robin Newman and Sharon Keveren who unfairly accused the claimant of being responsible for the atmosphere in the office. She complains that she became upset and that Mr Newman did not intervene after she started crying.

10. On 26th October she was required to attend a return to work interview with Mr Edwards and Robin Newman. The claimant had a Working Well report from 12th October 2018 recommending a stress risk assessment. In the meeting Mr Edwards stated that she was no longer permitted to work from home. In addition, the claimant complains that the stress risk assessment, which she did not see at the time and which she only received after the appeal is not an accurate reflection of what was said and that there was a failure properly to implement the Working Well recommendation and carry out carry out a proper risk assessment. Mr Newman's evidence is that the contents are derived directly from what was said at the meeting by the claimant and that it is an accurate record of what was said.

11. On 6th November 2017 the respondent removed the claimant's right to flexible working. She alleges she was required to work core hours but that others were not. The respondent does not accept this and contends that Mr Edwards asked all the team to cover core hours, which account version of events is supported by the evidence of Mr Newman.

12. In December 2017 Mr Edwards did not invite the claimant to his wedding, despite inviting all the others in the team.

13. On 20th December the claimant was signed off sick, and remained off sick until her resignation in August 2018. On that same day she had a telephone conversation with Nick Grubb of HR in which she set out her complaints about Mr Edwards. A meeting was set up with Firoxa Shaikh on 4th January 2018 at which the claimant set out her complaints, and stated that she did not think that she could return to Mr Edwards team. Ms Shaikh advised that the claimant should set these concerns out in writing and raise them at a meeting with Mr Edwards which was due to take place on 10th January 2018. That was an informal meeting conducted under the respondent's sickness absence policy as the claimant had, by 2nd January 2018 had thirty six days sickness absence since June 2017.

14. As advised the claimant prepared the statement setting out her contentions as to why she was absent with stress and read it out at the meeting on 10th January 2018. Having done so the claimant was advised she had three options, a sustained return to work, termination with twelve weeks' notice if that was not possible, or redeployment.

15. On 26th February 2018 the claimant submitted a formal complaint in writing against Mr Edwards. This was investigated by Mark Hemming. He met the claimant at her home on 16th March 2018, and subsequently Mr Edwards, and Faye Lynch of HR. He did not interview the other members of the team as he did not want to risk creating a rift. His conclusions in summary were that there was no evidence to support the allegations of bullying/harassment, and that the claimant's current role could not be performed outside the Quality Assurance Team. As the claimant would not accept returning to that team the options were to seek an alternative post within a twelve week period after which, if none were available her employment might be terminated.

16. As the allegation of a failure to take her concerns seriously is central to the claimant's claim it is necessary to examine Mr Hemmings investigation and conclusions. Firstly, the information he had was the statement that the claimant had read out at the meeting on 10th January 2018 which she described as the basis of her complaint in her grievance letter, and what was said at the meeting with her on 16th March 2018. The statement is lengthy and detailed, and the record of the meeting demonstrates that each of the complaints set out in the letter was discussed. In respect of the sickness absence the claimant's broad complaint was of the formal management process being commenced in that she alleged that the stress which led her to absent was caused by the bullying of Mr Edwards. Her complaints as to the alleged failures to comply with the policy in respect of return to

work interviews and the failure to produce the risk assessment was that had these steps been taken it was possible that it would not have been necessary to proceed to a formal sickness absence meeting. Mr Hemming looked at process overall and concluded that the claimant had six episodes of absence between 19th June 2017 and 2nd January 2018, totalling thirty six days' absence and that it was reasonable to have triggered a formal meeting. Accordingly, he concluded there was no evidence to support the allegation that the policy had not been followed appropriately. This is on the face of the information before him a rational conclusion he was entitled to reach.

17. The next issue in the 10th January statement is in relation to her not being invited to Mr Edwards wedding. She states, however, that she did not have a problem with not being invited. Mr Hemming did not deal with this in any detail as he considered it a private non work related issue. Again, whether the claimant agrees or disagrees, this is on the face of it a rational conclusion open to Mr Hemming.

18. In respect of her complaints about being required to work core hours; of the withdrawal of TOIL without prior agreement; and homeworking, he concluded that these were reasonable managerial instructions. Having interviewed Mr Edwards and had his explanation for these decisions there was again a rational evidential basis for Mr Hemmings conclusions. Once again there is evidence that he did consider all these points and none that he did not take the complaints seriously.

19. The claimant appealed. The appeal panel was chaired by Neil Savage with Gordon Benson (Assistant Director of Clinical Governance) and Tracey Harper (Senior HR Manager). The appeal hearing took place on 6th June 2018. In his witness statement Mr Savage sets out the process followed at this initial meeting. The panel went through with the claimant the incidents which she believed amounted to bullying. Mr Hemming then explained the scope of his investigation and the claimant expressed the view that more investigation was needed. The panel accepted the claimant's suggestion that more investigation was required, and directed that Mr Hemming interview more members of staff, looked at timesheets and made further enquiries about the question of events surrounding Mr Edwards wedding. Mr Hemming interviewed Simon Ball, Sharon Keveren, Robin Newman, Becky Poyntz- Wright and Mr Edwards again. Of those interviewed the tribunal has read their evidence and has heard from Mr Newman. He is one of the trust's Freedom to Speak Up Guardians and stated that he had never witnessed any bullying or harassment; and as is set out above personally held Mr Edwards in very high regard.

20. The reconvened appeal hearing took place on 24th August 2018. Having considered the new information the panel concluded that although Mr Edwards management style was not well received by the claimant that it had not crossed the boundary into unacceptable behaviour or bullying. The descriptions of Mr Edwards management style are not entirely consistent and there are comments that would tend to support the claimant's account. Equally there is significant amount of evidence to contradict it, such as that of Mr Newman set out above. In the end the appeal panel had to assess that evidence and in my judgement the conclusion that they reached was one that was reasonably and rationally open to them on the evidence. In respect of

the withdrawal homeworking they accepted Mr Edwards explanation that he had withdrawn that for all staff when he discovered that the office was not being staffed during core hours. They concluded that particularly with the further investigation that a full and fair process had been followed; that the claimant had had a sufficient opportunity to put her views across; and concluded that the investigating manager's decision was proportionate. In the outcome letter specific explanation as to its conclusions is given.

21. The panel did not find any evidence of bullying by Mr Edwards. It drew a distinction between forthright management which it accepted Mr Edwards had engaged in and which was not well received by the claimant, and bullying. It did not accept that Mr Edwards management style had crossed the line into bullying. There is in my judgement a clear and rational evidential basis for that conclusion. Their preferred outcome was professionally facilitated mediation and they requested the claimant's response to this by 31st August 2018.

22. However, on 28th August 2018 the claimant tendered her resignation. In her witness statement she describes the "appeal finding and disingenuous option I was requested to accept" as the last straw.

Conclusions

23. The first allegation is of failing to recognise the seriousness of the claimant's allegations of bullying. The respondent submits that this allegation is simply unsustainable. For the reasons set out above the allegations were self-evidently treated seriously. Firstly, the correct process was followed in that they were initially dealt with informally; there was then a formal investigation; followed by an appeal. In addition, they were investigated by individuals of significant seniority who were independent and had had no involvement in the events in dispute. Finally, it is self-evident from the fact of the investigations, the detailed engagement with the issues in the outcomes at both stages and the thought that had clearly gone into that process at both the initial and appeal stage that they were taken seriously. The fact that they were not in the final analysis upheld is not evidence that they were not seriously considered. There is no evidence to support that allegation and all the evidence there is contradicts it. The fact that the claimant does not agree with those conclusions is not in and of itself evidence that the allegations were not taken seriously. All the evidence before me indicates that they clearly were.

24. The second allegation relates to the alleged failure to adhere to policies and procedures. The policies referred to are the Sickness Absence Policy and the Dignity at Work Policy. The claimant's complaints about the breaches of the Sickness Absence policy are that Mr Edwards did not conduct a return to work interview on 6th September 2017 after she had been off for two days. The meetings with Mr Newman on 2nd and 3rd October 2017 were regarded by the respondent as return to work interviews although she had not been informed of that fact, and the notes of the meetings were not provided to her, and in addition that she was not

offered counselling. (This final issue has only been raised in the written submissions. It is not referred to in the witness statement and was not put to Mr Newman in cross examination. In any event the respondent correctly points out that this advice was given to the claimant by Occupational Health on 12th October 2017). No return to work interview was conducted on 16th October 2017; on the 26th October 2017 she was required to attend a return to work interview with Mr Edwards and Mr Newman which she contends was overbearing, a misuse of power and contrary to policy, and again she was not provided with notes of this meeting.

25. In addition, she complains of a failure provide her with a copy of the risk assessment completed by Mr Newman after the meeting on 26th October, that no review date was set, and that the stress risk assessment ignored the reported stressor of the radio.

26. The failure to follow the Dignity at Work Policy involves a number of assertions. Firstly the claimant asserts that at the meeting on 10th January 2018 she was given three options by Faye Lynch; to return to work; seek redeployment; or have her contract terminated. She complains that the policy does not provide for these either at the informal or formal stage. The respondent submits that this is to misunderstand what occurred. It is not a question of the policy but a consequence of the claimant's position that she did not wish to return to her existing team, which she had made in the meeting with Firoza Shaikh in the meeting on 4th January 2018; and which she reiterated in the grievance and appeal meetings. It follows that it was reasonable for her options to be explained in the light of her own position.

27. Secondly the claimant complains that despite raising bullying complaints that no action was taken in particular by Faye Lynch to invoke the Dignity at Work Policy before she raised a complaint herself on 26th February 2018.

28. The respondent submits that on any analysis these are relatively minor breaches of process if they are breaches at all. There is no evidence, as the claimant alleged in her grievance that had more formal return to work interviews and/or those of those interviews or the risk assessment been shared with her that the formal sickness absence process would not have commenced.

29. The third is the appeal outcome which is said to be the final straw. The conclusion of the panel was that although they found that there was cause for informal action, did not uphold the allegations of bullying and harassment. They did offer to pursue the claimant's preferred outcome of alternative employment.

30. There are a number of events in the course of employment which my damage trust and confidence. Obvious examples include the commencement of disciplinary proceedings, and rejection of a grievance. However, the implied term is only breached if the respondent acted without reasonable or proper cause. In terms of the implied term if the rejection of an appeal is capable of destroying or seriously damaging the mutual trust and confidence, did they have reasonable and proper cause for doing so.

31. Fundamentally therefore the question is whether the conclusions drawn by the appeal panel were reasonably open to them. For the reasons set out above they were. That leaves the "disingenuous option" presented to the claimant. The suggestion from the appeal panel was for mediation, and in the absence of he claimant agreeing to this for her to be placed on the redployment register to seek suitable alternative employment. The respondent submits that it is hard to see how this was disingenuous or what realistic alternatives were open to the appeal panel.

32. As a consequence, the respondent submits that the last straw is not capable of being a last straw and that the claim must fail in any event The leading authority on the application of the "last straw" doctrine is Omilaju v Waltham Forest LBC [2005] ICR 481. At para 14.5 of the Judgment Lord Dyson states "*A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents (he goes on to set out with approval a passage from Harvey*), and at paragraph 16 states ""*Although the final straw may be relatively insignificant it must not be utterly trivial…"* In addition to the passages set out above at paragraph 21 Lord Dyson held " *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect*.", and at paragraph 22 "*Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely , but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test …. Is objective*."

33. The respondent submits that the conclusions of the appeal panel and the options given to the claimant are objectively entirely innocuous. If the conclusions were reasonable open to them they cannot objectively be any form of, or contribute to any breach; and the options gave the claimant the possibility of returning to her former team via mediation or seeking an alternative post. Given that these were the only two options, and that there was therefore no alternative, this must also be entirely innocent.

34. In my judgment there is considerable force in this submission; and it may well be that on this ground alone the respondent is correct. Certainly in my judgment the factual allegations on which the last straw is based, that the appeal panel had not taken the complaints seriously, and that the claimant was offered "disingenuous options" are not factually well founded. It follows that in my judgement whether regarded as being innocuous, or whether because it is not factually well founded the last straw cannot be a last straw and the claimant's case fails on that ground alone.

35. However, in any event and in case I am wrong in the conclusion as to the last straw I have considered the case as a whole. The respondent submits that "*the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it,*". They submit that even if they are wrong and that the final straw is not entirely innocuous within the meaning of Omilaju, that this overall test is not remotely met. They submit, in my view correctly

for the reasons set out above that the allegation that the claimant's complaints were not taken seriously is unsustainable, as is the allegation that the appeal panels option was disingenuous. That leaves only the alleged breaches of the sickness absence policy and Dignity at Work policy. Even if all of the claimant's allegations are well founded applying the test set out above it cannot objectively be said that the behaviour was such that the claimant could not be expected to put up with it. Put another way it is not in my judgment looked at objectively in and of itself conduct which is sufficiently serious that objectively it was likely to destroy or seriously damage the mutual relationship of trust and confidence and the claim would fail for this reason as well.

36. It follows that the claimant's claim for constructive unfair dismissal must be dismissed.

EMPLOYMENT JUDGE CADNEY

Dated: 9 December 19
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