



EMPLOYMENT TRIBUNALS

Claimant: Mr A Allen

Respondent: Hampshire Hospitals NHS Foundation Trust

Heard at: Southampton

On: 27, 28, 29 January 2020

Before: Employment Judge Dawson

Representation

Claimant: Mr K Williams, Citizens Advice Bureau

Respondent: Mr S Wyeth, counsel

REASONS

JUDGMENT having been sent to the parties on 30 January 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

1. In this case Mr Allen, the claimant, brings only a claim of constructive unfair dismissal, an earlier claim of age discrimination having been dismissed upon withdrawal on 20 March 2018.

Issues

2. The issues are set out at paragraph 5 of the Case Management Summary prepared following a hearing on 23 November 2018. At the outset of this hearing both parties confirmed that the issues remained as set out in that Summary.
3. Thus there are
 - a. 10 specific factual allegations of repudiatory breach of contract by the respondent, or its employees,
 - b. an issue of whether the claimant affirmed the contract and
 - c. an issue of whether any breaches were the reason for the claimant's resignation.
4. The respondent did not advance a potentially fair reason for any dismissal in the event that I were to find that there was a repudiatory breach of contract.

The evidence

5. I have heard from the claimant and from his line manager, Ms McDowell. I have received and considered a bundle of evidence. Except where stated, references to page numbers in this judgment are to that bundle.
6. I did not hear from 2 employees of the respondent who the claimant makes specific allegations of bullying against. I understand that at least one of those (a deputy sister) still works for the respondent. It is, of course, a matter for the respondent which witnesses it calls and I must decide the case on the evidence which I have heard. However, where the claimant has made specific allegations which have not been answered and could have been, that is also something I take into account. My concern, however, is that in doing so I may make findings of fact, which may well be published on the Internet, against people who have not had the opportunity to defend themselves (it was not suggested to me that the respondent had asked those persons if they wanted to be witnesses and they declined). In those circumstances I have chosen not to name the employees in question. I do not believe it is necessary to do so for the purposes of this judgment, either to make it intelligible or to do justice between the parties.

The law

7. A termination of contract by the employee will constitute a dismissal within the Employment Rights Act 1996 if he or she is entitled to so terminate it because of the employer's conduct. The Court of Appeal made clear in *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, that it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment.
8. Harvey on Industrial Relations helpfully summarises the law as follows:

In order for the employee to be able to claim constructive dismissal, four conditions must be met:

 - (1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
 - (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.
 - (3) He must leave in response to the breach and not for some other, unconnected reason.
 - (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.
9. In this case the claimant, in respect of the breach of contract, relies upon a breach of the implied term of trust and confidence.
10. In *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, the term was held to be as follows: "The employer shall not without

reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

11. In *Omilaju v Waltham* [2005] ICR 481 Dyson LJ said:

14 The following basic propositions of law can be derived from the authorities.

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, 610 e– 611a (Lord Nicholls of Birkenhead), 620 h– 622c (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne-Wilkinson J in *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666, 672 a. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship.

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Mahmud* , at p 610 h, the conduct relied on as constituting the breach must

"impinge on the relationship in the sense that, looked at *objectively* , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. 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. It is well put in *Harvey on Industrial Relations and Employment Law* , para D1 [480]:

"Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

...

19 The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in the *Woods* case at p 671 f– g where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A

final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase “an act in a series” in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20 I see no need to characterise the final straw as “unreasonable” or “blameworthy” conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21 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. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

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 of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above).

Approach to the evidence

12. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, Leggatt J gave the following helpful guidance

Evidence Based On Recollection

[15] An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

[16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to

be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

...

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events...

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

...

[22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

13. In this case there is a good example of how recollections change over time. In the claimant's document "*Further & Better Particulars*" he has stated, at paragraph 9 that his manager, Ms McDowell, told him that maybe he deserved to get treated a particular way due to his behaviour and due to his laziness at work. That statement was translated into the list of issues at 5.1.4. In his evidence, the claimant stated that he had not suggested that Ms McDowell had told him that he was lazy and that the inclusion of that statement in the list of issues was an error. However, it can be presumed that he had given instructions in respect of his *Further & Better Particulars* at the time they were written. Thus I must approach oral evidence, even persuasively given, with some caution where it is not supported by contemporaneous documents.

Findings of Fact

14. The claimant was employed as a Concierge for the respondent from 26 January 2015. He was a good employee who was nominated for 3 WOW awards and won one of them. Until October 2016 the claimant was in a team of 3 concierges, including himself, Lee Collins - who was employed somewhat earlier in 2016- and Carolyn Robinson who had been employed from September 2016.
15. In October 2016 the claimant had an Inguinal Hernia requiring surgery and was off work from then until January 2017.
16. The evidence of Ms McDowell, which I accept, was that towards the end of October 2016 there was an increasing volume of work across the Candover Suite and Candover Clinic (which the claimant and his team served) and Ms McDowell, who was the claimant's manager and held the position of Private Patients Manager at the Candover Clinic, could not manage the organisation of the concierge team alone. Thus, after the claimant had gone off, she asked Lee Collins to help with the organisation of the team. He was appointed to a temporary post as Concierge Supervisor which was to last for 6 months.
17. The role of Concierge Supervisor required Mr Collins to deal with various paperwork functions (such as rotas, holiday requests and so on) but also ensure that all tasks were completed. Thus if a patient needed transferring, the Supervisor would be expected to do that if others were not able to. Thus that role required some heavy lifting.
18. The claimant could not be appointed to that role in October 2016 since he was off sick. It is clear that he was likely to be off sick for a reasonable period even if the precise date of his return to work was not known. It is also apparent that Mr Collins had impressed Ms McDowell in his time of being employed. She saw him as somebody who could manage the whole of the service.
19. Whilst the claimant was off work a report was provided from the respondent's internal occupational health provider which stated that the claimant must avoid heavy manual handling for 3 to 4 months following surgery (which had been performed on 25 November 2016).
20. The claimant returned to work on 4th of January 2017 and was, therefore, on light duties until at least 25 February 2017.
21. There is a file note which contains details of the return to work meeting between Ms McDowell and the claimant at page 89 of the bundle. It was explained to him that the business had evolved and, by then, there were four concierges (a further concierge called Greg having been appointed) and Ms McDowell had appointed Mr Collins into the temporary position of Concierge Supervisor. The claimant was unhappy with that and suggested that he was more appropriate for the role as he had worked there longer. Ms McDowell made reference to Mr Collins' extensive management experience and stated that this was a temporary measure for 6 months and the claimant would be welcome to apply for the post when it was made substantive, following his period of light duties.

22. Later that evening Ms McDowell approached the claimant in the waiting area to check if he was okay. He told her that he was not, she says he spoke loudly. She asked him if he would come to her office to have a chat and he declined stating that his next step was with the union. Ms McDowell explained that she was checking if the claimant was okay with light duties and he stated that they were fine and not too much for him.
23. Although the claimant states that he did not raise his voice as alleged, he does accept that in that conversation Ms McDowell asked him to go to a different room with him. The claimant agreed in cross examination that Ms McDowell would not have asked him to move into a different room if she thought the way he was speaking to her was appropriate. He accepted that the exchange took place in front of patients.
24. Having regard to the contemporaneous file note, in which Ms McDowell records *"he very loudly told me that he was not okay. I asked him if he would like to come to my office (there were lots of patients in the Waiting Area) to have a chat and he stated loudly that he did not wish to speak to me that the next step was the "Union"*" (page 89 of the bundle), I accept Ms McDowell's evidence that the claimant was speaking in such a way as to be described as speaking loudly. He was doing so, and talking about approaching his Union because he was unhappy that he had not been given the temporary Supervisor role.
25. On 13 January 2017, another employee of the respondent spoke to the claimant. She was the Admin Lead for the Candover Clinic reception area. The claimant accepted that she could properly be described as having "dotted line responsibility" for him. I understand that to mean that she was senior to the claimant and could ask him to undertake tasks around the reception area but was not his line manager, in particular, one of the claimant's tasks was maintenance of the coffee machine in the reception area.
26. Whilst I have not heard from the Admin Lead, there is, in the bundle of papers at page 91, a detailed file note of her recollection of events on 13 January 2017. She was concerned about a number of things, including that the availability of cups was running low, there were used ones by the Drinking Station. She had been approached by a patient who had picked up a "clean" cup which was filthy inside and the coffee machine had not been cleaned since the day before. She attempted to contact the claimant via a bleep and was unable to do so.
27. At around 2 PM she saw the claimant and asked him where he had been. She raised with him the question of the coffee machine. Her statement, within the file note, is that in a raised voice he said "well it's clear you're not the only one who doesn't trust me – I've had enough of this, I've been doing the job for ages...". She says he then, in front of patients, raised his hands in the air, turned his back on her and proceeded to take his keys from the machine and walk away down the corridor.
28. Whilst being cross-examined, the claimant accepted that the Admin Lead asked him to lower his voice. When, in cross examination, he was asked why she would say that if he was not shouting he stated "I didn't raise it to the extent she said, I spoke in a firm voice." He also agreed that the file note

was accurate in that it records that he raised his hands in the air, turned away from her and walked away from her in front of “a couple” of patients.

29. Having regard to the admissions made by the claimant in cross examination I find that the file note is substantially accurate.
30. The Admin Lead sent an email to Ms McDowell on the same day at 5:12 pm stating “I had an eventful afternoon with Aidan, so I have recorded everything as soon as I could. It’s quite long but I wanted to make sure that it was all down.”
31. Having received that email, Ms McDowell arranged an informal meeting with the claimant in relation to the 2 incidents that I have referred to - where he raised his voice with her and also with the Admin Lead.
32. By letter of the same date Ms McDowell wrote to the claimant setting out the outcome of the meeting and stating “in accordance with Trust Management of Conduct (Disciplinary) Policy we agree to have informal reviews to monitor your conduct for a period of 3 months. I explained that should a further occurrence happen, it may need to be dealt with under the formal stages of the Trusts Management of Conduct (Disciplinary) Policy” (page 94 of the bundle)
33. The claimant agreed in cross examination that Ms McDowell’s approach had been informal, not heavy-handed, she had reminded him of what was acceptable behaviour and she had done nothing unreasonable in meeting with him.
34. The claimant’s Further & Better Particulars of claim, at paragraph 5, state that after the meeting of 17 January, the Admin Lead treated the claimant in a worse way by demanding him to do the coffee area telling him “I want it done now” even though she could see he was busy doing his main duties. The particulars state that she talked to the claimant harshly and he felt disrespected. There was no oral evidence to that effect.
35. The respondent’s case is that on 7 February there was a further discussion between the claimant and the Admin Lead where she, again, raised the issue of the coffee machine. The claimant agrees with that. He, further, agrees that the coffee machine had not been attended to. He states, and I accept, that upon leaving the early shift he had asked a colleague, Greg, to clean the coffee machine because he had not had time to do so. He states that he told the Admin Lead that that was the situation but, at a later meeting, when the claimant was taken to task about not cleaning the machine, the Admin Lead was present and did not back him up. His statement does not, however, state that during that day the Admin Lead had been abrupt, rude or demeaning to him.
36. There is a file note dated 8 February 2017, written by Ms McDowell in which she records that the claimant had approached her on that day and said that he was unhappy with the way that the Admin Lead interacted with him. He felt that she dictated to him rather than asking him nicely to undertake tasks. He also said that in the meeting on the 7th, the Admin Lead had a look of disappointment on her face which made him feel small. I am willing to accept, given that the respondent has not called the Admin Lead to give

evidence that her approach to dealing with him up to 8 February 2017 may have been such that the claimant felt she dictated to him rather than asking him nicely to undertake tasks.

37. Ms McDowell's response was to suggest that if he felt comfortable to do so, the claimant should have a coffee with the Admin Lead and explain the way he was feeling. She offered to be present. The claimant declined her offer to be present and said he was happy to meet with the Admin Lead himself.
38. Ms McDowell records, and the claimant agrees, that he subsequently returned to her and said that he and the Admin Lead had a very amicable and productive conversation.
39. The Admin Lead has produced her own file note of that meeting (page 97 of the bundle) and that note records, early on in the meeting, the Admin Lead saying how sorry she was and that she felt terrible that the claimant felt bad. That was not her intention. The claimant explained that he felt extremely busy and under pressure to suit everyone's needs. After some discussion the Admin Lead explained that they were all part of the team, part of her responsibility is the reception area and part of his concierge role is the reception. That was a priority and must be done between them. She stated that if he ever felt under pressure he could come to her and ask for help with prioritisation. He agreed that he had never asked for help and not been helped, and both agreed that the claimant waiting until the end of his shift to tell the Admin Lead that he had not had time to address the coffee machines was unacceptable. The meeting ended with both shaking hands.
40. In cross examination the claimant accepted the salient parts of the attendance note which were put to him. There is no evidence of any problems thereafter.
41. Later the same day, Ms McDowell received a call from the claimant advising her that he had been signed off with work-related stress for 2 weeks. However, on 10 February 2017, at 10 PM, the claimant texted Ms McDowell asking if there was any possibility she could telephone him. She immediately did so and, I observe in passing, that this reflects well on her as a manager.
42. He asked if he could reconsider his sick leave and have it treated as annual leave and she suggested he came in the following Monday, 13 February, 2017 when they would talk about it.
43. The claimant came in on the following Monday and, although, Ms McDowell stated that she could not change the 2 days leave on the 9th and 10th of February to annual leave he was allowed to come back to work.
44. As a consequence of his absence he was invited to an informal attendance review meeting on 28 February 2017. In terms of the claimant's claim, nothing turns on this point. However, on 28 February 2017 he was also, appropriately, referred to the respondent internal occupational health department.
45. The contemporaneous evidence shows nothing else of significance until May 2017.

46. On 8 May 2017 the claimant was certified as unfit to work for one week due to acute viral pharyngitis (page 110).
47. While the claimant was off sick, Ms McDowell conducted a “safety huddle” in which staffing requirements were discussed in the context of the claimant being away. During that meeting a deputy sister, stated that she thought the claim would be back to work soon because she had seen a video of him on Facebook at a birthday party dinner.
48. Ms McDowell asked to see that video and, I am told by both parties, it shows no more than a 10 second snippet of a group of people singing happy birthday. The claimant is at the end of the table with his back to the camera and there is a small snippet of him eating but not singing.
49. The claimant’s evidence, which I accept, is that he was ill, as was his wife, and a friend from church had invited him to their house for dinner. The dinner was a birthday party, the claimant did not really join in the party and went home as soon as he had eaten. He had chosen to accept the invitation because neither he nor his wife felt like cooking and they had not been able to do much shopping because of their illness.
50. The video footage was posted to the claimant’s church’s Facebook page.
51. The Deputy Sister was also in a “dotted line” reporting role to the claimant. Although she was not his line manager she was able to instruct him to do tasks. Not only was the Deputy Sister part of the claimant’s church’s community but she was also, apparently, close to the claimant (or had been), having been a witness at his wedding.
52. When the claimant returned to work on 16 May 2017 Ms McDowell spoke to him and told him that they needed to discuss the video. She told him that she would not expect to see him at a birthday party while off sick with pharyngitis and asked him to explain what had happened. He explained his version of events as set out above and Ms McDowell told me, and I accept, that she accepted that explanation and took it no further. Ms McDowell firmly denies that she referred to the claimant faking his illness in this conversation. Having regard to the rest of her evidence and the fact that she took this issue no further, on the balance of probabilities I accept her evidence. It seems to me that if she had thought the claimant was faking his illness she would have taken matters further.
53. The claimant was upset that someone had, in his view, unfairly reported him to his employer. He was aware that it was the Deputy Sister that had done so. He went home and discussed matters with his wife. His wife posted a message on Facebook stating “whoever end or shown that video to Aidan’s manager, my question is what is your hidden hatred to us or my husband. What did we do wrong for you to do that? Is that called partying to you... I am crying I just couldn’t believe that someone can do something like this, stabbed us in the back. We are supposed to be loving one another not like this. I don’t really exposed problems like this but this one I can’t keep quiet any more. This is something to do with my husband’s source of income. The income that is supporting my family. We may not see what is inside your heart, you may be smiling to us, talking to us, being hypocrite to us but God

know you and He know your agenda. Whatever hatred you have towards us, God know that. You need praying.” (Page 112, sic)

54. One can understand a degree of upset on the part of the claimant's wife if she felt that a member of her church was unfairly trying to get him into trouble and it is not uncommon for Facebook to be used as he medium for people to vent their spleen, however unwise that may be. However, the Deputy Sister was upset by the message. Mr Wyeth, for the respondent, put to the claimant in cross examination that to be accused of being a hypocrite and to have one's faith challenged would be very hurtful and the claimant agreed. He also agreed that the Deputy Sister had, in effect, been given a dressing down in front of her church community and that it was not surprising that she would take offence.
55. There is no dispute that on 17 May 2017 she approached the claimant about the Facebook post. The claimant states, and the respondent has called no evidence to controvert his evidence, that she confronted him in a very aggressive manner. He states “this was an extreme example of how I was bullied and harassed by [her]”.
56. I find that, however, notwithstanding the claimant's evidence in this respect he had not raised any concerns about treatment of him by the Deputy Sister prior to this incident. The claimant's evidence is that when he spoke to Ms McDowell about the Admin Lead on 8 February 2017 he also complained about the Deputy Sister. However the contemporaneous file note by Ms McDowell shows no suggestion of any such complaint and, I find, that if such a complaint had been made she would have noted it down. Ms McDowell, it seems to me, was conscientious in the keeping of file notes.
57. The claimant left work mid-morning on 17th of May 2017 reporting to Tracey Grundy that he felt stressed and unable to work. He remained on sick leave until 31 May 2017. Ms McDowell attempted to contact him while he was away as is apparent from her email to the human resources Department on 23 May 2017 (page 114) of the bundle. She also completed an occupational health referral in his absence which was sent on 24th of May 2017.
58. On 26 May 2017 the claimant sent a letter to Human Resources which he saw as a grievance and, in my view, it was reasonable for him to do so. In the course of that letter he raised concerns about the issue with the video and stated “I also write you about aggressive actions of [the Deputy Sister] towards me for confronting me and for raising her voice to me and for intimidating me whilst I was doing my duties at work and also for bringing personal matters into my workplace. This kind of treatment has been going on for months at work and it has been affecting me mentally, emotionally and physically...” (Page 123).
59. Ms Carstens, HR adviser, sought to contact the claimant to discuss his letter. She was unable to do so by telephone and therefore, on 6 June 2017, emailed him stating “up until now, I have been unable to contact you with regard to the letter you wrote to me... To be able to discuss this further I will contact you again by phone on 7th of June at 2 PM.”
60. On 8 June 2017 the claimant replied stating “just to let you know that my union representative has got a new job role and at the moment I'm just

waiting for the new one who will handle my case to contact me. As soon as I have heard from them I will contact you.” (Page 132). The claimant did not revert to Ms Carstens or HR.

61. The claimant met with Ms McDowell on his return to work on 9th of June 2017 and it was agreed that they would meet again after the occupational health report had been obtained.
62. The claimant met with the internal occupational health provider on 19th June 2017 and the report following that meeting records that the claimant believed he had been bullied. It contains the statement “Aidan did wish to consider a reduction in his contractual hours and I have requested that Aidan discusses this with you directly however if this is supported, he is aware that there will be a financial implication but this does not concern him”. (Page 138). The report does not recommend a reduction in hours.
63. There was a later meeting on 20th of June 2017, which was an attendance review meeting, having regard to the amount of absence which the claimant had taken, and the claimant again discussed the altercation with the Deputy Sister as well as other issues. The content and outcome of the meeting is well documented in the letter of 22nd of June 2017 at page 139 of the bundle. It records that “due to the multifaceted concerns you have raised, I would like to reconvene your Informal Sickness Management Meeting once I have received your [OH] report. I advised you that I would speak to HR to see if it would be necessary for them to be in attendance at the next meeting.” The claimant states that letter was only delivered to his house on 7 July 2017 but nothing turns on that since the letter only records what I find the claimant was told in the meeting. Around that time Ms McDowell was told by HR to step away from the issues in respect of the Deputy Sister because of the grievance which would be managed by HR and the claimant’s trade union representative. That was a reasonable stance for HR to take.
64. The next day, 21 June 2017, the claimant went to Ms McDowell’s office to ask about flexible working arrangements. He wanted his request to be determined quickly.
65. It was determined by 27th of June 2017 when by letter of that date, the application was declined. Reasons were given for the decision including a detrimental effect on the ability to meet customer demand and an ability to reorganise work among other remaining employees. The letter states “it is not possible for the other Concierges, who worked 37.5 hours per week, to absorb these additional hours permanently. The recruitment of someone to work the other 3.5 hours per day of the shift is not possible due to the limited access they would have, in the short timescale, to training and ongoing development required for the role.” (Page 144). The claimant was given a right to appeal, which he did not exercise.
66. In cross examination of Ms McDowell, Mr Williams for the claimant put to her that her reasoning was wrong in respect of the flexible working request because, prior to the claimant having gone off in October 2016, he had worked flexibly to assist the respondent at a time of staff shortage. Ms McDowell did not agree with that analysis. Her evidence was that it would be inaccurate to describe the system as coping with the claimant doing split shifts in 2016. The claimant was being asked to work split shifts as an

interim measure but it was not an ideal situation and was for a limited period. In his flexible working request the claimant was asking for a long-term change and recruitment would be difficult. She pointed out that the Candover Clinic was a growing business and had 2000 patients a month going through it. I find that the service had clearly grown since 2016 as is evidenced by the need to move from employing one concierge to 4. The reasoning contained within the letter of 27 June 2017 seems to me to be cogent and has not been shown to be wrong.

67. The claimant did not attend work on 20 June 2017 and on 29 June 2017 sent a text to Ms McDowell stating that she knew how stressed he was at work and pointing to the fact that the previous year, when he was the only concierge he was asked to do split shifts for both the clinic and the ward. He stated "at that time management allowed me to change my hours because it suits you." That is a reference, in my view, to the decision to refuse his flexible working request. He referred to the stressful environment and went on, stating, "I am taking unpaid leave before my paid leave commences on 26 July" (page 146). By letter dated 29 June 2017 Ms McDowell pointed out that she had not authorised unpaid leave and told the claimant he was expected to be in work on 3 July 2017.
68. On 5 July 2017, the claimant resigned referring to verbal abuse and threatening behaviour since the end of "last year". (Page 160).
69. Since around 2nd June 2017, the claimant had been doing some work as a private hire taxi driver. He appears to have been doing the work mostly at the weekends and, perhaps, on one or 2 evenings a week. He told me that was to supplement his income having regard to the needs of his family. There was no prohibition on the claimant undertaking a 2nd role whilst working for the respondent. After his resignation the claimant started to work on a full-time basis in his taxi and the respondent asserts that the reason why the claimant resigned was, in truth, in order to operate his taxi business on a full-time basis. I do not accept that. I consider that the claimant was genuinely unhappy at work and, as a consequence, was suffering from stress and anxiety. Doctors notes, such as that dated 1 June 2017 at page 128 of the bundle confirm that. The respondent had noticed a change in the claimant's attitude and there is no doubt that the claimant had complained about the Admin Lead earlier in the year and, from the end of May 2017 about the Deputy Sister. It does not follow from those findings that the respondent was in repudiatory breach of the claimant's contract so that the claimant was entitled to resign and treat himself as dismissed (I will return to that question in a moment) but I am satisfied on the balance of probabilities that it was those matters that caused him to resign, combined with the refusal to allow his flexible working request. In particular, I find that the claimant never really moved beyond his disappointment and frustration that he was not given the supervising concierge's role. That failure coloured his view of the respondent and its staff from then on.

Conclusions

70. I will, initially, set out my conclusions in respect of each of the allegations of repudiatory breach. I bear in mind, however, the need then, to take a step back and consider whether, overall, matters were such that the respondent should be regarded as having been in repudiatory breach.

71. In respect of issue 5.1.1, namely that some of the claimant's duties and responsibilities were given to Mr Collins during his illness absence, I do not find that this allegation is well-founded. In his evidence, Mr Allen accepted that, in fact, none of his duties were removed (except the heavy duties on a temporary basis). It is, in reality, the case that he believes that he should have been given the concierge's Supervisor role. I find there is nothing wrong with what the respondent did. At a time when the claimant was off ill, it needed to appoint a Supervisor. There was no obligation on it to wait until the claimant returned from his sickness, one was needed immediately. Lee Collins was a suitable candidate for the role and had impressed Ms McDowell. The respondent was entitled to promote him to that role on a temporary basis and doing so did not amount to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence with the claimant had with the respondent. The claimant could not do that role since he could not perform the heavy lifting aspects of it, that remained the position when the claimant returned to work and there was no obligation on the respondent to remove the role from Mr Collins at that point to see if the claimant wanted to perform it.
72. In respect of issue 5.1.2, given the findings I have set out above I do not consider that on 17 January 2017 the claimant was unfairly and/or unreasonably accused of conduct related matters by Ms McDowell. I find that he had, at least, raised his voice to both her and the Admin Lead. His behaviour in raising his arms and turning away from the Admin Lead in front of patients was unacceptable. There was nothing wrong with Ms McDowell raising this with the claimant and, in cross examination, he accepted that.
73. In respect of issue 5.1.3, I have heard very little evidence on which I could find that the Admin Lead was abrupt, rude and demeaning in February 2017. In the claimant's witness statement he states "during a patient transfer they would order me to clean the coffee machine, or attend to the specimens, in a very abrupt manner. They were not satisfied if I said I would do the tasks after finishing this patient transfer, but insisted on me doing them immediately."
74. There is some evidence of what happened, in the note which the Admin Lead, herself, made of the meeting she had with the claimant in which she apologised for her behaviour. However, that apology was not, in truth, an admission that she had behaved badly; it was more an acknowledgement that the claimant felt unhappy with the way that he perceived that he had been treated and she was attempting to assuage his upset. The way in which the Admin Lead dealt with matters is, in my view, to her credit. It is clear that matters were resolved after that meeting and, therefore, at most the alleged behaviour lasted from 17 January 2017 to 8 February 2017.
75. I find that if there was firm behaviour on the part of the Admin Lead to which the claimant took exception, it was only an expression of her frustration borne out of the circumstances. She was requiring him to do no more, in asking him to perform tasks, than he was required to do under his contract of employment. Whilst it may be frustrating for employees, it is not unusual for more senior employees to insist that the task they want doing is the most important. If an employee asks for help in prioritisation and is not given it, then that may give grounds for complaint but that was not the case here. The claimant's case is that the Admin Lead would not allow the him to finish

patient transfers on occasion but required him to do her tasks immediately. Thus she was assisting him in prioritising his work. It has not been suggested that was not a decision she was not entitled to take. The claimant may not like her priorities but that does not amount to a breach of the implied term of trust and confidence. I do not find that there is any evidence that she was abusive or rude or demeaning in the way that she spoke to the claimant; the claimant gives no specific examples of such matters.

76. In respect of issue 5.1.4, the claimant in his evidence accepted that Ms McDowell had not suggested he was lazy and I do not need to consider that further.
77. In respect of issue 5.1.5, I do not find, as set out above, that Ms McDowell failed to act on or take the claimant's complaints about the Deputy Sister seriously. The claimant did not raise matters with her until June 2017 and, thereafter, Ms McDowell was meeting with him to discuss his concerns but was, reasonably, told by HR that the issue would be dealt with by them.
78. I turn then to issues 5.1.6 and 5.1.8 which I deal with together. I do not find that there was any action by the Deputy Sister before 17 May 2017 which could be described as bullying. Had there been I consider the claimant would have raised it with Ms McDowell and I have not found that he did so.
79. Whilst I have not heard evidence from the Deputy Sister, I accept Ms McDowell's evidence as to the manner in which she told Ms McDowell about the claimant's attendance at the birthday party; namely, that it was in the context of Ms McDowell wondering whether he would be back to work for the purposes of considering staffing requirements. I do not find that she was seeking to get the claimant into trouble. However, even if she was raising it because she felt that the claimant should not have been off work, that was not unreasonable. As Mr Wyeth put to the claimant in cross examination, the respondent is a public body with generous sickness policies. It should be diligent to ensure that those policies are not abused.
80. The highest part of the claimant's case in this respect is his statement that that on 17 May he was confronted by the Deputy sister in a very aggressive manner about his wife's Facebook post. In the absence of evidence from the Deputy Sister seems to me that I am bound to accept the claimant's evidence in this respect.
81. Whilst I have considered this point carefully, I do not consider it can be said that the allegation amounts to the claimant's employer conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. The Deputy Sister, whilst in a senior role to the claimant was not his line manager. They were colleagues outside work. The claimant's wife had written a strong post about her on Facebook, challenging her faith and accusing her of hypocrisy. It is not very surprising that she would approach the claimant about that at work. It is perhaps not surprising she would do so aggressively. Nevertheless, there was an imbalance of power between the claimant and the Deputy sister and it is unfortunate that she chose to tackle him about the matter at work.
82. I find this was an isolated incident which must be seen in the specific factual context which arose. This one-off incident, bringing an issue arising from a

social context into work, does not, in my judgment, amount to a breach of the implied term of trust and confidence.

83. In respect of allegation 5.1.7, I do not find that Ms McDowell alleged that the claimant was faking his illness.
84. In respect of issue 5.1.9, the claimant's grievance was not ignored and overlooked. Indeed to the contrary the respondent attempted to contact the claimant to deal with it. It was him who put the matter on the backburner and never moved it from there. He did not contact the respondent to say that his union representative was now in a position to deal with the matter. This allegation is not factually made out.
85. In respect of issue 5.1.10, the occupational health physician did not, in fact, make a recommendation that the claimant worked reduced hours. Moreover, the claimant's own request was not overlooked. It was considered and rejected on grounds which I have found to be reasonable.
86. I have found that none of the individual allegations of repudiatory breach of contract amount to such a breach. Taking a step back and looking at matters overall, taking into account all of the findings which I have made, I do not find that the situation was such that it could be said the respondent had destroyed or seriously damaged the trust and confidence which the claimant was entitled to have in it.
87. In those circumstances the claim of unfair dismissal must fail since the claimant has not proved that the respondent was in repudiatory breach of contract. I address the remaining issues only briefly in those circumstances
88. I have already found that the claimant resigned because of his perception of the conduct to which he believed he had been subjected. He did not resign in order to develop his self-employed taxi driving business.
89. I then consider whether the claimant affirmed the contract before resigning. The delay in this case, even going back to February, was not enormous. For some of the time the claimant was off sick. Mr Wyeth puts forward a strong argument that there was affirmation when the claimant made his flexible working request application. That was a positive act which, he says, showed that the claimant intended to affirm his contract. Whilst that is true it must be seen in the context of the claimant having raised complaints in his letter of 26 May 2017 and the fact that the reduction in hours was discussed within the context of the occupational health review, in the context of bullying. In my view, in the circumstances of this case, the claimant did not affirm any breach of contract.
90. Nevertheless, for the reason which I have given, the claimant's claim is dismissed.

Employment Judge Dawson

Date: 5 February 2020

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