



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Achaski

Respondent: East Lancashire Hospitals NHS Trust

Heard at: Remotely (by CVP)

On: 15 and 16 July 2020
17 July 2020 (In Chambers)

Before: Employment Judge Holmes (sitting alone)

Representatives

For the claimant: In person

For the respondent: Mr R Dunn, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

The claimant was not constructively, and hence was not unfairly, dismissed, and her claim is dismissed.

REASONS

1. By a claim form presented to the Tribunal on 2 June 2019 the claimant brought one claim of unfair dismissal. A preliminary hearing was held on 19 December 2019, at which the issues were identified, and case management orders made.

2. The "Code "V" in the heading indicates that this was a remote hearing by CVP , to which the parties have consented. A face to face hearing was not held because both parties were able to deal with the hearing remotely. Whilst the claimant had stated that she was hard of hearing, and the Employment Judge at the outset invited her to raise any issues with audibility, she had no such problems, and the hearing could, and did proceed. The respondent provided the Tribunal , and all other parties (save for the claimant's witness, Karen English) with a copy of the bundle, which was in hard copy format.

3. It has to be observed that the Tribunal found the bundle to be less than satisfactory. It contained many pages which were of no relevance at all (probably about two thirds of it – for example, why would the Tribunal need pages and pages of training material about how to make beds, handle infections and avoid MSRA?), and duplication of documents such as emails and text messages particularly in the grievance papers,

whilst omitting what would seem to be crucial documents such as when and how the claimant actually resigned by formally applying for early retirement . The copy quality of many documents was very poor making them very hard to read.

4. Be that as it may, the claimant gave evidence, and called Karen English, her trade union representative. For the respondent, Julie Cornall, Andrea Cottam, and David Simpson gave evidence. The parties made oral submissions. It was agreed that judgment be reserved, and is now given.

5. The Tribunal found the following relevant facts.

5.1 The claimant was a registered nurse. She started her nursing career in 2001 , and worked for the respondent in the outpatients department (OPD) of Accrington Victoria Hospital, until she left to work at a Hospice.

5.2 In 2016 she applied for and was appointed to the Endoscopy Department at Royal Blackburn Hospital from 14 November 2016. Her line manager was Julie Cornall, a Sister.

5.3 The claimant started this employment without any issues initially, and had a good relationship with Julie Cornall. It takes some two years for nurses on Endoscopy to acquire the necessary levels of training , skills and experience to be considered senior nurses, and hence the claimant , despite her experience as a nurse, was regarded as a junior nurse in this department.

5.4 On 3 October 2017 the claimant applied for a post in OPD at Burnley General Hospital, which is operated by the same Trust. She was unsuccessful in that application, but was interviewed. She did not inform Julie Cornall of this application, nor was she required to do so.

5.5 In April 2018 there was an issue in the Department in relation to shifts that the team were working, and in particular the allocation of weekend shifts. Julie Cornall received some complaints from other staff members about how these shifts being allocated and whether the claimant was doing her fair share. The claimant was unhappy that her colleagues had apparently been talking about her back (although they denied this to her), and , for the first time , she had an issue with Julie Cornall's management of her.

5.6 Around this time the claimant began to have some health issues, in April 2018, relating to her own health and that of her husband. She started a period of sickness absence on 19 April 2018, initially for fever , an investigation for malaria, and other physical conditions. This absence continued into May 2018, when the claimant had a chest infection, and then on 15 May 2018 the claimant was provided with a fit note indicating she was unfit for work for the period of one month because of low mood.

5.7 The claimant was subject to the sickness absence procedure, and as she had been absent for more than 28 days, had sickness absence review meetings with Julie Cornall. The first of these was held on 25 May 2018 (pages 116 to of the bundle), following which a referral was made to occupational health on 26 May

2018 (pages 113 to 115 of the bundle). The claimant reported in this meeting that she had low mood, family issues, a chest infection, and deranged bloods.

5.8 Around this time, on 23 May 2018, the claimant contacted her trade union, the RCN (pages 10 to 111 of the bundle). She expressed concerns at the way she was being invited to a sickness management meeting, and raised the issue of being challenged about the allocation of shifts that had been raised in April.

5.9 The occupational health report was prepared, dated 19 June 2018, which the claimant agreed to being shared with her manager (pages 124 to 126 of the bundle).

5.10 In it the following is recorded (page 124 of the bundle) :

"I understand Mrs Achaski has discussed with you about work-related concerns including the amount of bad news she has to give patients and their families within her role. She reports she has noted this also started to have a further adverse impact on her Mental Health and Well-being when she was at work. Mrs Achaski advised she has been given and has completed a stress questionnaire recently."

5.11 Under the heading "Additional information", a number of questions with tick boxes for yes and no answers are set out (page 126 of the bundle). Box 2 reads: "*The employee indicates a health problem is likely to be exaggerated by work*", and the "yes" box has been ticked.

5.12 Box 4 reads: "*Work-related stress reported by the employee as a contributing factor*", and the "yes" box has also been ticked here.

5.13 The claimant's trade union took on her case and she continued to correspond with it. On 21 June 2018 the claimant wrote to the trade union an email (pages 128 to 129 of the bundle) in which she said this:

"I am sure you are aware of the pressures of hospital life and working in endoscopy is no different. Frequently we escalated and have to accommodate our own list of procedures as well as staffing our unit as an acute ward. Not ideal and very stressful for all involved. Having come from nearly 9 years in the palliative care field acute nursing was very daunting so much so several times I have enrolled on the AIM course but through staff shortages and pressures of work have been unable to attend.

I have found that the job entails emotional stress when we give bad news alongside of the doctors and offering support to families and colleagues.

This is where my cracks start to show I have had a sever nout (sic) of tonsillitis (sic) and several chedt infections in the last 12 months as well as a procedure on my bladder. These have been sicknesses I could not avoid."

5.14 The next sickness absence review meeting was held on 28 June 2018. This was conducted by Julie Cornall, and the claimant was accompanied on this

occasion by her union representative Karen English. The notes of this meeting are at pages 134 to 138 of the bundle.

5.15 In this meeting the occupational health report was discussed, and the claimant again reported how she was suffering from low mood, along with family issues, a chest infection and deranged bloods. The claimant reported that her home life was stable and that counselling sessions had been arranged for her. She was next due to see occupational health on 16 July 2018. She wanted to discuss flexible working arrangements, which would need to be discussed with HR.

5.16 In this meeting there was some discussion of the section in the occupational health report which referred to the claimant breaking bad news. The claimant sought to explain how this was a confusion on the part of the occupational health practitioner, and she had been referring to her past employment working in the Hospice.

5.17 After this meeting Julie Cornall sent a letter to the claimant on 28 June 2018 (pages 140 to 141 of the bundle) summarising what had been discussed. In it she said this:

"We also discussed the following points:

I queried the part in the occupational health report about your worries about breaking bad news but it was a slight confusion and related back to your previous post at the hospice. I discussed with you that unfortunate the nature of our nursing does encompass breaking bad news occasionally and being there to support the relatives."

5.18 The claimant remained off work sick. She was at that time keen to reduce her hours, and to move to outpatients ("OPD") at the Royal Blackburn Hospital, where she had previously worked, and where a vacancy had arisen. It is unclear precisely when she made the application, but it appears to have been in June 2018, as she was interviewed for the post on 3 July 2018 (see page 148 of the bundle). She did not inform Julie Cornall of this application, nor was she obliged to do so.

5.19 After an interview, on 3 July 2018, the claimant was successful, and was offered the post, subject to references (page 149 of the bundle, although this is not a formal offer in these terms, which in fact appears at pages 63 to 65 of the bundle). The offer was subject to "acceptable references".

5.20 The claimant gave as one of her referees her current line manager, Julie Cornall. Consequently, on (or around) 5 July 2018, Julie Cornall received a request for a reference for the claimant from OPD (quite how is unclear, as whilst the completed reference request form is in the bundle, there is no document showing when and how it was transmitted to Julie Cornall).

5.21 The claimant had not told Julie Cornall that she was making this application, and the reference request came as a surprise to her. On 5 July 2018,

therefore, Julie Cornall sent a text (or Facebook , or similar, message, it is unclear which, and this applies to all other such messages referred to below) to the claimant at 9.35 am. (pages 142 to 143, and on page 438 of the bundle) saying that she had received a reference to do for her. The claimant replied saying that it was for a job in OPD, and apologising to Julie Cornall, saying *"but it's less hours etc."*. Julie Cornall replied that she would pass the information on to her new manager, for her to have a discussion with the claimant. The claimant then replied saying this (pages 144 and 438 of the bundle):

"We have already discussed hours and stuff. I feel really bad but healthwise and mental health wise I was advised to seek less hours etc I really siri Julie xx"

5.22 Julie Cornall replied :

"Its ok. I just thought you may have mentioned it to me that you had got a new job."

The claimant replied:

"The interview was only on Tuesday xx"

Julie Cornall did the reference and told the claimant she had done so by text at 14.45 that day. This exchange continued:

Julie Cornall :

"Okay i've done a reference. I will let HR know where we are at. You will need to give me a notice at some point."

The claimant :

"Yes i know but not been told yet to give my notice I really am sorry to be leaving you have been amazing but its less hours and I've worked thete before.Xxx"

5.23 Having only recently had a sickness review meeting with the claimant Julie Cornall did not feel the need to speak to her for the purposes of the reference, and , as the claimant had not told her about the application, she thought it best not to discuss the reference with her. She proceeded to complete it.

5.24 Noticing the question "Would you re-employ Jaqueline in a similar role/offer a further period of study", she sought advice from the recruitment department as to what this meant . She was advised that this meant in her present role, i.e the role in which Julie Cornall managed the claimant

5.25 Accordingly , Julie Cornall completed the reference (pages 247 to 250 of the bundle), which was in box format, as follows.

5.26 In box 1 which requested the dates that the claimant had worked for Julie Cornall's organisation, she correctly stated from November 2016 to July 2018. In

the second box , which asked what hours the claimant worked, she also correctly replied "30", as those were the claimant contracted hours at the time,

5.27 The third box requested "Reason for leaving (if known)". Julie Cornall's reply was:

"low mood, stressful work, giving pts bad news"

("pts" being patients).

5.28 The fourth box asked about the claimant's main tasks and responsibilities, which Julie Cornall correctly summarised. The fifth box requested details of the claimant's sickness record over the last year of employment, which again were correctly provided, the number of days of sickness absence being 116, on three occasions, and the claimant was at the time currently off sick.

5.29 The next boxes asked whether the claimant had been the subject of any substantiated disciplinary action , or whether she was currently subject of any disciplinary action , which again were correctly answered by Julie Cornall in the negative. Similarly , the ensuing boxes which asked about any child protection allegations, cautions of criminal convictions and the like, were correctly responded to in the negative. Julie Cornall then replied in relation to the period of time over which she had known the claimant , correctly, that this was from November 2016 to the time of the reference.

5.30 The next section on the reference requested comments upon 11 competences and skills, and in respect of each of these Julie Cornall ticked the box headed "Average/Meets standard".

5.31 In the next box Julie Cornall was asked "What are Jacqueline's strengths in the workplace?" , to which she replied *"good communicator with staff and patients."*

5.32 In answer to the next question *"What current development needs have been identified for Jacqueline to work towards?"*, the reply was *"Jackie is still in a two-year development programme/training role"*. This too was correct.

5.33 In the next box Julie Cornall was asked "On reading the job description for the position Jacqueline is applying for would you consider that Jacqueline is capable of carrying out this post?", to which she replied "Yes".

5.34 In the next box (page 250 of the bundle) Julie Cornall was asked "Would you re-employ Jacqueline in a similar role/offer a further period of study?" Her reply was "No". The next box asked for reasons if a negative was supplied in the preceding box, and here Julie Cornall said this:

"Jackie finds the workload to (sic) hard and the unit is a very acute demanding unit. Emergency work plus diagnostic and therapeutic."

5.35 The final box was for any other comments, which Julie Cornall left blank.

- 5.36 Julie Cornall explained to the Tribunal the reasons why she had made the entries in relation to the claimant's reason for leaving, and whether she would re-employ the claimant.
- 5.37 In relation to the former, her belief and understanding was that the claimant was finding work in the endoscopy unit stressful, and that this was exacerbating her medical condition of low mood. She believed that the claimant did find the work stressful, as the department was a very busy and acute department, with the need for "escalation", from time to time, emergency procedures, and having to deal with informing patients and relatives of diagnosis of serious conditions.
- 5.38 Her view was that the claimant did find giving patients bad news stressful. She considered, knowing that the claimant was looking to reduce her hours, and of her issues with low mood, that these were the reasons why she wanted to move.
- 5.39 In relation to the latter question, much the same considerations led to her writing that she would not re-employ the claimant in her department. These were her subjective opinions, but she genuinely held them. They were based on not only on the occupational health report and sick notes, but upon her observations of the claimant when in work, she herself being a "hands on" line manager, who would frequently be able to observe the claimant.
- 5.40 She had no issues with the claimant's competence, but regarded her as a junior member of staff because it takes two years for any nurse, whatever their previous experience or seniority, to acquire the relevant training and development for them to be regarded as fully competent, and senior, in the context of the endoscopy department.
- 5.41 Having received the reference from Julie Cornall, Andrea Cottam, the recruiting manager, reconsidered the offer of employment made to the claimant. She was concerned to note that the claimant had found the workload too hard on an acute and demanding unit. She also noted that the claimant was suffering from low mood, found the work stressful, and had issues with delivering bad news to patients.
- 5.42 She was also concerned that the claimant, who had not worked in OPD for several years, may have a misconception that this would be a less demanding role. She did not consider that it would be, this role would be equally demanding and it would not benefit her, or the Trust, for her to take it up.
- 5.43 Accordingly she telephoned the claimant on 13 July 2018 and explained that she was withdrawing the offer. She did not go into detail but did explain that there were concerns relating to the reference. The claimant was surprised and upset, and felt that there must have been a mistake.
- 5.44 The claimant contacted her union representative to tell her what had happened, and to ask how she could find out why the offer had been withdrawn.

She was told to ask for a copy of the reference. She sent an email to Andrea Cottam at 14.10 on 13 July 2018, having been told to contact her as to why the job offer had been withdrawn. She asked her to let her know what was wrong so that maybe she could then rectify it (page 151 of the bundle).

5.45 Later that day , probably at 15:04 , the claimant sent a text to Julie Cornall telling her that the job offer had been withdrawn and she was not sure why. Julie Cornall's reply was that she should concentrate on getting better (page 439 of the bundle).

5.46 It appears that there was a formal confirmation of the withdrawal of the offer by an email from Abigail Smith at 12.21 on 13 July 2018 (page 153 of he bundle, if this is complete) , where it is simply stated that the offer of employment was subject to receiving satisfactory pre-employment checks in line with Trust policy.

5.47 The claimant spoke with Andrea Cottam that day , and was told to speak to HR, as it was the reference that had made her withdraw the offer. She said that if the reference was improved it could make a difference. The claimant relayed this in a further text message to Julie Cornall at 18:32 that day, she replied:

"Ok. I cant improve the reference much as its a tick box exercise. Good luck"

5.48 This text exchange continued (page 439 of the bundle), the claimant saying that she had been told it was the comments that had been made, but she would ask HR about it on Monday and her union representative was also going to look at it. Julie Cornall replied "*you can't give a bad reference anyway. Hope you don't think I've made negative comments because I haven't.*" She went on to say how it may be the claimant's sickness record, and that she was in the following Tuesday. She made reference to having recruited another member of staff herself with a terrible sickness record, but at the end of the day it was the recruiting manager's decision.

5.49 The claimant replied that she did not think that Julie Cornall would give her a bad reference, but she thought that her sickness record would not be considered. Julie Cornall replied that jobs are offered subject to reference, and the sickness record would be asked for. She offered to email Andrea Cottam, and asked whether the claimant had informed her that she was currently off sick at the interview. The claimant replied that she had not , as she had been told she did not need to. She told Julie Cornall that it was Andrea Cottam who had interviewed her.

5.50 The claimant was provided with a copy of the reference on 16 July 2018. She wrote then to her union representative that day saying that she did not blame Andrea Cottam for withdrawing the offer, looking at the reference. She commented upon Julie Cornall stating what her reasons for leaving were , and how she had stated that she would not employ her again.

- 5.51 The claimant then sent an email to Andrea Cottam on 16 July 2018 (page 156 , also page 290 of the bundle) in which she stated that after seeing the reference she could see why she had her concerns. She acknowledged that she was currently off sick, but said that most of this would be corrected by the "less hours and calmer atmosphere". She sought to reassure her that she would give hundred percent , and offered to take the job on a trial period. She invited Andrea Cottam to speak to her about her concerns. She ended saying she was a conscientious and good worker, and was really shocked at the reference.
- 5.52 The claimant re - applied for the post (again , the actual application does not appear to be in the bundle, though this is probably of little consequence) and informed Andrea Cottam of this by email of 18 July 2018 (page 291 of the bundle). In this email she gave as her reasons that incorrect comments had been made on the reference from her manager. She went on to say that the reason that she was looking for another job in this line (although the "I" is missing in the email) was because it was less hours and calmer atmosphere, and she had worked there before, so she knew some of the team and the wider multidisciplinary team. She reiterated her commitment to give 100% and willingness to do a trial period.
- 5.53 Andrea Cottam was reinforced by these emails in her view that the claimant did not have realistic expectations of the role that she was applying for in the OPD, and that it would not be in her best interests to employ her in the role as it would be likely to exacerbate her current mental health issues.
- 5.54 In the meantime the claimant's sickness absence was still under review and a further meeting was to be held on either 1 or 2 August 2018. It appears that no such meeting took place at that time because the claimant was referred again to occupational health whom she saw on 30 July 2018.
- 5.55 The occupational health report dated 30 July 2018 is at pages 166 to 169 of the bundle. It notes the claimant's continuing absence, and also refers to the issues the claimant had with the reference provided by her management for the post that was withdrawn. In addition to low mood, stress and anxiety, the claimant still had ongoing symptoms , and was undergoing treatment and management for cardiac circulation conditions and recent hormonal symptoms.
- 5.56 The report (at page 167 of the bundle) states as follows:

"Miss (sic) Achaski reports this has now put her back in regard to recovering with her current Mental well-being; and advises she is unsure what terms she could consider returning to the current workplace. As she advises one of the comments made in the reference given related to if the current workplace would re-employ her and this was stated as 'No'.

In regard to current workplace issues reported which is now concerning Mrs Achaski we did discuss options such as mediation to look to address these issues if all parties involved are agreeable. Mrs Achaski advised she would need to feel better with her Well-being and resilience at this time however to do this she is also where she needs to know ; why the comments about her have been made.

I recommend mediation or facilitated meeting to take place and a further referral is to be sent to the mediation service for this to take place as required."

5.57 The opinion was expressed that the claimant was not currently fit to return to work, but that a phased return and adjustments to duties might be considered to support her returning to work in the future.

5.58 In the "Additional information" section the same answers to questions two and four as were previously given in the earlier report were repeated.

5.59 A mediation was accordingly arranged. Each party, that is the claimant and Julie Cornall, was required to prepare a questionnaire prior to the mediation. A copy of the claimant's has been included in the bundle (page 191), but that completed by Julie Cornall appears not to have been. The mediation took place on 9 August 2018 and was conducted by Karen English, notwithstanding that she was in fact the claimant's union representative. No objection was made to this and she was assisted in the process by Karl Cockerill.

5.60 Whilst the "Agreement to take part in Mediation" form (page 192 of the bundle) suggests that , if it was successful , a written agreement would be drawn up about how the participants would work with each other in the future, no such agreement came out of this mediation.

5.61 It was , however, considered successful, as recorded in the document Mediation Referral Report at page 193 of the bundle, where it is recorded that the parties were able to reach a successful outcome as part of the mediation process.

5.62 The claimant and Julie Cornall did "agree to disagree", but hugged at the conclusion of the mediation, and Julie Cornall considered that their relationship was restored.

5.63 The claimant after the mediation ended , at what appears to be 12:46 p.m., sent a text to Julie Cornall in these terms (page 443 of the bundle, for the whole of this exchange) :

"Thank you for today. I'm sorry this has impacted on you when you too have other stresses. I have always said you are a good manager and today just helped prove that. Me and thomas have spoken and not definate but probably will look at reducing to 20 hours just need to check finances. Again thank you for restoring my faith. Xxx" Julie Cornall replied

(Thomas is the claimant's husband.)

5.64 Julie Cornall replied that she had emailed Matt Sutcliffe (the operational manager for Endoscopy) about her hours, and went on to say:

"We can move on from this blip and if you want to definitely leave I will support you the best way I can xx"

5.65 The claimant replied:

"No Thomas and I been talking prob did me a favour i love working in endoscopy love our team your ace and OPD prob changed. Less hours where i love working is a good outcome. Working time directive soo all good prob got me now till i retire hope that's good for you ha ha xx"

5.66 The claimant remained off work sick. A further occupational health report was obtained dated 4 September 2018 (pages 196 to 199 of the bundle). At that time the claimant was still off sick and was undergoing urgent investigation for reported skin blemish on her face which was feared to be a symptom of cancer, (but turned out thankfully not to be) . In this report the following is recorded:

"Mrs Achaski in light of previous work related issues reports she has attended the mediation meeting to address the issues reported and feels she needs to return to work when proposed to be able to move on and move forward from this. Mrs Achaski reports she continues to access the counselling support through the Employee Assistance Program (EAP) and has one more session to have following having 4 sessions to date."

5.67 The next sickness review meeting was held on 20 September 2018. The claimant was still suffering with low mood , chest infection , deranged bloods, family issues and now the facial blemish. Flexible working had been agreed, but the claimant required more counselling and still did not feel able to consider returning to the workplace soon (notes are at pages 203 to 207 of the bundle).

5.68 Around this time, (though the date is very unclear from the copy in the bundle at page 210) the claimant wrote again to her union representative Karen English setting out her thoughts. She was thinking of early retirement and had mentioned that to Julie Cornall. She said that she could not bear the thought of going back and that her confidence was in tatters. She went on to say she wanted to bury her head, and was starting to hate herself. She then said:

"..(illegible) now after the mediation i should be fine. But i cannot shake off this feeling of doubt in myself ... certainly can not feel positive about julie's thoughts of me.

... Was ready for going back and soo looking forward to it. Now I have reduced my hours and can not see happiness for me there hence the hope to retire."

5.69 The next sickness absence review meeting was held on 11 October 2018 (pages 211 to 215 of the bundle). By this time the claimant had ceased to be paid, having exhausted her sick pay entitlement. She reported still feeling anxious, and how she was thinking of early retirement , and was looking into that. She would consider returning for 20 hours per week when fit.

5.70 Julie Cornall sent the claimant a letter on 12 October 2018 summarising this meeting. She made reference to the claimant having informed occupational health that her personal life and was not improving , and how she was feeling stressed about it. She acknowledged the possibility of early retirement and how

the claimant was going to look into it with the help and support of her union representative. Julie Cornall reiterated her offer of support to contribute to any improvement in the claimant's health , and she asked the claimant to keep her up-to-date by telephone.

5.71 The next sickness absence review meeting was arranged for 26 November 2018. In this meeting the claimant's condition is still recorded as low mood , depression and deranged bloods. It was recorded that the claimant felt unable to return to the endoscopy role as there remained some unresolved issues around the previous reference provided by Julie Cornall. There was discussion about redeployment and the other options available at that time. The claimant's union representative was with her in this meeting , which was taken by Matt Sutcliffe. In this meeting the claimant (or her representative) raised the possibility of a grievance in relation to the reference , the claimant was in consultation with the union about this .

5.72 Following this meeting the claimant on 28 November 2018 sent an email to Matt Sutcliffe (page 234 bundle) entitled "Way forward". In this email the claimant sets out the difficult position that she finds herself in. She says that she is aware that her "preferred choice of career move would be difficult to obtain". She goes on to discuss the choices of OPD, ENT and the fracture clinic, but she appreciated that jobs rarely became available in this latter area. She went on to say that the reason she was looking in this direction was that she started off in OPD , and had always hoped to go back and end her career there. She went on to say that she had discussed things with her union representative and her husband , and felt in the circumstances and with the events that took place she had been left with no choice but to take early retirement , and commence with a grievance.

5.73 She went on to say that she had been in communication with "Pensions". They were awaiting certain details and choices that the claimant needed to make in relation to the relevant schemes.

5.74 Following the meeting Matt Sutcliffe also sent a letter dated 28 November 2018 to the claimant (pages 230 to 233 of the bundle). This is a lengthy and significant letter, which sets out in considerable detail what was discussed in the meeting on 26 November 2018. On the second page there is a record of the discussion in the meeting about the reference provided by Julie Cornall, and how the claimant remained dissatisfied with the outcome of the grievance. The claimant's first issue was that she did not get a written apology, but she acknowledged that she got a verbal one. The second issue was in relation to the reference being removed from her file, and she was informed that it would not be kept on her file, as it was not practice to do so. Thirdly she considered that she had not been given the required level of explanation around the reference, but Matt Sutcliffe had himself discussed the matter with her on 2 August 2018. He had apparently also himself spoken with Andrea Cottam to provide her with some context for the reference.

5.75 The letter goes on to deal with other aspects of the discussion, and reference is made to whether the claimant would or would not raise a formal

grievance. Karen English was present in this meeting, and Matt Sutcliffe told the claimant that she would be able to support and advise on this aspect. The claimant also stated in this meeting that she had already sought legal advice around constructive dismissal, she felt there were no options provided to her leaving her post. Matt Sutcliffe went on to discuss other options, and what other support could be given to the claimant.

5.76 At the time of writing his letter Matt Sutcliffe had received the claimant's email of 28 November 2018, and he made reference to it. He expressed his disappointment that the claimant did not feel it was worth considering redeployment options, or a facilitated return to work. He agreed to provide the claimant with certain information that she required, and expressed his intention to continue to help to support her to return to work. He invited her again to consider the alternatives that were discussed in the meeting and his letter.

5.77 The claimant sent a further email to Matt Sutcliffe on 4 December 2018 (page 236 of the bundle), which is (though not identified in the course of the hearing), the claimant's resignation, as she expressly states that this is "notice" of her retirement at the end of January as she had been advised by the Pension office, known as ELFS shared services.

5.78 By email of 12 December 2018 the claimant submitted a grievance. There are two documents bearing this date. The first is an email at 11.06 on 12 December 2018 to Matt Sutcliffe (page 246 of the bundle). In it the claimant says that she has no alternative but to commence a grievance with Julie Cornall in reply to the reference given for a job in OPD. She went on to say that she had lost all confidence in management, and did not get any of choice but to retire early, being penalised in the process. She went on to say that everywhere she looked, she was the loser. Redeployment she was not an option that she wanted. She wanted to choose her own job, not have one "thrust" at her. She said that the professional relationship with Julie Cornall had completely broken down.

5.79 The second is a document headed "Grievance", page 237 of the bundle. In it the claimant sets out the background, and why she wanted to seek the post in OPD. She made reference to the discussion she had had with Matt Sutcliffe and his discussion with Andrea Cottam, who had told him that it was her sickness record that had made her decide to withdraw the offer. Andrea Cottam however had stated (precisely where and when is unclear) that it was the statement that Julie Cornall would not re-employ her that was the reason for the withdrawal of the offer.

5.80 The gist of her grievance relates to the reference, and the suggestive and inaccurate things that it contained. She also made reference to Julie Cornall guessing her reasons for wanting to leave. She went on to explain she had lost her future in nursing, that she felt she was forced to leave with no options to continue. She accepted that she was offered redeployment, but for her this was not an option. She claimed that she was therefore "pushed" into taking early retirement.

5.81 The grievance was acknowledged as a Stage 2 formal grievance by letter of 19 December 2018, and Matron David Simpson was appointed as the investigating officer. An Investigation, fact – finding, meeting was arranged for 9 January 2019, but this was changed to 3 January 2019, although no explanation for this, or documentation relating to it, has been provided.

5.82 On 3 January 2019, the claimant's union representative Karen English was, at the last minute, unable to attend. David Simpson informed the claimant of this, and informed her of the options available, which were to continue with the meeting without representative, to postpone it to a future date, or for a work colleague, instead of a union representative, to accompany the claimant. In terms of any restrictions in rearranging the meeting, the main consideration would be the availability of the claimant's representative, as this was usually the most difficult factor. He did not consider that availability of rooms was a factor, and put these options to the claimant.

5.83 The claimant agreed to continue the meeting without the trade union representative being present, and did not ask for a work colleague. She did become upset during the meeting, but did not seek to end it. After the meeting, the notes taken by Kelly Kakoullis were provided to the claimant for comment, and by email of 21 January 2019 (page 256 of the bundle) the claimant provided some comments upon those notes, but made no comment about feeling pressured into going ahead without her trade union representative.

5.84 The claimant was provided with the outcome of her grievance by letter of 23 January 2019, pages 295 to 298 of the bundle. The claimant's grievance was not upheld, and she was advised of her right of appeal. She exercised that right by writing to Kevin Moynes, Director of Human Resources, 31 January 2019, pages 299 to 301 of the bundle.

5.85 In her appeal letter the claimant sets out several grounds of appeal under various headings, but nowhere makes any reference to being pressurised into going ahead with the fact-finding meeting without her trade union representative being present.

5.86 An appeal hearing was held on 25 February 2019, chaired by Kate Quinn. The claimant was represented by Karen English. No notes of the appeal meeting appear to be contained in the bundle, and there is no record of the claimant or her union representative raising the issue of the meeting on 3 January 2019 in the appeal.

5.87 The claimant's employment ended on 31 January 2019.

6. Those, then are the relevant facts. There has been little issue upon the facts, and no suggestion that any party or witness has attempted to give anything but truthful evidence to the Tribunal. Where there have been issues of fact, in terms of reliability, on the claimant's own admission, her recollection of events at the time is not always reliable, and she may accordingly not have recalled everything accurately. As will be apparent, however, this is not a case in which much turns upon disputed factual evidence.

The submissions.

7. For the respondent Mr Dunn prepared a skeleton argument, and spoke to it, having provided a copy to the claimant. He took the Tribunal through the relevant case law on constructive dismissal, upon the nature of the implied term of trust and confidence, and upon affirmation. He submitted that the claimant had not established that, in providing the reference that she did, Julie Cornall had acted in fundamental breach of the claimant's contract. She had acted out of an honest and genuine belief, and was giving a subjective opinion. She was required to provide an honest reference to a fellow manager, and did so based upon her knowledge and observations of the claimant. It was unfortunate the claimant reacted so badly to the reference, but Julie Cornall acted perfectly properly in providing the reference that she did.

8. In any event in participating in the mediation, and agreeing with the outcome, so that her faith in Julie Cornall was restored, as could be seen from the exchange of messages after the mediation, the claimant had affirmed the contract. In any event she had delayed too long in resigning, so had affirmed the contract by that delay.

9. The claimant, not being represented or legally qualified, after being afforded an appropriate break which she considered was adequate, made her oral submissions. The Employment Judge explained how it would not be expected of her to comment upon legal issues and case law, which were a matter for him. In essence, the claimant repeated her complaints that Julie Cornall's reference had been a bad reference, and that Julie Cornall should not have volunteered what she thought were the claimant's reasons for leaving without asking her first. In saying that she would not re-employ the claimant she was suggesting that she could not carry out her work competently and professionally, which was contrary to the various compliments and expressions of gratitude that she had received whilst working in Endoscopy. She could work unsupervised, whilst Julie Cornall had suggested (in her witness statement) she could not. She could not see how Julie Cornall could write such a bad reference knowing what she did of the claimant's capabilities and dedication.

The Law.

10. Section 95(1)(c) of the Employment Rights Act 1996 provides that there is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

11. The classic statement of the law on constructive dismissal is set out in the judgment of the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] ICR 221** which held that for an employer's conduct to give rise to a constructive unfair dismissal it must involve a repudiatory breach of contract. There are three elements to a constructive dismissal, namely:

That there was a fundamental breach of contract on the part of the employer;

The employer's breach caused the employee to resign; and

The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

In order for a Tribunal to deal with these matters it must identify the contractual term or terms, either express or implied, which have allegedly been breached. It must then go on to identify a fundamental breach of that contract on the part of the employer. The implied term of trust and confidence was the term of the contract which had allegedly been breached by the respondent by acts or omissions which, the claimant says, individually or cumulatively amounted to a fundamental breach. The Tribunal, therefore must firstly decide whether the employer was guilty of conduct which was a significant breach going to the root of the contract of employment, or which showed that the employer no longer intended to be bound by one or more of the essential terms of the contract.

12. That term, as recognised in cases such as *Wood v. W M Car Services (Peterborough) Ltd [1981] IRLR 347* and *Mailk v BCCI [1997] IRLR 462* is that the respondent will not, without reasonable and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.

13. It is clear that in order to establish that there has been a fundamental breach of contract it is not necessary to show one fundamental act or omission. There does not need to be one event, there can be a series of events which cumulatively amount to a breach of that implied term. In such circumstances, where there is not one individual act or omission relied upon, but a series of actions that are alleged to amount to that breach, where they culminate in one particular act that is known as the "last straw", and in order to establish that a claimant has been constructively dismissed there has to be a last straw. Indeed in the leading case which the Tribunal is considering on this issue, *London Borough of Waltham Forest v Omilaju [2005] IRLR 35*, a decision of the Court of Appeal and the judgment of Lord Justice Dyson, it is clear from the discussion in that case of the nature of constructive dismissal, that in order for there to be a constructive dismissal where there is a series of acts, the final straw must be there, and although the final straw may be relatively insignificant, it must not be utterly trivial. There must be a final straw, otherwise there can be no constructive dismissal. 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. The judgment goes on to say:

"A claimant cannot subsequently rely on those 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."

Moreover, and this is an important part of the judgment:

"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 have been undermined is objective."

14. So , to the extent that the claimant might have subjectively perceived Julie Cornall's reference as having that effect, the Tribunal cannot rely solely on that, it must look objectively upon the act complained of.

Discussion and findings.

15. Two, and only two, matters were identified at the preliminary hearing as constituting the fundamental breach of contract on the part of the respondent. The first is the reference given by Julie Cornall, and second is David Simpson proceeding with the grievance meeting on 3 January 2019 in the absence of the claimant's trade union representative. There are no factual issues here, it is common ground that both these events occurred, as can be seen, in relation to the first, from the very reference document itself. The Tribunal will consider each in turn.

The reference.

16. The claimant views the reference provided as a "bad reference". Going through it though, she agreed that the only parts to which she could take exception were the following:

"Reasons for leaving (if known) low mood, giving pts bad news"

And:

Would you re-employ Jacqueline in a similar role/offer a further period of study? No

*If no – please state why Jaqui finds the workload to (sic) hard and the unit is a very acute demanding unit
Emergency work plus diagnostic and therapeutic "*

17. All other parts of the reference the claimant agreed, and was right to do so, were factually correct, and in one instance – strengths in the workplace – was positive.

18. The Tribunal thus has to consider whether in providing this reference Julie Connell's conduct such as was either intended, or likely , to seriously damage or destroy, the relationship of trust and confidence between employer and employee. The former cannot be the case. The Tribunal is quite satisfied, and the claimant has not suggested otherwise, that Julie Connell did not intend the reference she provided would have this effect. Her intention rather was to assist the claimant obtaining a job that she knew she wanted. Indeed , she thought she was assisting the claimant by helping her to move away from a department which she was finding stressful.

19. That is not , of course, the end of it, as whether Julie Cornwell intended it or not, if her conduct was such was likely to have the proscribed effect, then it may suffice. There are , the Tribunal considers , two elements , however , to these parts of the reference to which objection is taken by the claimant. The first in relation to the "reasons

for leaving" section. There, the Tribunal agrees, Julie Cornall speculated upon what the claimant's reasons might be, without actually asking her. She did so, however, in good faith, and genuinely believing that these were her reasons. She had only days previously had a sickness absence review meeting with the claimant. She did not, on that basis, feel the need, or that it was appropriate, to have a further discussion with her.

20. Thus whilst the response to this question was to some extent speculative, in that Julie Cornall did not ask the claimant first, it was not wholly speculative, and was based upon that recent meeting, and the first hand knowledge that Julie Cornall had of the claimant.

21. Providing speculative reasons for an employee wanting to move, which are not wholly fictitious or unfounded, does not, the Tribunal considers, amount to conduct likely to seriously damage or destroy the relationship of trust and confidence. It may be careless, it may be unwise, but the Tribunal does not consider that to engage in a limited degree of speculation, with a reasonable basis for believing the reasons for leaving that are then given, amounts, or comes close to amounting, to conduct of a nature to constitute a breach of the implied term of trust and confidence.

22. Turning to the second aspect, however, the response to the question "Would you re-employ the applicant", which was in the negative, the Tribunal takes a different view. For an employee to learn that his or her manager has stated to another manager that they would not re-employ that employee is something which in the Tribunal's view is likely, at the very least, to seriously damage the relationship of trust and confidence. It is easy to see how such a statement could be reasonably be construed by the employee as an expression of regret that the manager had ever employed the employee in the first place.

23. That, of course, is not what Julie Cornall meant to convey, nor were her reasons for doing so improper ones, but in terms of the likely effect of this conduct the Tribunal is satisfied that it would indeed be likely to have this effect. In considering whether there has been a breach of the implied term, however, the Tribunal also has to consider whether in so conducting itself the employer, in this case Julie Cornall, has done so without reasonable and proper cause, as the case law shows is necessary. In other words, the mere effect is not sufficient, the employer has to lack that cause in conducting itself so as to cause that effect.

24. In this case the Tribunal is satisfied that Julie Cornall did have a reasonable and proper cause. This is so both in the case of the reasons for leaving box, where it is, however, strictly speaking, not required, and, more importantly, in the re-employment box. The reasonable and proper cause was that Julie Cornall owed duties firstly to the manager to whom she was providing the reference, to express an honest but genuine opinion, and, secondly, to the claimant herself in terms of her view of how she was coping with her work in the endoscopy department. Whilst the claimant has made much in relation to the references given in both boxes to alleged breaches of confidentiality on the part of Julie Cornall, by referencing occupational health or other medical records, the fact is she told the Tribunal that her answers were not based on these materials, but upon her knowledge of and observations of the claimant in the Department, as both a colleague and a friend.

25. Whilst the claimant may have disagreed with Julie Cornall's assessment of the extent to which her work in the department was exacerbating her health issues, particularly her mental health issues, Julie Cornall was, the Tribunal considers, entitled to form a reasonable opinion of the effects of the claimant's working in endoscopy upon her health. This, ultimately, was the reason why she said she would not re-employ the claimant, as she considered the work in endoscopy was injurious to her health. There has perhaps been some confusion in this case as to whether the claimant's medical conditions, particularly her mental health, had been caused by her working environment. That is not the point. The point was whether her working environment was likely to exacerbate or prolong any of the conditions in which she was suffering. Julie Cornall's view was that her work was having that effect upon her. The relevance of the occupational health reports, and indeed some of the claimant's own comments to her union representative, which Julie Cornall would not have seen, is that they demonstrate that there was indeed some basis for such a view. The claimant herself had said she found delivering bad news stressful, and had said something similar to occupational health. Whether that was right or wrong or not is not the issue. The issue is whether Julie Cornall, in providing that opinion in the reference she gave was doing so for proper motives, and with a genuine belief in the truth of the reference that she was providing. The claimant was specifically asked whether she accepted that Julie Cornall genuinely held those views, and she did.

26. Thus, whilst to express the reference in the terms that Julie Cornall did was likely to seriously damage or destroy the relationship of trust and confidence between the claimant and the respondent, providing the reference in those terms was not, the Tribunal is satisfied, without reasonable and proper cause, and cannot therefore amount to any breach, let alone a fundamental breach, of the implied term of trust and confidence.

27. On that basis there was no fundamental breach of the implied term of trust and confidence in relation to the reference, and the claimant's claim based on that alone would fail.

The grievance meeting on 3 January 2019.

28. That would leave solely the holding of the grievance meeting in the absence of the claimant's trade union representative on 3 January 2019 as the other alleged breach. There is some dispute about this, which is not assisted by the complete absence of any reference to it in the notes that were taken of the grievance meeting, in which, other than to record that the claimant had no representative, there is no record of any discussion about this. Clearly the claimant did proceed without a trade union representative, and equally clearly, this was a difficult meeting because she got upset. She may have felt pressurised, but the question for the Tribunal is whether that was actually the case. What the Tribunal finds surprising is that nowhere, in the subsequent email in which she made comment upon the notes provided to her, or in the ensuing appeal, in which the claimant was assisted by her trade union representative, is any mention made of this issue. One would have expected it to be one of the grounds of appeal, or at least mentioned in the course of the appeal, or the appeal letter. The first complaint made of this matter is in the course of these proceedings.

29. On that basis, whilst not doubting that the claimant felt pressurised, the Tribunal is not satisfied that, other than to offer the claimant the options available to her at the time, the respondent did pressurise her into continuing with this meeting without her trade union representative. Even if, however, the respondent did, the Tribunal would have great difficulty in accepting that this was in any event a fundamental breach of the implied term of trust and confidence. Mr Dunn in his submissions very fairly refers the Tribunal to the judgment of the Employment Appeal Tribunal in **Blackburn v Aldi Stores Ltd. [2013] ICR D37**, which is authority for the proposition that breach of grievance procedures can in certain circumstances amount to a fundamental breach of the implied term of trust and confidence. In the judgement the EAT says this:

*"In our judgment failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to or contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the tribunal's task is to assess what occurred against the **Malik** test."*

That is clearly correct, but in this case the breach, at most, comprises of proceeding with a fact-finding interview at the beginning of the grievance process. There was never any attempt to reconvene at meeting with trade union representative present, nor anything further made of the breach by the claimant or her union representative. There was a grievance meeting, an investigation, an outcome, and an appeal. If therefore there was any breach of the grievance procedure Tribunal considers that it was a minor one, and certainly not one that would justify the Tribunal holding that the respondent was in breach of the implied term of trust and confidence.

30. There is, however, a further consideration which renders this discussion academic. Whilst previously the claimant believed this meeting was in October 2018, it has now been established that it was not until 3 January 2019. The claimant give notice of resignation on 4 December 2018. For the purpose of constructive dismissal, any breach relied upon must have occurred before the decision to resign has been made. A claimant cannot rely upon alleged breaches which occurred after that decision has already been taken. In this case that decision was taken, at the latest, on 4 December 2018, and hence any breach, even if established on 3 January 2019 is too late for the claimant to rely upon it in support of a constructive dismissal claim.

Affirmation.

31. In the alternative, and for completeness, if the Tribunal were wrong in finding that the provision of the reference by Julie Cornall did not constitute a fundamental breach of contract, so that the claimant would have been entitled to resign in response thereto, the question would then arise as to whether she delayed too long in doing so, and thereby affirmed that breach. In relation to this issue the caselaw is clear that whether there has been an affirmation or not depends on all the circumstances. Time is not the only factor, but clearly the longer the delay between the breach and the resignation the

more difficult it will be for an employee to argue that they have not affirmed any breach (see *W E Cox Toner v Crook [1981] ICR EAT 823* cited by Mr Dunn).

32. This, therefore, requires initially examination of the timescale involved. The reference was provided on 5 July 2018. The claimant learned of it on 16 July 2018. She then went to mediation, on 9 August 2018. The first issue therefore is whether by doing so, and by agreeing that the matter had been resolved at mediation, and raising no grievance or resigning for another four months thereafter, the claimant is to be taken to have affirmed that breach. The Tribunal's view is that she clearly did. Whilst she was still off sick, it is appreciated, the messages that she exchanged with Julie Cornall after the mediation were clearly positive, and she even specifically speaks of having her faith restored. For "faith" one could read the words "trust and confidence". What appears to have happened thereafter is that the claimant changed her mind. That she subjectively still lacked trust in Julie Cornall is apparent, but as she would doubtless accept, this also is likely to be partly a consequence of her mental state at the time, and her reaction to the circumstances she found herself in at the time. Once, however, she has affirmed the breach of contract, she cannot thereafter revive it without further breach. She was apparently upset (see page 218 of the bundle where she writes to her union representative on 18 November 2018) about what Julie Cornall had written in a sickness absence review outcome letter, and was contemplating a grievance, but she did not raise one then.

33. It is also apparent from the letter from Matt Sutcliffe of 28 November 2018, following the sickness absence review meeting on 26 November 2018, that in that meeting too the claimant had not only mentioned pursuing a grievance, but said that she had already sought legal advice around constructive dismissal, a point not brought out in the hearing, but apparent from this document.

34. The claimant did not, however, resign until, at the earliest, 4 December 2018, some five months after the reference was given, and four months after the mediation. Karen English was expressly asked if anything occurred between the date of the mediation and the claimant's grievance in December 2018, and she replied that nothing had. To be fair to the claimant, and bearing in mind that Karen English did not have the benefit of the bundle in front of her, she may have overlooked the claimant's concerns at what Julie Cornall wrote after the sickness absence review meeting on 12 October 2018.

35. Even, however, if that is right, it still behoves claimant seeking to claim constructive dismissal to act promptly in response to the breach. By this time the claimant was no longer receiving any pay. Doubtless she wished to secure early retirement, and was clearly contemplating this from early October 2018. The Tribunal appreciates that an employee in the circumstances, particularly when off sick, and faced with difficult decisions must be permitted to take some time, but when represented by a trade union, and apparently in receipt of legal advice by the end of November 2018 at the latest, the Tribunal can see no good reason why the claimant's resignation was delayed even further until 4 December 2018.

36. If participation in and agreement to the outcome of the mediation was not affirmation in itself, the Tribunal would in any event have found that by delaying her resignation until 4 December 2018 the claimant affirmed any fundamental breach of

contract that had occurred previously , and thereby lost the right to claim constructive dismissal.

Causation.

37. The final alternative issue, were the Tribunal to have found that there was a fundamental breach of contract on the part of the respondent, entitling the claimant to resign, and that she did not lose that right by delaying too long to do so thereby affirming the contract, would be whether the claimant's resignation was indeed in response to any fundamental breach of contract.

38. For these purposes the Tribunal will ignore the events of 3 January 2019. Even if they were capable, in themselves or cumulatively, of amounting to a fundamental breach of contract, the claimant had made her decision to resign before those events occurred. They cannot therefore have been a cause of her resignation, as discussed above.

39. In relation to the reference, however, this could have been the cause of her resignation, the Tribunal accepts, but there were other more likely operative causes. They were primarily that the claimant had exhausted her entitlement to sick pay and was now no longer in receipt of any pay. That had been the position since October 2018. The claimant did not simply resign, she applied for , and obtained early retirement. There were thus financial reasons, understandable ones, for her decision. It is appreciated that the claimant did not want to end her career in nursing, and that this has been very traumatic for her. She did not however end her career in nursing after the reference. She only did so when , finding herself unable to return to endoscopy, not wishing to explore any other redeployment options, she chose for obvious financial reasons to seek early retirement. That was , the Tribunal would find , a response to the circumstances that she found herself in, which were clearly unfortunate and distressing, but the Tribunal does not consider that she did in fact resign in response to any fundamental breach that she may otherwise have proved. She resigned in response to an unfortunate set of circumstances, of which, granted , the reference was one, but was far from the only one.

Conclusion.

40. The Tribunal's primary finding , that there was no fundamental breach of contract, is sufficient to dispose of this claim. As will be clear , however , even if the Tribunal were wrong in that finding, the claimant would nonetheless have failed in her claim for either one of the other two reasons discussed above.

41. With considerable sympathy for her , and an acknowledgement , as doubtless the respondent would give , of the unfortunate and upsetting circumstances that have led to the premature end of her nursing career , the Tribunal must dismiss her claim.

42. Whilst it is not the Tribunal's function to proffer gratuitous industrial relations advice to employers, it will doubtless not have escaped the attention of the respondent that this claim arises almost entirely because of the inclusion in the reference request of two questions, both of which called for subjective assessments and answers from Julie Cornall. The first was the "reasons for leaving" question, and the second the "would you re-employ" question.

43. The first was, of course, inaccurate, the claimant had not "left" and was not necessarily going to leave the endoscopy department if unsuccessful in her application, indeed, she did not. It calls for a degree of speculation on the part of the manager (which the "if known" caveat does in part recognise) , but it does slightly expose a manager in circumstances where the reasons have not been discussed with the employee.

44. Both questions are probably "standard" ones, and are likely to be uncontentious when asked of a third party former employer, upon whom any liability may rest , to both the ex- employee, and the new employer , if an inaccurate , misleading or unfair reference is given . The potential for problems, as this case highlights, is when they are asked of a current manager , in the context of an internal appointment. As observed above, the potential for serious damage to the ongoing relationship of trust and confidence from a negative answer to the second question is obvious, and the respondent will appreciate the risk of other types of claim arising from a negative response to such a question. The utility of such a question, when weighed against its dangers, is something the respondent may wish to consider. A positive answer may not be genuine, but designed to help to move on an unwanted employee, a negative one can lead to the issues explored in this case. It is not only the interests of employees which need to be considered. Such requests put the receiving manager in a difficult position as well , and Julie Cornall herself too was something of a victim of this process, having to move departments as a result of the fallout.

45. Those observations are not meant to be critical, and the problems highlighted derive from process , rather than any individuals' intent or failures, but they may , for what they are worth, assist to reduce the risk of a recurrence of such an unfortunate set of circumstances in the future.

Employment Judge Holmes
DATED: 20 July 2020

RESERVED JUDGMENT SENT TO
THE PARTIES ON 31 JULY 2020

FOR THE TRIBUNAL OFFICE

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.