



EMPLOYMENT TRIBUNALS

Claimant: Mrs Carol Hurley

Respondent: East Sussex Healthcare NHS Trust

Heard at: Croydon (remotely by video) **On:** 21 January 2021

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: Mr L Dilaimi, instructed by Bevan Brittan Solicitors

JUDGMENT

1. The claimant's dismissal was unfair.
2. The dismissal was not in breach of contract.
3. The claimant is awarded compensation of **£9,890.60**.

REASONS

Introduction

1. The claimant, Mrs Hurley, was employed the respondent, East Sussex Healthcare NHS Trust as a Deputy Finance Business Partner. It was a responsible role in finance, with a salary of about £33,000 a year. She says in short that she was bullied by her line manager, Stella Armstrong and ostracised by members of her team, so that she resigned. That was in September 2018. In April that year she

raised a grievance about her treatment, and that had been largely rejected. An appeal was underway but the outcome was not known until October, by which time she had left the Trust. Fortunately for her another job came up at her former employer, Sussex Police, at a similar level, so she gave the contractual notice of 8 weeks. Her contract ended on 9 November 2018 and she started with Sussex Police the following Monday.

2. One unusual feature of the case is that her complaints were largely upheld on appeal, and her former manager was disciplined.

Procedure and evidence

3. This hearing was conducted by video, and apart from occasional technical difficulties no great problems arose. It was characterised by a very cordial spirit throughout. Mr Dilaimi set out the law and put his questions with exemplary fairness. The witnesses for the Trust were those who had helped Mrs Hurley resolve her difficulties and no ill feeling of any sort was apparent. I am grateful to all concerned for the way in which the hearing was conducted.
4. The evidence for the claimant came from Mrs Hurley, her adult daughter Adrianna who paid a visit to the workplace at one point, and Ms Veronica Prebble (Unison Representative). There was also a witness statement from a Mr Stuart Brookes, a former colleague and friend from a previous NHS Trust, whose statement recorded how she became depressed while working for the respondent. The effect on Mrs Hurley is well documented however, given her periods of sickness absence.
5. On behalf of the Trust I heard from Mrs Julie Hales, who was at the time the responsible Human Resources Manager; Mr Evan Haselwood, Finance Business Partner and her line manager towards the end of her employment with the Trust; and Mr Stephen Hoaen, the Head of Financial Services and Temporary Workforce Services, who handled the original grievance. All of them have now moved to other positions within different Trusts or outside organisations.

Claims and issues

6. Before setting out the findings of fact I will say a little more about the legal issues involved. The complaints presented were of constructive dismissal under section 95(1)(c) Employment Rights Act 1996 and breach of contract in relation to notice pay, but Mrs Hurley accepted at the outset of this hearing that that was a mistake and she received all of her notice pay.
7. So, the only complaint is of constructive dismissal. According to the House of Lords in the well-known case of **Malik v BCCI** [1997] UKHL 23 an employer shall not conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence. Hence it is not necessary that the conduct

be calculated (i.e. intended) to have that effect.

8. It is well established though that if an employee does something to show that they are happy to overlook this damage, known as affirming the contract or waiving the breach, then they will lose the right to complain of constructive dismissal. Sometimes that can be inferred simply from the fact that someone stays in post for a long time afterwards, without making up their mind whether to stay or go. But employers and employee are expected to try to resolve things internally wherever possible, and in larger, public-sector organisations like this, that can take some time.
9. To set the legal scene I will refer to one case not mentioned - the Court of Appeal decision in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908. I will explain a little of the facts. The case concerned the marks given to a student. Professor Buckland marked the paper. The student was not happy with the result. He challenged the assessment. The University then gave the paper to be marked by another member of staff. They therefore went behind Prof Buckland's back. He complained about this, and that led to an internal review which vindicated him. Despite this, he resigned, on 22 February 2007, several months after he had raised his complaint. He gave notice, and left at the end of academic year, in July. Despite the long time after raising the complaint, and the fact that he was vindicated, the professor was successful in his claim.
10. Lord Justice Jacob stated:

54 ... When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation.
11. The court went on to look at whether a fundamental breach could be "cured," in that case by the internal investigation, and held that it could not. The injured party does not lose the right to resign and claim constructive dismissal.
12. So cases of this sort are not a review of the grievance process and how it was conducted. It is clear that conscientious efforts were made, and ultimately that much of what was alleged was accepted. There was in fact no real dispute at this hearing about the events at work which eventually led to Mrs Hurley's resignation. Anticipating some of my conclusions therefore, the key question in this case is whether or not the contract was affirmed. That involves identifying the build up of things that caused it, and in particular the last thing that happened – the final

straw.

13. This is often difficult to work out. A person may put up with difficulties for a while, even bullying treatment, putting on a brave face, until there comes a point when they are not willing to do so any more. The fact that they have put up with it so far is no answer to a claim of this sort. This was the main lesson to be drawn from the Court of Appeal decision in **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR which was relied on particularly by Mr Dilaimi. Underhill LJ held that the questions were:
 - a. what was the most recent act (or omission) on the part of the Respondent which the Claimant says caused, or triggered, her resignation?
 - b. has she affirmed the contract of employment since that act (or omission)?
 - c. if not, was that act (or omission) by itself a repudiatory breach of contract?
 - d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation.)
 - e. did the Claimant resign in response (or partly in response) to that breach?
14. Mrs Hurley said in her witness statement, at paragraph 1.17 that the last straw occurred when Mr Evan Haselwood took over as her line manager. She was upset about a poor appraisal by her previous line manager, Stella Armstrong, against whom she had raised an informal complaint of bullying. Mr Haselwood, no doubt for well-intentioned reasons, said not to worry about it, and that he would form his own opinion of her. But she felt that she could not do this as these comments would be added to her personnel file. She felt the criticisms were unjust and unfair, and that he was not treating them at all seriously. She went to see her doctor immediately and was signed off sick with stress, and then immediately afterwards contacted HR about raising a formal grievance.
15. But that wasn't quite the end of the matter. That prompted her to raise a formal grievance, but she remained with the Trust for several months afterwards, and awaited the outcome. This result was disappointing for her. She was largely unsuccessful, and there was no finding that Ms Armstrong had intentionally bullied or undermined her. She exercised her right of appeal, expecting it to be reviewed in 14 days, although that is not in fact what the policy requires. It dragged on past September, when the job at Sussex Police came up. Mr Dilaimi suggests that this delay or perceived delay was the final straw, the thing that caused her to resign. It is possible to look at the matter in that way. A further interpretation would be that the outcome of her initial grievance was the final straw, as she had no real

confidence that the appeal would make any difference, and did not see how she could stay there from then on. That last alternative is the interpretation that I ultimately prefer in this case.

16. But however the situation is analysed, as far as possible Tribunals should avoid introducing too many technicalities. It is very difficult for an employee faced with a situation at work where they feel that they cannot carry on unless something is done to make it better, and they wait to see if that will happen, and then reach the end of their tether. They may be criticised for waiting too long. It may be said, "How can there be a fundamental breach if you have put up with it all these months?" On the other hand they may be accused of jumping the gun – "Why didn't you wait until the end of the grievance process to give us a chance to sort it out?" This is the dilemma in which Mrs Hurley finds herself.
17. Let me turn to consider the events in question in a little more detail and explain my findings.

Findings of Fact

18. Mrs Hurley joined the Trust as part of the Medicine and Emergency Care team in October 2016. She worked in Eastbourne but some of her colleagues were in the Hastings office. Her immediate manager was Ms Armstrong, a Finance Business Partner. Mrs Hurley felt that there was a lack of training and a heavy workload. She found it difficult to manage. About six months later her colleague Nicola Sage left, and her workload increased sharply, so that on 30 March 2017 she was signed off sick with stress. She was referred to Occupational Health in June and returned to work at the end of that month. About a month after that Keren Loder joined the team and Mrs Hurley was asked to train her, which also added to her workload.
19. It was during this period of high stress and workload, on 3 August 2017, that Ms Armstrong decided to play a practical joke on her. Like many practical jokes, it was not at all funny.
20. It was coming up to financial month end, a very busy period. At 11:25 that morning Ms Armstrong sent Mrs Hurley an email to "remind" her of a 3 hour presentation that she to deliver to the Senior Management Team the next day. Other people in the office were in on the joke. It also involved Ms Armstrong mocking up an email purportedly sent from a General Manager, at 13:59, to corroborate the story. Ms Armstrong told Mrs Hurley that she had notified her earlier in the week about this presentation and she must have forgotten. Keren Loder confirmed she had overheard Ms Armstrong telling her this. Initially Mrs Hurley did not believe it, then she began to doubt herself. She found it extremely stressful. She stopped her already urgent work for month-end and began working on the presentation. At 4pm she left work still believing she had to give the presentation the next day, and expecting to be working on it at home into the early

hours. Then at 16:37 Ms Armstrong sent her an email stating "Only joshing!!!! Have a great day".

21. There is no possible justification for doing that to a member of staff in any circumstances. But Mrs Hurley was busy, stressed, and had already been signed off sick. That was a fundamental breach of contract by itself, and Mrs Hurley she would have been entitled to resign at that point. She did not however. People feel they must try to take practical jokes in good part, but she remained very unhappy about it.
22. At around the same time plans were put in place by the Trust for a central finance team, working across all clinical areas, so that there would be more cover if someone was away. Mrs Hurley was asked if she would be interested in a role in this new Central Team and she agreed. That began to take effect from October 2017. Around the same time a new manager was appointed for the department, above Ms Armstrong, Ms Alex Graham.
23. The transition to the new team was difficult. Mrs Hurley's team were not happy about the changes. They felt they had not really been consulted about it. One of them in particular, Steve Perriman, seemed reluctant to do anything asked of him. By 9 November Mrs Hurley had contacted her trade union (Unison) to say that she was having problems with bullying at work. That led to a meeting with Ms Prebble which did not take place until the following January.
24. The day after this call, 10 November 2017, Mrs Hurley had a one-to-one meeting with Ms Graham, and raised with her the incident on 3 August 2017. From then on, she felt that she word of this had got out. She began to be excluded and noticed, for example, that one of her team would not include her when making drinks for colleagues in the office. Shared spreadsheets that she had updated were tampered with and information deleted, a particularly disturbing form or revenge or sabotage. She took to saving copies on her own computer in case they disappeared. At the same time other managers were trying to take control of the work done by members of the team and the team members were openly criticisms of the changes.
25. On 8 January 2018 Mrs Hurley took her concerns to HR. She had an informal meeting with Mrs Julie Hales, who suggested they involve Ms Graham, and a week later they did so. Ms Graham agreed to put together an action plan of support and to share the Trust's behavioural framework with the staff, to remind them generally of expected standards and appropriate conduct.
26. That seemed to have little effect, and on 1 February 2018 Ms Prebble emailed Mrs Hales to say that, in Mrs Hurley's view, the work environment has not changed for the better and members of staff were now creating further obstruction to Mrs Hurley in performing her role.

27. Also that day, Mrs Hurley had her first appraisal (PDR) with Ms Armstrong. The notes of that meeting followed over a month later, on 6 March. They recorded things factually, but without praise. Mrs Hurley felt this didn't reflect the conversation they had had at the meeting, and that she was being criticised me for being overwhelmed by the workload, which was particularly unfair as she had been covering two roles for nearly 6 months.
28. In the month between the meeting and the receipt of those notes further steps were taken to resolve matters which Ms Armstrong may have felt were aimed at her. Ms Graham sent an email to all staff about behaviour. The action plan was also formulated and Mrs Hurley had some further discussions with Mrs Hales about raising a formal grievance. There was an issue over whether to raise it against Ms Armstrong or against Ms Graham, who had overall responsibility for the state of the team.
29. Having received the PDR comments, Mrs Hurley went to see Mr Haselwood, and had the discussion already described, before being signed off sick on 19 March. She did not return until 4 June.
30. While she was off she put together her formal grievance, which was submitted on 30 April 2018. This followed discussions and meetings with Mrs Hale and Ms Prebble from Unison. Mr Haselwood kept in contact with her during her absence. She was referred to Occupational Health and there was a Stage 1 Sickness Absence Meeting.
31. In the grievance Mrs Hurley included a new allegation, that Ms Armstrong had forwarded to her an email, apparently sent by Ms Armstrong to her on 6 February 2018, with the PDR notes, i.e. claiming to have sent them to her a full month earlier. She did not accept that that was the case.
32. In May, Mr Stephen Hoaen was appointed to hear the grievance. He met Mrs Hurley on 21 May, and later interviewed all of the managers and team members involved. It was a thorough and extensive exercise.
33. Then, on 4 June 2018, when Mrs Hurley returned to work, she found that the contents of her desk drawers had been removed. They contained useful notes from her training among other things. No one owned up to this, which was again unsettling for her. On her third day in the office, a folder she created mysteriously disappeared from the shared drive, compounding her concerns.
34. Shortly afterwards she was reassigned, with agreement, to do project work, so that she was not working with the same team, and her desk was moved further away.
35. The grievance proceeded and she had a formal grievance hearing on 11 June. She carried on while everyone else was interviewed, and then in July 2018 her daughter Adrianna visited the office. They came in together. Her evidence was

that she wanted to see the individuals who were making her mother so upset, her mother did not want her to come but eventually agreed, and that as they walked into the office it fell silent. Everyone buried their heads in their work, and no one spoke, even to ask “Is this your daughter?”

36. That was only a snapshot, but Mr Haselwood did not seem at all surprised when asked about this description of the office environment. He said it was a quiet place of work, and a good place to get work done – he was mainly based in the Hastings office – and so I accept this evidence of what occurred.
37. The investigation report was sent to Mrs Hurley on 10 August 2018. There were four allegations but on the main issue about the joke in August 2017 it was accepted that Mrs Hurley was upset, and since the definition of harassment did not require intent, that was upheld, albeit on the basis that it was not intentional. That was as far as it went.
38. Unhappy about this, Mrs Hurley had a meeting with Mr Haselwood and decided to appeal. That was on 14 August. Between 23 and 29 August she was on annual leave, and on 14 September she resigned. The letter was addressed to Mr Haselwood and said:

“As you are aware I have had a particularly unhappy experience whilst working at the Trust due to bullying and I don’t really think that the Trust has handled my complaints or the grievance process very well.

Since returning to work after my period of sickness absence (which was caused by the bullying) I have felt uncomfortable and sometimes isolated in my working environment. I feel there is an atmosphere in the office which is caused by me being there. I have tried to ignore the feeling of hostility towards me but it causes me to continually feel on edge and defensive. ...”

39. I accept that description, which appears a rather measured one. In her evidence at this hearing Mrs Hurley described it as purgatory and hating every day.
40. She had by then received an offer of a job at her old place of work, Sussex Police. She was in touch with her old colleagues, one of them told her when the job came up, she applied – her only application – was interviewed and then offered the job. It all happened quite quickly, and in the period since she lodged her grievance appeal.
41. While she was working her notice she received the outcome of her appeal, which was a review.
42. On the first allegation, previously considered unfounded, that the training had been inadequate, this was upheld.
43. The allegations of humiliating and bullying her (the joke incident) had already been

upheld and so was not revisited.

44. The final allegation was about falsifying emails, including the one relating to the appraisal, and this too was upheld. It was also held to have been done with an intention to mislead, and management (disciplinary) action was to be taken. These new conclusions completely changed the position and it is not small thing for a line manager to be found to have acted dishonestly to mislead the Trust, with a view to undermining the truth of Mrs Hurley's account. In due course Ms Armstrong was disciplined. Mr Hoaen presented the management case at the disciplinary hearing and was candid enough at this hearing to say that the sanction of a first written warning felt light to him.
45. Nevertheless, notice had been given and Mrs Hurley's employment ended on 9 November 2018. She began work with Sussex Police on 12 November.

Conclusions

46. I see this as a connected series of events, beginning with the lack of training, (itself enough to lead to management action) the purported joke, the actions taken to undermine Mrs Hurley was a manager, with her team amending or removing her work, the unduly negative appraisal and efforts to conceal this, followed by further isolation and small pranks such as deleting files. The attitude of colleagues appears to have followed hard on the heels of the informal complaint about Ms Armstrong, and management efforts to address the culture appear to have had little effect, and perhaps even resulted in further isolation. The Trust is vicariously liable for the actions of its employees, even more junior staff, but here the mainspring her relationship with Mr Armstrong, and other staff appeared to side with her.
47. And taken as a whole I have no doubt that this amounted to a fundamental breach of the duty of trust and confidence. The fact that her manager was disciplined as a result is enough to show that this was unacceptable, indeed dishonest, behaviour, entitling Mrs Hurley to resign.
48. Having reviewed those facts I conclude that the final straw was the receipt of the grievance outcome on 10 August 2018. The series of events was continuing to that point, and that was the spur to her resignation. Did she then affirm the contract in the period between then and 14 September? I do not accept that lapse of time over those few weeks – some on annual leave - is enough, against a background of a process that had already taken over three months, and where there was a right of appeal, nor is appealing itself an act of affirmation. If it were, no employee who tried to resolve matters internally, like Professor Buckland, would be able to claim constructive dismissal. However, if I am wrong about the final straw event here, particularly whether it was the delay in the appeal process, I do not regard the difference as significant. The series of events, particularly the isolation, was still ongoing right to the end, and there was no subsequent

affirmation of the contract.

49. The final question is whether the reason for her resignation was the breach or this new job. Mr Dilaimi referred me to the case of **Meikle v Nottinghamshire County Council** [2005] ICR 1, CA to the effect that it need only be a substantial part of the reason. But here, I take the view that it was the major, if not exclusive reason. The new job was slightly less well paid, and further away, so that there would be extra travel and cost. There were no particular pull factors for the job, but it was a means of escape. The timing was fortuitous, but her situation was by then too difficult to continue with.
50. For all of the above reasons the claim is upheld.
51. As to remedy, the fact that Mrs Hurley obtained another role immediately reduced her losses considerably. The main item in dispute was the length of future loss. Given that Mrs Hurley is now 63, has been with Sussex Police over 2 years, and plans to retire at 66, I concluded that it would not be realistic to expect her to be looking for alternative employment now and she should receive compensation for 30 months. Since she now has 2 years' service there is no loss of statutory rights.
52. Much time was taken up with the calculation of extra motoring costs, the fact that she is now working from home, the likely future need for commuting, and small differences in parking costs, and holiday entitlement. On reviewing the calculations I see that I have taken the £30.25 monthly parking charge from the weekly net figure, and so the figures below, now corrected, are slightly less than those considered at the hearing:

Compensatory Award

Net pay with Trust: £2,147.12 pcm, or £495.49 per week (allowing for £30.25 per month parking charges)

Prescribed Period to date - 2 Years 2 Months and 12 Days

Net Loss over that period: £56,674.53

(LESS Other earnings)

Net pay with Police: £2,107.86 pcm, or £486.43 per week

Initial extra motoring costs: £162.50 pcm, or £37.50 per week

Revised totals £1,945.36 pcm, or £448.93 per week

Loss of holiday: 3 days per year, at £70.78 per day, £212.34 per year, or £4.08 per week

Revised totals: £1,927.68 pcm, or £444.85 per week

Time to hearing: 2 Years 2 Months and 9 Days

Earnings in that period: £50,691.71

Net loss to date (i.e. in the prescribed period) £5,982.82

Adjustment for home working saving since March 2020 to April 2021: £2,000

Net loss to date: **£3,982.82**

Future loss of earnings: 30 month period.

Continuing loss: £146.12 per month (£2,417.12 - £1,927.12)

Total Future Loss: £4,383.60

Summary of losses

Basic Award	£1,524.00
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Compensatory Award

Prescribed element	£3,983.00
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Non-Prescribed element	£4,383.60
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<i>Sub total</i>	£8,366.60
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Total Award	£9,890.60
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Employment Judge Fowell

Date 21 January 2021