EMPLOYMENT TRIBUNALS

Claimant: **Ms E. Nagle**

Respondent: **East Kent Hospitals University NHS Foundation Trust**

Heard at: **London South via CVP**

On: 27 and 28 February 2022 and in chambers 01 February 2022

Before: **Employment Judge T. R. Smith**

Representation:-

Claimant: Mr King (retired counsel)

Respondent: Mr Kirk (counsel)

JUDGMENT

The claimant's complaints of unfair dismissal and/or constructive unfair dismissal are not well founded and are dismissed.

The claimant's complaint of wrongful dismissal is not well founded and is dismissed.

Reserved Reasons

The Issues.

The issues agreed at the start of the hearing with the parties, along with any concessions, made were as follows: –

Dismissal.

Was the claimant dismissed by the respondent either pursuant to section 95 (a) (”express dismissal”) or section 95 (c) (“constructive dismissal”) of the Employment Rights Act 1996 (“ERA 96”).

Express dismissal.

If the claimant was expressly dismissed can the respondent show a potentially fair reason namely some another substantial reason of a kind such as to justify the dismissal.

If so, was the dismissal fair or unfair within the meaning of section 98 (4) ERA 96.

Constructive dismissal.

Did the respondent do or fail to do the following: –

- Did Ms Groombridge instruct the claimant on 31 March 2020 to return to work at Kent and Canterbury Hospital?
- Was the instruction unlawful and/ or in breach of government advice and instructions?
- Did the instruction put the claimant’s life at serious risk?
- Did Ms Groombridge inform the claimant on or about 01 April 2020 that if she did not return to work she would not be paid?
- Was the said communication that the claimant would not be paid if she did not return to work an offence of blackmail under section 21 of the Theft Act 1968?
- Was the claimant instructed to return her laptop to the Kent and Canterbury Hospital?
- Was the instruction to return to work and to return the laptop contrary to section 44 of the Serious Crimes Act 2007?

Were the following express or implied terms of the claimant’s contract of employment: –

- an implied duty of mutual trust and confidence?
- the respondent would only issue reasonable and lawful instructions to the claimant?

- the respondent would not instruct or require the claimant to carry out any act which might be dangerous or might put the claimant's health at risk?
- the respondent would not instruct, require, or encourage the claimant to do any offence contrary to statute or common law?
- the respondent would not instruct, require, or encourage the claimant to carry out any act which would be contrary to the government's advice concerning health and safety?
- the respondent would not threaten and stop paying the claimant salary if she failed to comply with any unlawful instruction?

Was any breach, a fundamental breach?

Did the claimant resign at least in part in response to the breach?

Did the claimant affirm the contract before resigning?

Wrongful dismissal.

Was the claimant dismissed by the respondent? It was conceded that the claimants contractual notice, if she was dismissed was 12 weeks pay.

Was the claimant paid for that notice period?

If not, did the claimant do something so serious that respondent was entitled to dismissed without notice?

Remedy.

The parties agreed that due to the shortness of time the tribunal would only reach a judgement on the issue of liability. Remedy, if necessary, would be dealt with at a separate hearing, if agreement was not reached in the interim, between the parties.

The evidence.

1.The tribunal had before it two statement from the claimant. The first was dated 19 March 2021 and the second, 23 September 2021.

2.The claimant also relied upon a statement from her daughter, Ms Helen Nagle, a senior environmental consultant, dated 19 March 2021.

3.For the respondents the tribunal had statements from Ms H. Groombridge, dermatology operations manager, which was undated and a statement from Mr M. Luff, head of employee relations, again undated.

4.The tribunal heard oral evidence from the authors of the above statements.

5.The tribunal had before it a master bundle which consisted of 291 pages and a supplemental bundle which consisted of 39 pages. A reference in this judgement to a page in the bundle is a reference to the master bundle unless the prefix “S” appears. The latter prefix denotes a document in the supplemental bundle.

Procedural history

6.There was one brief point the tribunal should record in respect of the procedural history. At a preliminary hearing held on 21 May 2021 the claimant was granted leave to amend her claim form and the amendment (S06 to S15) pleaded the claimant was expressly dismissed or, in the alternative, constructively dismissed.

Findings of Fact

7.The tribunal has not sought to resolve each and every factual dispute, only those that were necessary in order to address the agreed issues.

8.The claimant was employed by the respondent from 01 April 2020 until, she said, 02 April 2020. The claimant relied upon that date as the date of termination both in her tribunal claim form, various tribunal documentation (examples are at 33 and 128) and in her oral evidence.

9.The claimant was aged 69 as at the purported date of termination.

10.The claimant was employed as a waiting-list coordinator within the respondent’s dermatology department.

11.The respondent is an NHS trust operating from five sites. The claimant was based at the respondent’s Kent and Canterbury Hospital, but undertook bookings at two other hospitals within the respondents group.

12.The claimants contractual place of work was the Kent and Canterbury Hospital. Whilst dermatology operated from other sites the principal location for the delivery of dermatological services (approximately 90 %) was at the Kent and Canterbury Hospital.

13.The respondent employs approximately 8000 staff.

The claimant’s duties

14.The tribunal heard conflicting evidence as to the extent of the claimant’s duties.

15.It preferred the evidence of Ms Groombridge as to the nature of those duties for the following reasons.

- Firstly she was the manager of the dermatology department and therefore had a detailed knowledge of the administrative procedures.

- Secondly the tribunal found that the claimant's evidence was at times inconsistent when cross-examined as to the nature of her duties (for example the claimant said in her statement that the booking system was completely computerised but accepted in cross examination that was not wholly accurate. In addition the claimant had initially said she spent 90% of time utilising a computer system known as Allscripts but when taken to various documents eventually conceded it was about one third of her time).
- Thirdly whilst the tribunal noted the evidence of Ms Nagle as to what her mother did, the tribunal attached little weight to that evidence. Ms Nagle's evidence was based on having worked for the respondent as a waiting-list coordinator for one year in 2007, some 13 years before the incident. Further she worked in a different clinical commissioning group to the claimant, namely trauma and orthopaedics.

16.Whilst the tribunal found there were similarities between the procedures of various commissioning groups, the procedures themselves were not identical. For example Ms Nagle very fairly conceded that she did not use a manual diary when she worked for the respondent but accepted manual diaries were in operation in the claimant's commissioning group.

17.The tribunal found the claimant's role involved, principally, dealing with enquiries from members of the public by email and telephone, booking, changing and cancelling appointments, and entering information utilising paper records onto Allscripts.

18.In dermatology the claimant worked from a small office with a colleague who worked part-time. The volume of paper records was such that on occasions another member of staff would provide assistance.

19.It is necessary to set out in some detail of how the waiting list role operated.

20.A clinician would prepare a manual waiting-list referral form and the paper copy was placed on the patient's medical notes.

21.That referral form was then copied and put in a tray for one of the waiting-list coordinators to collect.

22.The referral was then placed on a computer utilising a computer program. The waiting-list coordinators allocated an appointment to the person who had been waiting the longest on the waiting list.

23.Each dermatology clinician, and there are approximately 13, has a paper-based diary with a day-to-day page entry and these were managed by the waiting-list coordinators. The waiting-list coordinators then manually entered into the clinician's diary an appointment. This information was also entered onto the computer system. The claimant fairly accepted utilising a manual diary system was faster than the computer. The tribunal also found that there was greater clarity to waiting-list coordinators using a manual diary system because, while Allscripts could schedule appointments, it did not have a maximum scheduling facility so it was possible to overbook a clinician's list. This was unlikely to occur with a manual diary system given an appointment or procedure was entered for a specific time of the day

24.The tribunal was satisfied on the evidence before it the claimant and her colleague both used a diary and computerised system.

25.Without access to the paper diaries and the referral forms, the system could not operate.

26.The paper diaries contained personal data and were not to be removed from the respondent's premises.

27,Whilst the claimant did, wholly remotely, do some work for other hospitals within the respondent's group, as the tribunal has already found, the overwhelming majority of work was at the Kent and Canterbury Hospital.

28.Even before the pandemic contact, with patients was almost exclusively by telephone, email or letter. There was very minimal direct face to face patient contact.

29.When a patient received an appointment letter they were issued with a telephone number which was to the waiting-list office.

Home working

30.On 18 March 2020 Ms Groombridge was in a meeting with other managers within the clinical care group to discuss the pandemic. She was told by one of her colleagues that the claimant wanted to work from home and was taking the spare encrypted laptop from the general office. At the conclusion of the meeting Ms Groombridge spoke briefly to the claimant and it was agreed that she could work from home for the time being. The tribunal concluded this was a temporary arrangement.

31.The claimant photocopied a number of the paper patient referral forms so she could enter information onto the computerised system from home.

32.The tribunal is satisfied the claimant did not undertake a full range of duties whilst working from home. She did not have access to the paper diaries, which were an essential element of her role to book, change or cancel appointments.

33.She was not able to take telephone calls from patients who utilised the telephone number they had been given on their appointment letters. The tribunal considered, at the particular time, given the pandemic, contact from patients was likely to be considerable.

34.That said there was no suggestion the claimant was working anything other than hard and diligently whilst working from home, on the limited duties available to her.

35.During three days of the homeworking the claimant took accrued annual leave. As will be seen the claimant was only contracted to work eight days whilst working from home and on three of those days she took annual leave, thus a total working time whilst at home was five days including 18 March.

The Prime Minister's announcement, legislation and guidance.

36.On 23 March 2020 the Prime Minister addressed the nation on the issue of COVID 19. He stressed that people should stay at home, protect the NHS and save lives.

37.Mr Luff prepared a frequently asked questions document which the tribunal was satisfied was sent by email to all staff and posted on the respondents Internet.

38.It is likely the same came to the claimant's attention.

39.He stated that the respondent's position in response to the Prime Minister's announcement was:- *"you should not take the Prime Minister's announcement as an agreement that you can work from home. You will still need to complete a risk assessment form and you should discuss the practicalities of homeworking with your line manager".*

40.On 26 March 2019 the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 ("the Regulations") came into effect. The Regulations were to give legal effect to the Prime Minister's entreaty to the public.

41.It is appropriate at this juncture to record sub paragraphs 1 and 2 of regulation 6 , as originally drafted, which stated :-

"*6 (1) During the emergency period, no person may leave the place where they are living without reasonable excuse. "*

42.Regulation 6(2) states that:

"For the purposes of paragraph (1) a reasonable excuse includes the need -

(f) to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living;

(h) to fulfil a legal obligation, including attending court or satisfying bail conditions or to participate in legal proceedings".

43.Finally the tribunal should record that the NHS Business Services Authority advised NHS providers in respect of the government's job retention scheme that *"where employers receive public funding for staff costs, and that funding is continuing, it is expected that employers will use that money to continue to pay staff in the usual way and not furloughed them. This includes trusts, GP practices etc who should continue to pay their staff in full"*

Communications 31 March to 02 April 2020.

44.Given the agreed list of issues the tribunal makes no apology for repeating, in detail, its findings as regards the communication between the parties between 31 March and 02 April 2019.

45.On the 31 March 2020 the claimant was requested by telephone to come back to work by Ms Groombridge and to return the laptop.

46.She was expected to return to work the following day, 01 April 2020. The reason for the latter request was the respondent had no other available laptop and an advanced nurse practitioner had been directed by the government to shield. The claimant had the only laptop in the department and Ms Groombridge considered, and the tribunal considered reasonably, that clinicians had to be prioritised over administrative staff.

47.It was self-evident that without a laptop the claimant could not do the limited duties she been undertaking from home.

48.Ms Groombridge , sensitive to the fact the claimant had wanted to work from home because she was not unnaturally nervous about the pandemic, indicated that she could make arrangements for the claimant to occupy a room on her own rather

than sharing with her colleague if that would help the claimant to feel safer. The claimant indicated the latter was preferable.

49.It is appropriate to interject at this point that the respondent, like many NHS trusts, were experiencing major problems procuring equipment and had insufficient laptops and peripherals to permit extensive homeworking. Demand exceeded supply for the equipment and the respondent had to prioritise. Although the respondent had placed an order for additional resources the normal expected delivery time of 10 working days had been significantly extended due to difficulties caused by the pandemic internationally and supply chain delays from the Far East.

50.As a result the respondent sought to prioritise the allocation of these scarce resources.

51.The tribunal was satisfied from the evidence of Ms Groombridge that the reason she wanted the claimant to return to work was because the claimant's role could not be efficiently and fully done remotely. In particular there was no access to the clinician's diaries and phone enquiries could not be dealt with from patients. Further as she could no longer be immediately supplied with a laptop all of the limited work she had been undertaking was no longer feasible. The tribunal accepted the logic of her assessment of the situation

52.Whilst the claimant was disappointed, the tribunal found that the general tone and tenor of the conversation was positive. A good working relationship existed between the parties. Ms Groombridge empathised with the claimant's position and the claimant had an appreciation of the difficulties Ms Groombridge faced, particularly in respect of the laptop.

53.However although the position had initially been positive it changed somewhat during the day as is evident by an email from the claimant (100) sent at 16.14 stating: –

I had a think about coming back to work at KCH tomorrow, after your phone call, and I have to say it is not something that I am comfortable doing during this 'lockdown' period.

Apart from myself, given that I have suffered recurring chest infections, I have to think about bringing the virus back to Helen and Freya [daughter and granddaughter] *who as you know are living with me during this strange time. When I was off work for 3 x months I did have to go to QEQM* [hospital] *twice and have a nebuliser to help me breath. That was frightening enough but the thought of*

contracting this virus is so scary especially seeing the escalations of the death toll today.

I am more than happy to work from home and as you know I have been doing more than my hours — so am not looking for an excuse to not do any work. On the contrary I want to be able to continue to help in any and every way I can."

54.Ms Groombridge responded by e-mail on 01 April 2020, at 8.30, (101) and indicated that she was seeking HR advice and believed the claimant was in a low-risk category following a risk assessment.

55.It may be appropriate before returning to the email to briefly comment upon the risk assessment and the claimant's health. The risk assessment was described as *"individual risk assessment checklist for eligibility for remote working in extenuating circumstances (COVID 19) nonclinical staff groups".* The claimant completed it herself and identified only two issues, one that she had asthma and used inhalers and secondly she was approaching her 70th birthday. The claimant indicated that she considered she could work remotely.

56.At no stage in her communications with the respondent did the claimant produce any evidence from her GP as to why, due to her health she could not return to work.

57.Further the claimant did not produce a letter to show she was highly vulnerable and required to shield.

58.Returning to the email Ms Groombridge went on to say *"one option would be for you to return the laptop so we can deploy it over with the doctors we have off at current* [sic] *and you can use your NHS net account to receive lists etc. However, let me seek advice"*

59.HR advised that on the basis of the risk assessment, unless the claimant could show she received a government letter saying that she was at high risk and had to shield or isolate then she should return to work, perhaps with adjustments, or in the alternative could take unpaid absence. HR suggested if the claimant was experiencing any breathing problems she should be reviewed by occupational health.(103).

60.Ms Groombridge emailed the claimant later that day in the light of that advice at 16.20 (115) and said:-

"As I said on the phone- we can offer you to work in a different area if it makes you feel more comfortable and keep you away from people/ the patients we have

coming in. I have kept your risk assessment on file, however we have lots of staff who have asthma and we have asked them to come in and work. After discussion with HR if you do not want to come into work we can mark you as unpaid leave however we do need the laptop back if you do this".

61.On 02 April 2020 the claimant emailed Ms Groombridge (116) to ask if she took unpaid leave whether it would be authorised as *"it would give me a bit of breathing space to assess the situation"* .

62.Ms Groombridge promptly responded (117) and said the leave would be authorised leave and she was happy to refer the claimant to occupational health in the meantime to see if they could offer any assistance or suggest adjustments, if that is what the claimant wished.

63.The claimant e-mailed back at 9.39 on 02 April 2020 (118) as follows: –

"That would be great if I could do that. Don't worry about occupational health at the moment as I would rather work anyway.

In the meantime if another laptop becomes available and if I can help, then I would be happy to return to working from home. I will of course bring this one back, so where would you like me to leave it? '

Will I still able to access my e-mail on my pc? Do I need any authorisation?

Many thanks for your help Holly, it is very much appreciated."

64.The response from Ms Groombridge at 11.22 (119) helps to complete the picture when she said: –

"Thanks Liz, I can put that one (sic).

Of course- once we have deployed the laptops I will always keep you in mind to get one back

You can access NHS.net on any device. As you're unpaid I don't want you to do any work for the time being, I'm hoping the guidelines will change shortly (they seem to change once an hour at the moment) and we can do something more".

65.To summarise, at this stage the claimant was being asked to fulfil her contractual obligations namely to be ready willing and able to work at her contractual place of work. The tribunal is satisfied had the claimant attended work she would have been paid.

66.The offer of unpaid leave was made by the respondent to give the claimant an alternative if she remained fearful of returning to work and that offer was accepted by the claimant. The tribunal is satisfied the respondent had offered a number of

adjustments to seek to alleviate the claimant's concerns namely an office of our own, an individual risk assessment and offering occupational health referral. The office that was available was a director's office and it was not necessary to have any patient contact or to pass patients or wards to access the facility.

67.At no stage did the claimant suggest any other adjustments She did not, for example suggest a visit to the hospital to examine the proposed adjustments to see if they helped to allay her understandable concerns.

68.At no stage did the claimant suggest there was any difficulty in terms of travelling to and from the respondent's premises due to COVID19. She did not use public transport, but her own car.

69.The tribunal noted that the claimant's colleague remained working from the respondent's premises without complaint.

70.The tribunal concluded having regard to the totality of the email exchange that the claimant had decided she did not wish to attend work, because she was worried of the risk of COVID 19. She agreed to a contractual variation namely that in consideration of being granted leave she would not be paid. She was happy to work again from home if a laptop became available and was asking whether she could access her work email account, which evidenced a desire to maintain a relationship with the respondent. The claimant had told Ms Groombridge that she would contact her again in a months time. Thus as at the 02 April 2020 the respondent reasonably believed the claimant remained an employee and the current variation to the contract would be reviewed.

71.The claimant returned the laptop on 02 April 2020. The claimant did not suggest returning the same would expose her to any form of criminal liability. The tribunal is satisfied that Ms Groombridge had offered to collect the laptop if that was more convenient. Whilst the claimant could not recall any such conversation the tribunal considered on balance it did occur because there was pressure on Ms Groombridge to ensure that the advanced nurse practitioner was able to work. It follows therefore that it was probable she would have offered to collect the laptop.

Subsequent communication.

72.As it transpired the claimant was not to report for work again and other than subsequently telling the respondent that Mr King was communicating on her behalf, there was no further contact directly between the claimant and the respondent.

73.Following the above telephone and email exchanges the claimant discussed matters with Mr King, a former barrister and asked him to act on her behalf.

74.A letter was sent by Mr King, who the respondents were initially unaware was advising the claimant, on 08 April 2019 (124 to129) to the respondent's chief executive which stated the claimant was seeking damages for breaches to her contract of employment.

75.The tribunal attached significance to the following paragraph *"Mrs Nagle is entitled under Section 95(1) of the Employment Rights Act 1996 to, and hereby does, treat your instructions given in the Individual Staff Risk Assessment Checklist for Covid~ 19, together with the email correspondence and telephone conversations with Miss Holly Groombridge (Mrs Nagle's immediate line manager) dated 1st and 2nd April 2020 as conduct which unlawfully terminated her contract of employment. That termination was both a wrongful dismissal and an unfair dismissal and as a result she has suffered and will continue to suffer significant loss and damage and, in the circumstances, claims damages."*

76.The letter went on to assert that the claimant's work could be done remotely and therefore regulation 6 (2)(f) of the Regulations was in applicable and thus she was given what was described as an illegal and unlawful instruction by the respondent to attend work.

77.It is appropriate to interject that the NHS, of which the respondent was a part, is heavily unionised. The recognised unions did not represent to the respondents that they considered requiring staff to work during the pandemic was an unlawful act.

78.The letter stated *"Miss Groombridge by her email dated 2nd April 2020 confirmed that the Trust were not going to pay Mrs Nagle's salary. In effect the Trust had unlawfully terminated Mrs Nagle's contract of employment by 2nd April 2020".* The letter concluded that the claimant had no alternative other than to treat the respondents *"illegal and unlawful conduct as a wrongful dismissal and an unfair dismissal".*

79.As is obvious from the previous findings of fact at no stage did the respondent expressly say the claimant had been dismissed and at no stage did the respondent do any act (other Mr King would say than requesting the claimant to return to work

with the laptop and not pay her) that was inconsistent with the continuation of the contract of employment. For example no P45 was issued. As will be seen, later in this judgement, that caused some difficulties with the claimant subsequent pension application.

80.The claimant accepted in evidence that the reason she believed she had been expressly dismissed by the respondent was on the basis of what she'd been told by Mr King.

81.The letter eventually came to the attention of Mr Luff. He considered the respondent needed to understand the status of the letter particularly as the respondent was unaware of who Mr King was. In his own mind he considered the letter of 08 April might well have been a resignation but wanted to be clear that was the claimant's intention.

82.On 27 April 2020 (137) Mr Luff responded to the letter of 08 April 2020 enquiring as to Mr Kings status, given a detailed response from the respondent would require the disclosure of personal information, and the claimant remained in his eyes an employee of the respondent. (137/138). He recorded that he believed that the actions taken by the respondent had been agreed with the claimant's express consent and there had been no breach of the law or the Regulations.

83.No review or communication took place between the claimant or the respondent on the expiry of the agreed period of authorised unpaid leave of absence.

84.Authority was subsequently supplied by the claimant to Mr Luff to correspond with Mr King.

85.Mr King repeated in a letter to the respondent on 07 May 2020 (140 to 142) that the claimant's case was the telephone conversation of 31 March and subsequent correspondence up to and including 2 April 2020 was conduct that unlawfully terminated the claimant's contract of employment.

86.Mr Luff enquired with Mr King on 14 May 2020 whether the claimant was saying she had resigned in response to the alleged breaches of contract with her last day of employment being 02 April 2020 but did not receive a response to that specific issue. On the same day he explained to Mr King that he considered the respondent needed to be absolutely clear the claimant was no longer an employee.

87.Mr King in response on 15 May 2020 made it clear that it was the respondent who had unlawfully terminated her contract with an effective date of termination of 02 April 2020.

88.In subsequent correspondence and in particular a letter from Mr King of 27 May 2020 (154) he asserted the claimant was not "*electing to claim that she was constructively dismissed"* although said that, if necessary, that cause of action would be pleaded in the alternative.

89.The claimant issued tribunal proceedings on 24 June 2020.

90.On 03 September 2020 Mr King informed the respondent that consideration would be given to an injunction because the claimant could not access her pension as a leaver date had not been supplied to NHS Pensions by the respondent.

91.The tribunal considered that the principal reason the claimant was seeking to access her NHS pension was one of financial necessity. Whilst it is true that in 2019 the claimant had enquired as to the possibility of flexible retirement (a procedure which the tribunal understood allowed the person to access their pension and then to work after a short break part-time for the same employer) the claimant intended to continue working for the respondent at least in some capacity. The claimant enjoyed her job. She would not have accessed her pension when she did, had it not been for financial need.

92.By letter dated 05 November 2020 Mr King sent a letter before action to the Secretary of State for Health and Social Care threatening judicial review proceedings in respect of the claimant's pension.

93.There then followed protracted correspondence between various parties. The principal impediment to the payment of the pension being that pension payments were linked to a termination date and a dispute existed as to whether the claimant's contract had been terminated. Ultimately without either party conceding the matter a date of 02 September 2020 was agreed as being the last day of the claimant's membership of the NHS pension scheme. The tribunal attached no significance to this agreement as it was irrelevant to the issues the tribunal had to determine.

Submissions

94.Both Mr King and Mr Kirk provided the tribunal with lengthy written submissions. The tribunal does not intend to repeat those submissions but would assure the parties that it has had full regard to them in reaching its judgement.

Mr King

95.Mr King opened his submissions by stating the effective date of termination was 02 April 2020.

96.Mr King stated the word resignation was not used, at all, in section 95 ERA 96 which was concerned solely with dismissal and the tribunal should not allow the respondent to confuse the issue by importing the concept of resignation into the factual matrix.

97.He accepted the respondent did not expressly use words to say the claimant was dismissed but nevertheless said it had clearly dismissed her.

98.In terms of constructive unfair dismissal, whilst he accepted that the elective rather than automatic theory applied to the termination of a contract of employment for a repudiatory breach he observed that in none of the speeches in **Societe Generale -v- Geys [2013] ICR 117** was there any reference to resignation, only that that one party's repudiation terminated the contract only, if and when, the other party had elected to accept the repudiation. He submitted that acceptance of repudiation was not the same as a letter of resignation.

99.He said the claimant's case was that by letter dated 08 April 2020 the claimant accepted *"she had been dismissed by the respondent and at the same time she terminated the contract of employment by reason of the employers unlawful conduct".* He pointed out that the letter made specific reference to section 95 ERA 96 and not specifically to subparagraph (a) or subparagraph (c). On a proper reading, he said it was clear the claimant was saying that she was dismissed.

100.To the extent the respondent had not expressly accepted the implied terms pleaded in the amended claim form they were necessary to be incorporated into the claimant contract applying the officious bystander test.

101.He said the claimant was entitled to adhere to the Prime Minister's announcement to *"stay at home, protect the NHS and save lives"* and therefore was entitled to refuse to go to work.

102.There was Mr King said no complaints made of the quality of the work the claimant did whilst at home and having regard to the claimant's own health challenges she was entitled to be genuinely concerned about contracting COVID 19 if she went to work.

103.He said that the claimant risked being arrested or fined for committing a criminal offence if she went into work. He relied on the wording of the Regulations. The tribunal had to concentrate upon whether it was not reasonably possible for the claimant to work from home.

104.Mr King submitted that the instruction given to the claimant to return to work was not a lawful instruction and for this reason she was not bound by it.

105.He made criticisms of the respondent's risk assessment and contended it did not fully take into account the Regulations

106.He submitted the respondent should have made use of the government's job retention scheme and furloughed the claimant.

Mr Kirk

107.Mr Kirk put his case simply on the basis that there was no express dismissal or constructive unfair dismissal and the employment terminated by means of the claimant accessing her pension, which did not amount to a dismissal in law.

108.Mr Kirk submitted there was no express dismissal as they were neither unambiguous words of dismissal nor any ambiguous words from which the tribunal could reasonably infer an intention by the respondent to terminate the claimant's employment.

109.If there was a dismissal the respondent could establish some other substantial reason because the claimant had failed to attend her place of work and would not communicate and ignored correspondence from the respondent trying to ascertain her exact position.

110.Neither was there a constructive dismissal because the claimant alleged her contract was terminated by the respondent and Mr King had said in correspondence *"this is not a case of Mrs Nagle electing to claim that she was constructively dismissed",* although in the same letter he made it clear that it was pleaded as cause of action in the alternative

111.He submitted that there was no evidence the tribunal could infer that the interactions between the claimant and respondent prior to 02 April 2020 to be conduct likely to destroy trust and confidence.

112.If there was a fundamental breach by the respondent it had not been accepted by the claimant.

113.He said at its highest the letter from Mr King of 08 April 2020 was ambiguous and the respondent had to satisfy itself that the claimant genuinely intended to resign.

114.Mr Kirk said it followed from his primary submissions that a complaint of wrongful dismissal also had to fail because there was no dismissal.

The law and the tribunal's conclusions

115.The Tribunal applied the following legal principles

116.To bring a claim of unfair dismissal the claimant must establish, and the burden is upon her, that she has been dismissed and that dismissal must be in accordance with the statutory concept set out in the ERA 96.

117.In essence dismissal may occur in one of three circumstances set out in section 95 ERA 96 which are as follows: –

(a) termination of the employment contract by the employer, with or without notice — s.95(1)(a);

(b) termination of a limited-term contract by virtue of the limiting event without its being renewed on the same terms —s.95(1)(b);

(c) constructive dismissal, where the employee resigns, terminating the contract with or without notice, in circumstances such that she would be entitled to resign without notice because of the employer's repudiatory breach of contract – s.95(1)(c)

Was there a dismissal and if so by whom?

Express dismissal

118.The principal case of the claimant is that she was expressly dismissed by the respondent.

119.There was no words of dismissal.

120.There was no written document dismissing the claimant.

121.There was no express unambiguous dismissal.

122.As there were no unambiguous words were there ambiguous words from which an express dismissal could be gleaned?

123.In order to answer this question it is necessary matters objectively.

124.Looking at matters objectively the tribunal found the evidence pointed to the respondent wanting the claimant to return to work to undertake her contractual duties. It had no intention of terminating her employment. It was for this reason the respondent offered to allocate an office of her own to the claimant, undertook a risk assessment and offered a consultation with occupational health.

125.The request for the return of the laptop was not to deprive the claimant of the opportunity of working, because she could use the fixed IT systems within the respondent's hospital, but because a clinician who was required to shield was assessed as having a greater need to work remotely. The respondent was entitled to regard the needs of a clinician as being greater than that of an administrative worker in the delivery of health services.

126.Nor did the respondent unilaterally place the claimant on authorised unpaid leave. The respondent was ready, willing and able to pay the claimant if she returned to work. When the claimant expressed concerns she was given the option of unpaid authorised leave which she accepted. The claimant herself accepted that by going on unpaid leave she could see how matters developed and it would give her what she described as breathing space. This was an agreed variation to the contract.

127.The tribunal therefore found there was no unambiguous, or even ambiguous words which looked at objectively could amount to an express dismissal.

128.That is not the end of the matter however because there can be rare circumstances where an express dismissal may be established based upon the actions of an employer, a good example can be found in the surprisingly short judgement in **Hogg -v- Dover College 1990 [ICR] 39**, a case with a particularly unusual factual matrix. In that case Mr Hogg, head of history, suffered a severe attack of meningitis and was absent for a lengthy period of time. He was told by

letter that he would no longer be head of history and his teaching would be reduced which in turn would result in a reduction of approximately 50% of his salary. Thus he lost both status and remuneration. The EAT held that the letter communicating that decision terminated his employment or alternatively the fundamental changes was such that Mr Hogg was constructively dismissed and he had not affirmed the contract by remaining in employment because his new contract was to a totally different nature.

129.This case however differs greatly from **Hogg** in that there was no suggestion that the claimant would return on anything other than her existing terms and conditions, working from the premises she was contractually obliged to work from, doing exactly the same duties as she always done prior to 18 March 2020 and on the same remuneration. The claimant has no contractual right to work from home. Her contractual place of work was the respondent's Kent and Canterbury hospital. Had she returned to work she would have been paid. This was the classic work/wage bargaining found in contracts of employment.

130.The tribunal was not persuaded that the respondent's conduct in asking the claimant to attend work breached her obligation under the regulations. It reached this conclusion because there is no breach where a person has a "reasonable excuse". Under regulation 6 (2) (f) the claimant has a reason excuse if, in summary it was not reasonably possible for that person to work from the place where they were living. Whilst the tribunal has not simply accepted the word of the respondent that the claimant's role could not be done remotely, on the balance of the evidence, for the reasons it has already given, the tribunal found that at its highest the claimant was only doing part of her role at her home. In any event when the respondent asked the claimant to return the laptop she could not do any other role from home. Whilst Mr King said it was not the claimant's problem the respondent did not have another laptop, that is not the point. The unchallenged evidence was that the respondent was there was a shortage of laptops and they were ordering more but there were delays in delivery. The claimant therefore could not work from home when she was required to return the laptop.

131.The tribunal attaches significance to the fact that the recognised trade unions did not suggest that administrative staff were in breach of the Regulations by being required to work at the respondent's premises.

132.Thus the tribunal concluded that there was no express dismissal by the respondent by words or actions falling within the meaning of section 95(1) (a) ERA 96.

133.It follows that as the claimant has not established an express dismissal she cannot, on this basis pursue a complaint of unfair dismissal.

Constructive dismissal

134.However that is not the end of the matter because the claimant has expressly pleaded a constructive dismissal within the meaning of section 95 (1) (c) ERA 96.

135.The question therefore is whether the claimant has terminated the contract of employment and when.

136.If the tribunal was to find the letter of 08 April 2020 was unambiguous, save for what are classed as *"special circumstances",* the letter should be construed on its face value. The matter was explained by Lord Justice Rimmer in **Willoughby -v- CF Capital PLC [2012] ICR 1038** at paragraph 37 in the following terms: –

"37. The "rule" is that a notice of resignation or dismissal (whether given orally or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given it cannot be withdrawn except by consent. The "special circumstances" exception as explained and illustrated in the authorities is, I consider, not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so-called exception to the rule is well summarised by Wood J in Kwik-Fit (GB) Ltd v Lineham [1992] ICR 183, 191, and, as the cases show, such need will almost invariably arise in cases in which the purported notice has been given orally in the heat of the moment by words that may quickly be regretted."

137.Of course, here, there was no heat of the moment outburst but a detailed letter written by a former barrister.

138.Mr Kirk submitted that the letter of 08 April could not amount to a resignation. Both he and his clients noted that the word resignation did not appear anywhere in the document. That is correct. However the tribunal preferred the submission of Mr King that there is no requirement in law for the word resignation to appear. What is important is for the employee to demonstrate they no longer regard themselves as bound by the contract of employment.

139.Whilst Mr Kirk made much of the reticence of Mr King in subsequent correspondence to confirm the claimant had resigned and at one stage denied it (although in fairness to him relied as a subsidiary argument on constructive dismissal) does not mean there cannot have been an affirmation of the alleged repudiatory breaches. As the Mr Justice Underhill (as he then was) said in **McKenzie-v- Billing Aquadrome Ltd UKAEAT /0095/11/SM**

24…. The appellant has in his witness statement and oral evidence steadfastly denied that he had resigned. That does not of course mean that the tribunal could not find that he did resign. If he spoke words which objectively amounted to a resignation, the fact that he denied having done so, or having intended them to constitute a resignation, is irrelevant and there is nothing objectionable in principle about a party succeeding on a pleaded fallback basis that is inconsistent with his own evidence established on the facts"

140.Whilst Mr Kirk relied upon the earlier case **Logabax Ltd -v- Titherley [1977] IRLRL 97** where EAT held that an employee could not pursue a complaint of constructive unfair dismissal in circumstances when he walked out over a dispute over commission and then wrote to the employer stating that there was *"no question of resignation or termination of employment by myself"* that case is distinguishable from **McKenzie** for two reasons,

141.Firstly in **Logabax** the claimant relied on termination by the effluxion of time of his fixed term contract and not the failure to pay commission. Secondly and more significantly he had not pleaded, as here, constructive unfair dismissal.

142.On the assumption that there was a fundamental breach of contract by the respondent the claimant needs to accept that breach as was made clear in **Societe Generale -v- Geys [2013] ICR 117.** Acceptance need not be express and may be inferred from the circumstances.

143.The tribunal concluded that the letter of 08 April 2020 unambiguously stated that the claimant no longer regard herself as bound by her contract of employment. It reached this conclusion having regard to the totality of the letter.

144.In particular, firstly it alleged the respondent by its conduct had engaged section 95 ERA 96. Mr King did not specify which subsection. However section 95 is only concerned with dismissal.

145.Secondly the letter stated *"that termination was both a wrongful dismissal and unfair dismissal…'*

146.Thirdly the letter stated *"it is an express or implied term of Mrs Nagel's contract of employment that the trust would not instruct nor require her to carry out or perform any unlawful or illegal acts".* That is language consistent with a complaint of constructive unfair dismissal.

147.Fourthly on page 128, having set out five specific complaints of alleged conduct by the respondent the letter went on to say that *"Mrs Nagel has no alternative but to treat the trust's illegal and unlawful conduct as a wrongful and unfair dismissal"*

148.When the respondent received that letter that, and not 02 April 2020 was the effective date of termination.

149.This was not a case such as **East Kent Hospitals University NHS Foundation Trust-v-Levy UKEAT /0232/17/LA** which Mr Kirk took the tribunal to where there was clear ambiguity. In that case the claimant worked in a hospital, she was dissatisfied with her current role and had been conditionally offered another role in another department. She stated that she was resigning and it was held there was ambiguity because it wasn't clear whether she was resigning from her employment with the employer or simply from her then current role within the employer's records department in order to take up the new role.

150.Thereafter the claimant did nothing inconsistent with a resignation. She did not return to work. She did not contact the respondent after her authorised one-month unpaid leave had expired to extended.

151.If the tribunal was wrong on construing the letter of 08 April 2020 as acceptance the respondent's alleged repudiatory breaches the tribunal relied upon the decision in **Mr Clutch Auto Centre -v- Blakemore EAT 0509/13** which held

that the submission of an employment tribunal claim form for unfair and wrongful dismissal was capable of amounting to acceptance of a repudiatory breach .

152.The tribunal therefore concluded that there was a termination within the meaning of section 95 (1) (c) ERA 96.

153.Having found there was a termination the tribunal then went on to consider whether there was a constructive unfair dismissal.

154.Four conditions, on the balance of probabilities, must be satisfied for the claimant to succeed.

155.One, there must be a breach of contract by the respondent. This may be either an actual or anticipatory breach.

156.Two, that breach must be sufficiently important to justify the claimant resigning.

157.Three, the claimant must leave in response to the breach, that is, it must have played a substantial part in the claimant's' decision, and not some other unconnected reason, see **Wright -v- North Ayreshire Council [2014] ICR 77.**

158.Four, the claimant must not delay too long in terminating the contract in response to the respondent's breach, or done anything else which indicates acceptance of the change to the basis of the employment

159.The Court of Appeal in **Western Excavating (ECC) Ltd -v-Sharp 1978 IRLR 27** made it clear that the question of whether there was a constructive dismissal is determined in accordance with the terms of contractual relationship and not in accordance with the test of reasonable conduct by the employer.

160.The tribunal then applied the above law in looking at the acts identified in the list of issues.

161.The tribunal found as a fact that Ms Groombridge did instruct the claimant on 31 March 2020 to return to work at Kent and Canterbury Hospital.

162.However for the reasons already given, that was not the breach of regulation 6 and nor was it a breach of government advice and instructions. The claimant was being required to abide by an express clause of her contract.

163.The tribunal is not satisfied that the request to return to work put the claimant's life at serious risk. A risk assessment had been undertaken. The claimant was not extremely vulnerable. She was not required to shield. Measures were offered to

reduce any risk. The claimant herself accepted she had virtually no contact with patients. That is not to say that the tribunal does not accept that at the time of the pandemic, and the limited treatment available for COVID 19, that the claimant did not have genuine concerns. Others however, such as those in public transport or in the retail trade no doubt had similar concerns.

164.The claimant was placed on authorised unpaid leave at her request because she was not prepared to return to work. That was a step taken by the respondent to maintain the contract. It was not an offence of blackmail under section 21 of the theft act 1968

165.The claimant had no contractual right to a laptop or to work from home. The respondent was entitled to take a decision as regards the allocation of this scarce resource and chose to allocate the laptop to a clinician who was required to shield in preference to the claimant. There was no breach of the regulations requiring its return. Firstly Ms Groombridge was prepared to collect it so the claimant did not need to leave home. When the claimant did leave home to return it she was complying with a legal obligation under the Regulations, returning property that was not hers and which the owner wanted.

166.The requirement therefore to return the laptop was not a criminal offence.

Having regard to the above conclusions of the matters complained of by the claimant the tribunal then looked at whether there had been a breach of any express and/or implied terms of the claimant's contract of employment as set out in the list of issues

167.The tribunal considered that Mr Kirk's submission that the respondent's conduct did not even approach the **Malik (Malik -v- BCCI [1998] AC 20)** threshold of being likely to destroy or seriously damaged trust and confidence was well founded. It also found that even if the clauses Mr King submitted should have been implied into the contract (and the tribunal was not satisfied every one was required to be implied) there was no breach.

168.It follows therefore the claim must fail.

169.For completeness, if the tribunal was wrong on the above points, the tribunal was satisfied that what the claimant perceived to be the respondent's conduct was a substantial factor in her decision to resign. Whilst the tribunal have noted the claimant had previously applied for a phased retirement, which had been refused, she had accepted that decision and continued to work. Thus the fact that the

claimant subsequently was to retire did not take away from the tribunal's finding that the substantial reason for the resignation was the respondent's perceived conduct.

170.The reason she took retirement was to obtain financial support to which she was entitled.

171.Nor would the tribunal have found the claimant had affirmed the contract. She resigned promptly.

172.However as the tribunal has already said there was no breach of any express or implied terms of the claimant's contract of employment.

173.Given the above reasoning the tribunal was not required to consider whether the claimant had or had not affirmed the contract .

174.It follows therefore that the claimant's complaint of constructive unfair dismissal must be dismissed .

175.Given the tribunal has found the respondent did not breach the claimant's contract of employment the claimant's complaint of wrongful dismissal must also be dismissed.

Employment Judge Smith
01 February 2022