EMPLOYMENT TRIBUNALS

Claimant: **A**

Respondent: **B**

FINAL HEARING

Heard at: **Bristol** **On: 17 and 18 February 2021 and 29 March 2021 (in Chambers) 20 April 2021 (in Chambers)**

Before: Employment Judge Midgley

Representation
Claimant: Mr J Duffy, Counsel
Respondent: Mr A Shellum, Counsel

JUDGMENT

The claims of constructive unfair dismissal and breach of contract in respect of notice pay are not well founded and are dismissed.

REASONS

Claims and Parties

1. By a claim form presented on 4 March 2020, the claimant brought claims of constructive unfair dismissal and breach of contract in respect of unpaid notice pay.

2. The claimant was employed between 22 September 2003 and the 19 November 2019 as a Clerical Officer within a department of the NHS.

Procedure, Hearing and Evidence

3. The parties had agreed a bundle of 91 pages of relevant documents. The claimant gave evidence on her own behalf by affirmation in accordance with a witness statement. She answered questions from Mr Shellum and from me.

4. The respondent called three witnesses who gave evidence by affirmation in accordance with their statements and answered questions from Mr Duffy and from me. They were as follows:-

   4.1. Mr Zebe-Chaka, the Regional Donors Record Manager.

   4.2. Mr Matt Wood, the National Donor Records Manager.

   4.3. Mr Michael Lovett, and HR Adviser.

5. Mr Shellum had prepared a cast list and chronology which was of considerable assistance in relation to the case. The parties also agreed a helpful list of issues.

6. The case was conducted as a hybrid hearing, the claimant and Mr Duffy attending in person, Mr Shellum and the respondent's solicitor and witnesses attending remotely by CVP.

7. The case had been listed in accordance with standard orders for a two-day final hearing. In circumstances where there were 15 allegations of breach of the implied term of mutual trust and confidence, and four witnesses, that was always an optimistic listing. In consequence, the two days were taken in hearing evidence, and the parties agreed that the best course was for them to file written submissions and replies to avoid the need for a further liability hearing. I therefore directed that written submissions should be provided by 5 March and replies by 19 March 2021.

8. At the end of the hearing, I raised with the parties the question of whether there was a need for a rule 50 anonymity order given the reference to potentially confidential medical details relating to X and the need for a reserved Judgment. Mr Duffy suggested that both parties' names should be anonymized to avoid reverse data harvesting and Mr Shellum consented to that course. I granted the rule 50 order because it seemed to me that it was in the interests of justice to do so and in accordance with the authorities. A separate rule 50 order accompanies this Judgment.

9. The file was referred to me by the casework team at the Tribunal following receipt of written submissions from Mr Duffy and Mr Shellum on or shortly before the 29 March 2021. I took 29 March as a chambers day to consider the submissions and review the evidence. I required one further day in chambers to promulgate this Judgment.

Factual Background

10. I make the following findings on the balance of probabilities in light of the evidence which I have read and heard. The claimant was employed by the respondent, initially as a Warehouse Operative, from 23 September 2003 until her resignation in 2019. In December 2009, following a disagreement with a colleague, the claimant was redeployed to a new role as a Donor Records Clinical Officer at the respondent's site in Filton.

11. In that new position her line manager was Mr Masai Zebe-Chaka, who was the Regional Donors Records Manager. He had very recently been appointed to that role. His line manager was Mr Matthew Wood, the National Donor

Records Manager.

12. On 17 August 2018, a colleague of the claimant ("X"), made an allegation of harassment to the police concerning the claimant's conduct towards him on 16 August 2018. On 22 August 20 X made a formal complaint against the claimant under the respondent's dignity at work policy alleging that she had used inappropriate language and behaviour towards him on 16 August 2018. Mr Zebe-Chaka wrote to the claimant that day, advising her that she should attend a grievance investigation meeting. He made the claimant aware that she could access the Employee Assistance Program ("EAP") if she felt she required support because of the allegations.

13. The claimant alleges that on 30 August 2018, prior to the meeting with Mr Wood, Sharon Holland, a colleague of the claimant within the Donor Records Department, had emailed Mr Zebe-Chaka raising concerns regarding the safety of her colleagues as a consequence of X's behaviour and that the respondent failed to react to or address those concerns. The respondent's position is that it never received such an email. I resolve that dispute in my conclusions below.

The grievance investigation meeting

14. The claimant subsequently attended an investigatory meeting with Mr Zebe-Chaka on 6 September 2018. Marie Mitchell, an HR Consultant, took a note, and the claimant was supported by Linda Stafford, a work colleague.

15. At the meeting the claimant was told that X had alleged that the claimant had made comments mocking his glasses, his hair and his relationships outside work, together with his choice of weekend activities. The claimant denied making any such comment or any comment that might have been misconstrued by X as alleged. The claimant was also told that X had made a police report and the police had spoken to the respondent, advising them that it was not a criminal matter. The claimant suggested that if X was in fear of his safety, as he alleged, it was strange that he had not been moved. The respondent said that it had considered redeploying him but concluded that that could create the perception that the claimant had done something wrong, and so had opted against it at that stage. The claimant was reminded of the availability of the EAP, should she wish to use it.

16. On 10 September the claimant provided the respondent with an impact statement and amended minutes of the meeting in which she reported the extreme stress and anxiety that the allegations had caused her, which she stated had led to insomnia and panic attacks. She stated that she felt unsafe, unsettled, and anxious in X's presence.

17. The claimant made no reference to the concerns expressed by Mrs Holland about X during the meeting or in the amended minutes, or in her impact statement.

The outcome meeting

18. On 13 September 2018 the claimant met with Mr Wood to discuss the outcome of the investigation. The claimant was informed that there was no case to answer. Mr Wood thanked the claimant for her cooperation and

indicated that if she required any further support she could contact him; he again reminded of the availability of the EAP if she required additional support.

19. The claimant further alleges that on 13 September 2018 a senior member of staff told her that X had experienced delusions that she and her husband had been plotting to kill him, and yet despite that, the respondent failed to address the matter or provide the claimant with any support. Again, I resolve that dispute in my conclusions below.

20. Between 13 September and 28 December 2018, the claimant and X continued to work in the same building without incident, albeit with some awkwardness and anxiety. The claimant sought to avoid contact with X wherever possible.

The incident of the 28 December 2018

21. On 28 December 2018, the claimant returned from an afternoon break with Mrs Stafford. As the claimant and Mrs Stafford were climbing the stairs, X approached the claimant, drew level with her and shouted at her, "fucking bitch… You fucking bitch." He was extremely angry and aggressive. He then stormed away. The claimant immediately informed Mr Zebe-Chaka and Sarah Tanner. Both the claimant and Mrs Stafford sent email accounts of the incident to Mr Zebe-Chaka the following day (a Saturday). X began a period of sickness absence that day.

22. Upon his return to work, on 31 December 2018, Mr Zebe-Chaka acknowledged the claimant's email, informed her that he was very sorry to have learnt of the incident and that he would address the matter through an investigation process and keep her informed of its progress. In the interim he suggested that claimant should contact him or his deputy, Sarah Tanner, if she required further support and again reminded her of the availability of EAP, attaching the relevant details. The claimant accepted in cross-examination that he was thereby being supportive and taking the matter very seriously.

23. The respondent instigated a disciplinary investigation in relation to the events of the 28 December 2018.

24. The claimant was absent from work until Monday, 7 January. She did not work on Wednesdays and took annual leave on 1 (Tuesday), 4 (Thursday) and 5 (Friday) of January. Mr Wood had himself returned that day, 7 January, from annual leave.

25. On her return to work, the claimant emailed Mrs Tanner copying in Mr Wood, asking whether X's access card been deactivated as a consequence of the incident. In addition, she complained that she was unhappy that she had not been kept informed of events during the period of her annual leave. Mr Wood replied to the claimant within 30 minutes of her email, advising her that X was absent from work due to sickness until the end of January and that he had contacted human resources to check that he was able to suspend X's access card, but would do so by the end of the day. He further advised the claimant that human resources were organising an independent individual to lead the formal investigation in relation to the claimant's formal complaint against X. Finally, he reassured the claimant that X would not be permitted to return to

work until the investigation was concluded and "we have done all that we need to do", and that he would ensure that the claimant was informed of X's return to work date in advance. The claimant accepted in cross examination that Mr Wood was taking the matter very seriously.

26. On 7 January 2019 X's access card was suspended; Mr Wood confirmed that action to the claimant by email.

27. On the same day Sarah Van Niekirk emailed Claire Hodge a draft email she proposed to send to Mr Zebe-Chaka raising concerns that X was schizophrenic. Miss Hodge forwarded it to the claimant. However, the claimant did not raise the email or the concerns raised within it with Mr Wood or Mr Zebe-Chaka on 7 April or at any point until prior to the 16 August 2019 (see below).

Employee's collective concerns.

28. On 24 January 2019, six employees sent a letter to Mr Zebe-Chaka, voicing concerns about the safety and wellbeing of their colleagues because of the behaviour of X. The claimant was not a signatory to the letter, but Miss Hodge was. It is inconceivable, given the events described in paragraph 27 that the claimant was not aware, at the very least, of the existence of the letter and in a general sense of the concerns raised within it. Amongst the behaviours about which the signatories expressed concern were X's tendency to be verbally abusive, and at times aggressive towards his colleagues, as well as making errors in his work.

29. The letter was not a grievance, however, and did not make any reference to the dignity at work policy or suggest that a formal or informal process should be adopted in respect of it. Mr Zebe-Chaka forwarded the letter to Mr Wood, who in turn forwarded it to HR requesting a meeting to consider the appropriate course to manage the concerns expressed in the letter and the corresponding concern that the respondent should not permit a witchhunt to develop. The meeting took place on 31 January, and Mr Zebe-Chaka, Mr Wood and a member of HR attended. There is no suggestion in either Mr Zebe-Chaka's or Mr Wood's email that the respondent was taking the matter other than very seriously, and the claimant accepted that in cross examination that.

30. The respondent chose to take the contents of the letter into account during the investigation into X's conduct on 28 December 2019 as the conduct described was similar to that which had occurred that day and it was felt could therefore be addressed through the same management process. There is no evidence that any of the signatories to the letter regarded that as unsatisfactory or as a failure to address a grievance or to follow any applicable process.

The disciplinary investigation meeting

31. On 5 February 2019, the claimant attended a disciplinary investigation meeting with Mr Matt Clee, a BMS Advanced Specialist, in relation to her allegations against X. During the meeting the claimant was asked whether there was any additional support that she believed she would benefit from and replied that she did not require any further support at that point. She stated

that she felt that she would be unable to work with X again, whether in the same department or the same building, on the grounds that he frightened her too much.

32. The claimant did not make any complaint in that meeting that the respondent had failed to investigate the concerns raised in August 2018 in relation to X, or that the respondent had failed to take any action against X as a consequence of the finding that there was no case to answer in respect of his allegations, nor did she make any reference to X's delusion that the claimant had been plotting with her husband to kill on the telephone. Similarly, she made no reference to the letter of concern or any failure to act in respect of it by the respondent. The claimant accepted in evidence, however, that Mr Clee was very supportive of her.

33. In the period between February and March 2019, Mr Zebe-Chaka regularly checked with the claimant to ensure her well-being. He made repeated references to the availability of the EAP, and suggested the claimant take annual leave which he would authorise. Whilst the claimant remained anxious about X's return, and uncertain as to what stage the disciplinary investigation had reached, she remained professional and did not raise any concerns as to the process, her work or the support offered to her.

34. The claimant began a period of sickness absence on 7 March 2019 due to anxiety, stress and depression. The sickness absence continued until 25 April 2019.

The disciplinary sanction and communication with the claimant

35. On 27 March 2019 a disciplinary panel issued X with a first level formal sanction and required him to participate in mediation with the claimant on his return to work.

36. On 28 March Mr Wood informed the claimant that disciplinary process relating to X had concluded and action had been taken against X (although for reasons of confidentiality and data protection he could not disclose exactly what), but eventually X would return to work. The claimant was incensed and swore at Mr Wood, subjecting him to a barrage of abuse on the grounds that she believed that X should have been dismissed. The same day claimant submitted a further medical note for a four-week period.

37. On 9 April 2019 Mr Zebe-Chaka emailed the claimant asking whether she had received a further sicknote or whether she anticipated that she may be fit to return to work. He provided his mobile number so that the claimant to contact him more easily if she wished.

38. On 10 April the claimant emailed Mr Zebe-Chaka, indicating that the proposal that X should return to work in the same department was "wholly unacceptable" and that she would not be able to work in the same department with him, whether then or in the future. She repeated many of the previous concerns which were detailed her impact statement dated 10 September and raised new concerns in relation to her discovery that X had (as she believed) disclosed to Susan Van Niekerk that he had previously suffered from schizophrenia. The email expressly stated that it was not a formal grievance, but rather a request for matters to be resolved informally. Again, however, the

claimant did not suggest in the informal grievance that the respondent had failed properly to respond to Miss Niekerk's concerns for her colleagues or the collective letter of concern.

39. Mr Zebe-Chaka telephoned the claimant on 16 April to discuss the informal grievance and sent an email on 18 April confirming their discussion. He confirmed that X would be returning on a phased return but would be required to participate in a facilitated formal or informal meeting with the claimant to discuss his actions. He explained that he could not provide an assurance that X would not be returning to the department or building where the claimant worked as a consequence of the disciplinary panel's outcome, which limited his managerial options. However, he passed the information on to HR and enquired whether the claimant would like an occupational health referral as a means of support. The claimant accepted in cross-examination that Mr Zebe-Chaka had addressed the concerns raised in her email of 10 April 2019.

40. The claimant did not suggest upon receipt of that email or at any point thereafter that the respondent had failed appropriately to respond to the concerns she expressed in her email of 10 April or that it had failed to support her, nor did she complain about the proposal to meet with X for a facilitated meeting.

The grievance of 29 April 2019 and the claimant's return to work.

41. On 29 April 2019 the claimant emailed a formal grievance to the respondent, raising the concerns which she had identified in her email of 10 April. Within that document she referred to the email of 10 April as an "informal grievance document."

42. The claimant returned to work on 30 April. At that point X remained absent on sickness absence. Mr Zebe-Chaka emailed the claimant the same day offering support if she required it and indicating he would catch up with her when he returned to the office on the Friday that week.

43. On 3 May 2019 Mr Zebe-Chaka met with the claimant to discuss the concerns she had repeated in her formal grievance. He sent her an email detailing that discussion that on 7 May 2019. During their meeting the claimant had confirmed that whilst she was very concerned and scared at the thought of being the same environment as X, she was willing, with support from Mr Zebe-Chaka, to participate in the facilitated meeting. Counter-intuitively, given her expressed fear of X, she wanted to be able to ask X questions and wanted X (rather than his union representative) to answer them. It was agreed, following the claimant's request, that the meeting would take place in a large room and she would be given the following day as leave.

44. The claimant replied to Mr Zebe-Chaka's email on 7 May 2019. She did not suggest that she was unhappy in any way with his resolution of her grievances or that despite the discussion and agreement as to the route forward she still wished the formal grievance to be completed. Indeed, she accepted in cross-examination that it would have been reasonable for Mr Zebe-Chaka to have formed the view that the discussion resolved the concerns in her emails of the 10th and 29th of April 2019.

X's return to work and the meeting of 16 August 2019

45. Between 7 May and 12 August 2019, the claimant continued to attend work without issue and did not raise any complaint either that her informal grievance of 10 April or her formal grievance of 29 April had not been responded to or addressed.

46. On 12 August 2019 Mr Zebe-Chaka informed the claimant that X was due to return to work the following week. The claimant immediately re-iterated her previously expressed concerns about that. On 15 August Mr Zebe-Chaka emailed the claimant proposing that they should meet with a member of HR to discuss how she had been since her return to work, her concerns, and to arrange the facilitated meeting and to discuss any support options she required. The claimant accepted in cross-examination that the email was a supportive one.

47. On 16 August 2019 Mr Zebe-Chaka, Ms Julie Clutterbuck (an HR manager) and the claimant and her workplace colleague, Claire Hodge[1], attended an informal meeting. A note of the meeting was produced by Ms Clutterbuck. The claimant was fraught, stressed and aggressive during the meeting; the claimant accepted in cross examination that she was hostile and very angry She began the meeting by stating that she was not prepared to work with X, she requested that the respondent provided her with a written guarantee that she would be safe at work before she would work with him. Ms Clutterbuck told her that she was "coming across as hostile and whilst she could understand and relate to the claimant's stress, she was not prepared to continue the discussion unless the claimant was willing to calm down. She said could not absolutely guarantee anyone's safety and it was not the respondent's practice to issue documents of that sort to individuals. The claimant told her that she had therefore failed to take any steps to protect her health and safety and she would not listen to anything that Mr Clutterbuck or Mr Zebe-Chaka said.

48. Claire Hodge asked what had been done in respect of X and Ms Clutterbuck explained that she was only able to provide limited information because of the respondent's duty of confidentiality in respect of employees' medical information, but she could say that he had been signed as fit for work by his medical advisers and by occupational health, and that the respondent was putting support measures in place for him, but the purpose of the meeting was to discuss the support measures that the claimant required. The claimant raised concerns that X might stop taking his medication, and Ms Clutterbuck advised that the respondent would be monitoring him on a weekly basis to ensure his health.

49. The claimant reiterated that she was not prepared to listen anything the respondent had to say if he was returning to work in the team. She complained that she was the victim and had been left in the dark and unsupported. The claimant then indicated she was no longer prepared to participate in a mediation or a facilitated meeting with X and said that if he returned she felt would have no alternative but to resign. Ms Clutterbuck asked the claimant if she would be willing to reflect on the matter over the weekend and to meet the following Monday to discuss her concerns, but the claimant rejected that proposal.

[1] Miss Hodge was a signatory to the letter of concern regarding Mr X.

50. The claimant accepted in cross examination that the stance which she had adopted at the meeting was that either X should made to leave the respondent, or the claimant would resign.

51. Ms Clutterbuck emailed the claimant a short note of the key points the meeting that day. Ms Hodge also produced note of the meeting which was within the tribunal bundle.

The claimant's sickness absence

52. On 18 August the claimant met with Mr Zebe-Chaka to seek to resolve the concerns she had raised on 16 August. On 19 August 2019 Mr Zebe-Chaka telephoned the claimant who informed him that she had been signed off with "stress at work" and was due to see her GP. She began a period of sickness absence that day. Mr Zebe-Chaka informed the claimant that EAP support was available and that he would keep in touch with her on a regular basis during her sickness absence. He subsequently received the claimant's fit note for one month. The claimant accepted in cross-examination that Mr Zebe-Chaka's approach was supportive of her throughout this period.

53. Mr Zebe-Chaka attempted to contact the claimant without success on the 9th, 10th, 16th and 18th of September, eventually leaving a voicemail asking the claimant to contact him. Consequently, on 16 September, Mr Zebe-Chaka emailed Michael Lovett, an HR consultant, and provided him with an update on the claimant's sickness absence and his efforts to speak to her about her progress and to organise an occupational health referral.

54. On 23 September the claimant was invited to attend an informal absence support meeting by Mr Zebe-Chaka, which was to be attended by Mr Lovett.

The meeting of 27 September 2019.

55. On 27 September 2019, the claimant attended an informal absence support meeting with Mr Zebe-Chaka and Mr Lovett. The claimant alleges that during that meeting Mr Lovett accused her of being uncooperative and suggested she was dragging up the past when she expressed her concerns about having to work with X. Mr Lovett denies that allegation. I resolve that dispute in my conclusions below.

56. Neither Mr Zebe-Chaka nor Mr Lovett made notes of the meeting as it was an informal meeting. The claimant did not make notes of the meeting but says that after the meeting she made a note in her diary whilst sitting in her car.

57. In any event, the parties agreed that the following matters were discussed: First, the respondent sought to discuss measures that it could put in place to assist the claimant to return to work. The claimant was reminded of the availability of EAP support and offered a workplace stress risk assessment and/or mediation, which she refused. Mr Lovett then suggested OH assessment which the claimant agreed to attend. The claimant asked how the respondent had determined that it was safe for X to return to work. Mr Zebe-Chaka detailed the steps which the respondent had taken or proposed to take to minimise the risk to the claimant of working with X. He agreed to provide the claimant with a list of steps after the meeting, which he duly did on 17 October 2019.

58. On 15 October 2019 the claimant attended an occupational health assessment. The respondent and the claimant were sent a report that day. The report advised that the claimant was unfit to return to work in her normal work location as a consequence of her symptoms of stress and anxiety and would be unlikely to be able to return to work in close proximity to X for the foreseeable future. It opined that she would be likely to be fit to return to a similar role and on an alternative location. Finally, it advised that mediation be unlikely to be effective in the case.

59. On 17 October Mr Lovett requested that Mr Zebe-Chaka or Mr Wood should arrange a second informal absence review meeting on 21 October with the claimant to discuss the content of the report. It is clear from that email that the respondent was preparing to consider redeployment either to a similar job in a different location or to an alternative role (whether through the respondent's internal or external vacancy lists). Similarly, consideration was being given to remote working or working in different part of the office or building.

The claimant's resignation.

60. On 22 October 2019, the claimant resigned (purportedly with immediate effect) by letter sent to Mr Zebe-Chaka. She complained that she was resigning because X had returned to work and she was unable to share a workplace with him, and the respondent had failed to offer her assurances that he was well enough to return to work and/or that his conduct would not be repeated. Finally, she complained that he had not demonstrated any remorse or insight into the impact of his actions.

61. She had at that point been employed for 16 years by the respondent.

62. On 30 October 2019, Mr Zebe-Chaka wrote to the claimant in response to her resignation inviting her to attend a meeting with himself and Mr Wood to discuss her resignation. The hope was that the claimant would reconsider. She did not agree to attend the meeting and the respondent confirmed her resignation by letter dated 11 November 2019, which was the effective date of termination, the claimant being paid until that date.

63. The claimant first notified ACAS of the dispute on 12 January 2020 and a certificate was issued on 4 February 2020. The claimant presented her claim to the Tribunal on 4 March 2020.

The Issues

64. The parties had agreed a relatively sensible list of issues which was largely adopted for the hearing (sections in square brackets below connote section which in my view form part of the narrative or otherwise are not in reality part of the issues to determined, sections in italics are my additions to the issues).

Constructive Unfair Dismissal

65. Did the Respondent *without reasonable and proper cause conduct itself in such a manner as to destroy or seriously damage the relationship of mutual trust and confidence* [conduct itself in such a way which fundamentally

breached the Claimant's contract of employment]? The Claimant relies upon the following breaches:

65.1. On 30 August 2018 a colleague raised concerns regarding the safety of her colleagues in relation to X's behaviour, but the Respondent failed to address them;

65.2. On 13 September 2018 it was confirmed that there was no case to answer in respect of X's allegations against the Claimant, but these false allegations were not addressed with X [(as far as the Claimant is aware)];

65.3. Around 13 September 2018 the Claimant was informed by a senior member of staff that X had been experiencing delusions about her and her husband plotting to kill him. [Despite this deeply concerning revelation,] the Respondent failed to address this or provide the Claimant with any support;

65.4. Following the incident in the stairwell on 28 December 2018, [when X verbally abused the Claimant], the Respondent failed to keep her updated regarding X's attendance at work;

65.5. On 7 January 2019 the Respondent was unable to confirm whether X still had access to the workplace;

65.6. The Respondent failed to investigate the collective grievance raised by the Claimant's colleagues on 24 January 2019 [in respect of concerns about X's behaviour (to the Claimant's knowledge)];

65.7. The Respondent failed to investigate the Claimant's grievance raised on 10 April 2019 [regarding X's conduct and the Respondent's failure to support her];

65.8. The Respondent determined that X would be able to return to work on 27 March 2019 despite the Claimant confirming [on 5 February] that she would be unable to work with him;

65.9. The Respondent emailed the Claimant on 18 April 2019 confirming that she would be required to meet with X to discuss the incident on his return to work, and they could not provide the requested assurances regarding her safety;

65.10. The Respondent did not acknowledge or provide an outcome for the grievance that the Claimant raised on 29 April 2019;

65.11. On 16 August 2019 a member of the Respondent's HR team called the Claimant 'hostile' [because she stated that she had serious concerns about working with X];

65.12. During the 16 August 2019 meeting [the Claimant confirmed that she had been experiencing panic attacks before work due to the thought of X returning to the workplace. The Respondent failed to offer any support in respect of this concern;

65.13. At the 16 August 2019 meeting the Respondent was unable to confirm how they were going to support the Claimant or safeguard her from X; and

65.14. In a meeting on 27 September 2019 the Respondent accused the Claimant of being uncooperative and said that she was dragging up the past when she expressed her serious concerns about having to work with X; and

65.15. On 27 September 2019 the Respondent emailed the Claimant to confirm the measures that had been put into place to support X in the workplace, but that no direct support was offered to the Claimant.

66. [Whether the alleged breaches took place and if so, was the Respondent's conduct sufficiently serious to amount to a repudiatory breach(es) of the Claimant's contract of employment entitling her to resign]? [2]

67. Did the Claimant resign promptly in response to the breach(es)?

68. Did the Claimant affirm the contract [since] *after* the most recent alleged breach?

69. [Was the Claimant entitled to resign and consider herself dismissed?]

70. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s.98(4) of the Employment Rights Act 1996?

Notice Pay

71. Did the Respondent dismiss the Claimant by committing a fundamental breach of contract, entitling her to resign without notice?

72. How much Notice Pay was the Claimant entitled to?

Remedy

73. In the event that the Claimant's claims succeed in part or in full;

73.1. What losses has the Claimant suffered as a consequence of the dismissal? [Is it] *Are they* attributable to the Respondent?

73.2. [Is it just and equitable, and] has the Claimant taken reasonable steps to mitigate her losses?

73.3. What is the value of the Claimant's notice pay?

73.4. If the Claimant was unfairly dismissed and is awarded compensation, *would it be just and equitable to make a* [should] reduction [s be made] to the basic award and/[or] to any compensatory award for contribution / fault pursuant to ERA sections 122(2) and 123(6)?

[2] A breach of the implied term of mutual trust and confidence is a breach of a fundamental term of the contract which would entitle the claimant to accept the repudiation and resign.

73.5. If the Claimant's claims are successful, should a Polkey reduction be applied to any compensatory award?

The Relevant Law

74. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

75. If the claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides

> "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the siXe and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and –
>
> (b) shall be determined in accordance with equity and the substantial merits of the case. "

76. The best-known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

77. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Cuiv 131 Maurice Kay LJ endorsed the following legal test at paragraph 20:

> "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

78. However, the circumstances that induced the employer to act in breach of contract are irrelevant to the issue of whether a fundamental breach has

occurred (Wadham Stringer Commercials (London) Ltd v Brown [1983] IRLR 46, EAT).

79. Unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672) but, conversely, reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract (Courtaulds Northern Spinning Ltd v Sibson [1988] ICR 451).

80. However, once the Tribunal conclude that there was a breach, it is clear from Meikle v Nottinghamshire City Council [2005] ICR 1, CA; Abbycars (West Horndon) Ltd v Ford 2005] 5WLUK 595, EAT and Wright v North Ayrshire Council [2014] IRLR 4 EAT, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. It need not be the predominant, principal, major or main cause for the resignation.

81. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA at para 14 p.487 B-H:

> "The following basic propositions of law can be derived from the authorities:
>
> (1) The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761.
>
> (2) It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence
>
> (3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.
>
> (4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer
>
> (5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents".

The last straw doctrine

82. If the incidents complained of do not contain an incident which of itself is a breach of the implied term, the last straw doctrine applies. The last straw doctrine only requires that each incident is capable of contributing to a series of events the cumulative effect of which is to amount to a breach of the implied term, it does not require each incident separately to constitute such a breach (see Lewis v Motorworld Garages Ltd [1986] ICR 157 at p167C; 169F, approved in Omilaju at para 15). The final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju at paras 19-20):

> "The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> ….viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred."

Affirmation

83. Where an employee does not accept the repudiation of their contract represented by the breach of the implied term but continues to 'soldier on' and work for pay, the question of affirmation may arise. However, if the conduct in question is continued by a further act or acts, in response to which the employee *does* resign, he or she can still rely on the *totality* of the conduct in order to establish a breach of the Malik term, because the subsequent act entitles the employee to resign in consequence of the earlier breaches (see Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 918 at paras 43 and 45 , confirming Omilaju at para 21).

84. The principle above applies both (a) when the Malik threshold has been crossed by the last act, *and* (b) where the Malik threshold has been crossed, the employee has continued to work, and further acts occur in response to which the claimant is entitled to resign (see Kaur at paragraph 45).

85. In such cases the Tribunal should ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in

Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

86. If the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign (see Williams v Governors of Alderman Davies Church in Wales Primary School [2020] IRLR 589, EAT at 33). In that circumstance the Tribunal must therefore consider whether the last straw (i.e. the cumulative effect of the conduct) has crossed the Malik threshold at a point in time prior to the temporal 'last straw' (i.e. the last act about which complaint is made).

87. A constructive dismissal may still be a fair dismissal (see Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as:

87.1. in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied;

87.2. If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;

87.3. It is open to the employer to show that such dismissal was for a potentially fair reason;

87.4. If he does so, it will be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair.")

Discussion and Conclusions

88. I consider each of the alleged breaches in turn; the claimant put her case on the basis it was a last straw case where the events she complained of cumulatively amounted to a breach of the implied term of mutual trust and confidence (and thereby crossed the Malik threshold).

Did the respondent fail to address the concerns raised by the claimant's colleague on 30 August 2018?

89. The claimant relies upon a document, which she describes as an email, but which is not, which she confirmed was given to her by the author of it. She did not describe in her witness statement how the document came to be in her possession, but in evidence she said that a copy had been given to her. I have no reason to doubt that evidence, but equally there was no evidence

(whether from the claimant or from any other party) to suggest that the document had been given to or attached to an email and sent to Mr Zebe-Chaka. He himself had no recollection of receiving any such document, and there is no reference to it in any of the correspondence passing between the claimant and the respondent, or internally between the respondent's employees. Had it been sent, given the seriousness with which the respondent was treating the matter, it would have been referred to by someone. I am not therefore persuaded on balance that it was sent to Mr Zebe-Chaka as alleged. It follows that the respondent had reasonable and proper cause for not taking action in respect of it, but even had it been received by the respondent, the document only raises concerns for X's health and well-being. In the circumstances where the claimant herself had made no complaint about X, it cannot have been unreasonable and certainly could not be a breach of the implied term in the claimant's contract of employment not to take action in relation to it. It is relevant in that regard that the claimant made no reference to this in any of her correspondence with the respondent, including her informal and formal grievance or her letter of resignation.

90. Even if I were wrong about that, I would have found that the claimant had affirmed any such breach through her conduct in continuing to work without protest in respect of this failure until her resignation on 22 October 2019, a period of 13 months.

Did the respondent fail to address "false allegations" made by X against the claimant on or after 13 September 2018?

91. On 13 September 2018 the respondent found that there was no case for the claimant to answer in respect of X's allegations. Mr Wood informed the claimant of that matter. The respondent did not, however, find that the allegations were either false or made in bad faith. At no stage did the claimant suggest that the respondent should have taken action against the X in relation to the allegations contained in his grievance. She did not present a grievance, whether formal or informal, raising any concern about that alleged omission, and she continued to work in the same building alongside X. Indeed, she did not suggest in her witness statement that she had made such a suggestion to the respondent, this was therefore an allegation made for the first time in the ET1. The claimant had been offered support in the form of EAP counselling at the time that the respondent communicated the outcome of the grievance to her. It follows that it had reasonable and proper cause not to take action against X as (a) it had not found that the complaint was either false or made in bad faith, and (b) the claimant made no complaint about that decision. The respondent's conduct did not therefore amount to a breach of the implied term in itself, nor was it capable of contributing to such a breach given its supportive approach; its actions lacked the essential character necessary to contribute to the breach of the implied term.

92. If I were wrong about that, for the same reasons as given in paragraph 90 above, I would have found that the claimant affirmed the contract in respect of this breach.

On 13 September 2018 did the respondent fail to address an allegation, reported to the claimant by Mr Wood, that X had experienced delusions that the claimant and her husband had plotted to kill him, or provide the claimant

with any support?

93. There is a direct dispute of fact as to whether Mr Wood made the comments to the claimant at all. The claimant's case as to when the meeting at which they were made occurred altered. In her witness statement, she suggested that it may have occurred on 6 September 2018, whereas in her claim she suggested the meeting was on or around 13 September. The respondent adduced evidence to demonstrate that Mr Wood was not in the respondent's premises on the 6 September and relied upon the lack of any reference to the comments in the meeting on 13 September. In cross-examination the claimant suggested for the first time that the comments had been made in a second meeting on 13 September which she attended with Mr Wood and at which Ms Stafford was present. Mr Wood denies making the comments at all.

94. I must decide this issue on the balance of probabilities, and I am not persuaded by the claimant on balance that the conversation occurred as she alleged. That is because the evidence available to me demonstrates the extent to which the respondent sought to maintain confidentiality in respect of X and others through these difficult processes, and Mr Wood at all other times was at pains to comply with that duty. Secondly, it makes no sense in the circumstances of the case for the respondent to have disclosed to the claimant matters that would only add to her alarm and distress in circumstances where it was proposing that the claimant and X should continue to work together. Thirdly, the claimant did not make any reference to the discussion in any of her emails or grievances. Had it occurred as she suggests, I am certain that she would have done. Finally, if the matter were mentioned to the claimant, it being of such significance, she would have been be able to say precisely when she was told and by whom. Her inconsistency on the point undermines her credibility in relation to it.

After the incident on the 28 December 2018, did the respondent fail to keep the claimant updated as to X's attendance at work?

95. The incident occurred on Friday, 28 December. Mr Zebe-Chaka responded to the claimant on Monday, 31 December. The claimant accepted in cross examination that his email was both supportive and showed that he was taking the claimant's concerns seriously. The claimant was absent from work until 7 September, at which stage Mr Zebe-Chaka was on leave. Whilst it may have been best practice for the respondent to arrange to meet with the claimant immediately upon her return to work to tell her the current position regarding X, given that Mr Wood had himself returned from annual leave that day and Mr Zebe-Chaka was away, it was not unreasonable and certainly not a breach of the implied term of mutual trust and confidence for that not to have occurred.

96. Within 30 minutes of the claimant raising a concern about what was happening, Mr Wood had replied by email with a full update in a very supportive manner. It is noticeable that the claimant did not raise a grievance in respect of this alleged failure, nor did she reference it in her informal grievance of 10 April 2019, which is indicative of the fact that she did not regard it as being a significant matter at that stage.

97. Consequently, even were I wrong to conclude that there was no

unreasonableness in the delay and that it could not contribute to a breach of the implied term, I would have found that the claimant had affirmed the contract by continuing to work without complaint.

On 7 January 2019 was the respondent unable to confirm whether X still had access to the workplace?

98. In reality this adds very little to the allegation above. Whilst it is true that Mr Wood did not know, immediately upon his return from annual leave, whether X's ID card had been suspended and so could not respond to the claimant's question on that point in his email, he was able to confirm the position later that day. Whilst best practice might have been to have informed the claimant prior to her attending work or on the morning she was due to attend by way of reassurance, the claimant attended work without raising any concern as to whether X did have access, and therefore the respondent was not on notice that the matter was so serious that the claimant's trust and confidence in it depended on it. It was not therefore a failure that was itself a breach of the Malik term nor was it capable of contributing to a such a breach.

99. Just as with the allegation above, if I am wrong about that, as the claimant did not raise a grievance in respect of this alleged failure or reference it in her informal grievance of 10 April or formal grievance, I would have found that the claimant had affirmed the contract by continuing to work without complaint about this matter.

Did the respondent fail to investigate a "collective grievance" raised by the claimant's colleagues on 24 January 2019?

100. The respondent did not fail to address the concerns. Rather, the respondent chose to treat the letter of concern, which was not an informal or a formal grievance, as a matter of evidence to be considered with other evidence during the disciplinary investigation that had already been commissioned in respect of X's conduct. That approach was well within the band of reasonable responses open to a reasonable employer and one for which it had reasonable and proper cause. There was no evidence before me that the claimant, or any of those who put their signatures to the letter of concern, raised any complain about that courset. I reject the claimant's argument that such conduct breached the implied term, or could contribute to a series of events which cumulatively amounted to a breach of the implied term in the claimant's contract of employment firstly because the letter did not raise concerns about her, secondly because she was not a signatory to it, and finally because the claimant did not raise any concern about the alleged failure to address the letter at any stage prior to issuing proceedings.

101. Again, if I were wrong about that I would have found that the claimant affirmed the contract in respect of any such breach by continuing to work and accept pay without any complaint about this matter.

Did the respondent fail to investigate the claimant's grievance of 10 April 2019?

102. In my view it did not. The claimant accepted in cross examination that in speaking with her on 16 April 2019 Mr Zebe-Chaka resolved the matters of concern in her informal grievance. The claimant agreed to the proposed

course of a facilitated meeting with X during which he would be required to explain the reasons for his actions. The claimant did not make any complaint thereafter that her informal grievance had not been resolved. Therefore, the respondent had reasonable and proper cause for its action in resolving the grievance in that way, and in any event its actions were reasonable and neither amounted to a breach of the implied term of mutual trust and confidence nor were capable of contributing to such a breach in the circumstances of the claimant's consent to the proposed action.

103. Again, given the claimant's failure to complain about this alleged omission, I would have found that the claimant affirmed the contract by continuing to work without protest about it and accept pay for six months.

Did the respondent determine that X would be permitted to return to work on 27 March 2019 despite the claimant confirming on 5 February that she would be unable to work with him?

104. The claimant alleges in her argument that this was a breach of the implied term on the grounds that the decision was made "without providing any further support or tangible measures to the claimant, despite her clear indication that she could not work with him." Put simply, that allegation is misconceived because the claimant had agreed on 16 April to X's return, subject to a facilitated meeting supported by HR and Mr Zebe-Chaka. The respondent therefore had reasonable and proper cause for its actions both in terms of the claimant's consent, but more importantly because of its duties under the Equality Act in respect of X and his right to work. The respondent's conduct was not therefore a breach of the implied term of mutual trust and confidence in itself, nor was it capable of contributing to such a breach in the circumstances.

Did the respondent email the claimant on 18 April 2019 confirming that she would be required to meet with X to discuss the incident on his return to work, and they could not provide the requested assurances regarding her safety?

105. The allegation is inaccurate in the sense that Mr Zebe-Chaka did not say that he could not provide the requested assurance regarding the claimant's safety, but rather that he could not make the assurance that X would not be in the department or building where the claimant was working. Mr Zebe-Chaka did email the claimant on 18 April and confirm that the disciplinary panel which had determined the allegations against X had directed that he should attend a formal or informal facilitated meeting with the claimant to explain his actions to her. That was the course which the claimant had consented to during her discussion with Mr Zebe-Chaka on 16 April 2019. Mr Duffy sought to argue that despite the claimant's consent to that course, the respondent should have understood that the claimant was still fearful of X because she had requested the meeting to take place in a big room. The fact that the claimant remained fearful about the course is not tantamount to withdrawing her consent, nor does it get close to establishing that the respondent acted unreasonably or without proper cause in understanding her agreement to the course as constituting consent to it.

106. In those circumstances the respondent had reasonable and proper cause for sending the email it did on 18 April 2019, and its conduct in sending the

email cannot be said to have been a breach of the implied term or to be capable of contributing to such a breach of the facts of the case.

107. In the circumstances where the claimant had not complained about that alleged conduct prior to her resignation, I would have found that the claimant had affirmed any such breach by continuing to work without protest and accept pay for nearly 6 months.

Did the respondent failed to acknowledge or provide an outcome for the grievance on 29 April 2019?

108. In my judgement, the respondent did not fail to acknowledge or provide an outcome for the claimant's grievance of 29 April 2019. Rather on 3 May 2019 Mr Zebe-Chaka spoke at length to the claimant regarding her concerns. He wrote to the claimant confirming the content of that discussion and the claimant replied to confirm that the discussion had been correctly recorded. The proposed and agreed solution to the claimant's concerns was that a facilitated meeting should take place in a big room following which the claimant would be permitted to take the following day as leave. The claimant did not indicate in her email to Mr Zebe-Chaka or at any point thereafter, including in her letter of resignation, that the respondent had failed to address or resolve the concerns she had raised in the email of 10th of April which she raised as a formal grievance on 29 April 2019.

109. The respondent therefore had reasonable and proper cause for failing to adhere to its usual grievance policy, because the claimant had ostensibly consented to the approach proposed. In the circumstances, therefore, the respondent's conduct neither amounted to a breach of the implied term nor could it reasonably contribute to such a breach.

110. In the circumstances where the claimant had not complained about that alleged conduct prior to her resignation, I would have found that the claimant had affirmed any such breach by continuing to work without protest and accept pay for nearly 6 months.

On 16 August 2019 did Ms Clutterbuck call the claimant "hostile"?

111. The claimant accepted in cross examination that she had been hostile and extremely angry during the meeting. The notes of the meeting taken by the claimant's colleague and friend, Claire Hodge, record Ms Clutterbuck saying "You are coming across as hostile". That was in circumstances where the claimant was by her own admission furious, had demanded that the respondent should provide her with a written assurance that it would guarantee her health and safety, and had told Ms Clutterbuck that she was not interested in anything that she or Mr Zebe-Chaka may wish to say during the meeting. Whilst they fully understood and empathised with the claimant's distress at the concept of having to work in the same building as X given his conduct towards her (as I do), and the considerable anxiety and distress that might cause, the meeting had been arranged with the claimant's full knowledge and consent to discuss a facilitated meeting to try to ameliorate some of those concerns.

112. It was therefore reasonable and the respondent had proper cause to say to the claimant that she was "coming across as hostile," and that Ms

Clutterbuck had not been prepared for such an response given that she believed she was attending an informal meeting to discuss the arrangements for the facilitated meeting. Ms Clutterbuck stressed "I can understand and relate to your stress" and was clearly through her entire response trying to appease and calm the claimant so that a meaningful discussion could take place. She accurately described the effect of the claimant's conduct in an effort to enable her to 'reset' and approach the meeting with the necessary decorum and professionalism, in the same way as one might say "please don't shout/or raise your voice at me, I understand why you are upset but we must all remain professional." The fact that Ms Clutterbuck used the expression she did in the face of the 'storm' of the claimant's fury was not best practice but certainly was not unreasonable, or a breach of the implied term or capable of contributing to such a breach.

113. Given that the claimant did not raise a grievance about her conduct or refer to it in her resignation, I would have found that she affirmed any breach by working without protest in respect of this matter whilst accepting pay.

Did the respondent fail to offer the claimant any support following her disclosure on 16 August 2019 that she had been experiencing panic attacks before work at the thought of X returning to work?

And

At the meeting on 16 August 2019 did the respondent fail to confirm how it was to support the claimant and safeguard her from X

114. I consider the two allegations together as they are component parts of the same complaint. The first allegation is factually inaccurate. It relates to the same meeting detailed above. The meeting was terminated in circumstances where the claimant had refused to attend the facilitated meeting which had been the agreed course to support her, and she had subsequently refused to attend another meeting to discuss the matter. She declined to take up the support offered through the EAP. In any event, the claimant was subsequently to decline a stress risk assessment and to agree to a referral to occupational health.

115. Mr Duffy argues that the respondent should have considered re-deployment as a means of support. That allegation must be assessed against the chronological context. The claimant had, until 16 August 2019, agreed to a facilitated meeting as a means of resolution. She had expressly declined other offers of support. It was only on 16 August 2019 that the claimant indicated that she could not and would not return to work with X. She was then off sick and failed to respond to four calls from Mr Zebe-Chaka who sought to discuss her health and her return to work with her. Consequently, the first opportunity to discuss support with her was the capability meeting on 27 September 2019. At the meeting further support was offered, namely a stress risk assessment (which she declined), and a referral to OH (which she accepted). The occupational health report identified redeployment as an option, having confirmed as a matter of professional opinion that the claimant's state of health prevented her from working in the same building as X. However, before that could be actioned, the claimant resigned.

116. Therefore, the respondent did not fail without reasonable and proper cause to offer redeploy or 'support' the claimant more generally and did in fact offer reasonable support. Its conduct did not breach the implied term of mutual trust and confidence.

117. In so far as the claimant alleges that the respondent was unable to confirm what steps it would take to support her and safeguard her, she is wrong. The respondent was ready and able to explain the steps it would take to support the claimant. The agreed step was the facilitated meeting. In addition, the respondent explained the steps it was proposing to monitor X's health, again to offer reassurance to her. The claimant's true complaint is that the respondent refused to take the only step which she regarded as satisfactory to safeguard her, which was to dismiss X. She did not believe that there were any steps short of that which were sufficient to provide the degree of assurance which she required. It is somewhat disingenuous therefore to suggest that the respondent could not confirm the steps which would safeguard her (to the claimant's satisfaction).

118. For the same reasons as detailed in paragraph 116, the allegation fails.

Did the respondent accuse the claimant of being uncooperative and of dragging up the past during the meeting on 27 September 2019?

119. There is a direct dispute of fact between the parties in relation to the central facts of this allegation. The claimant relies upon a note which details Mr Lovett accusing the claimant of being "uncooperative and putting up a 'brick wall!" Later in the note it details Mr Lovett saying, "stop dragging up the past." Mr Lovett denies making either of those specific comments, although he accepts that he did encourage the claimant to focus on her return to work and how it was to be achieved.

120. In her evidence under cross examination the claimant confirmed that the document produced in the bundle was not a contemporaneous note made on the day of events, but rather following the meeting she had made notes in her diary and later had transcribed the relevant passages into the document which was disclosed and produced in the bundle. I directed that the claimant should disclose the original diary pages to the respondent; the claimant disclosed the document, and no questions were asked about it.

121. There are certain factors that point each way in relation to the truth of this issue. In the claimant's favour are the facts that Mr Zebe-Chaka brought the meeting to a close because he was concerned that the claimant had become so distraught that continuing the meeting was not sensible. Secondly, the claimant made a note of her recollection of the discussion shortly after the meeting, but Mr Lovett made no note and was seeking to recall matters from his memory. Finally, it is consistent with Mr Lovett's accepted approach to the meeting that he should be focusing on progress and the claimant's return to work, and that he was frustrated by the claimant's actions in dwelling on historical matters relating to X.

122. Conversely, if the comments were said and were said in the manner suggested by the claimant with the result that the claimant was as distressed by them as she argued she was during cross examination (to the extent that

she placed the comments as the primary cause of her resignation), then firstly it is striking that there is no reference to them in the claimant's letter of resignation and secondly it is strange that the claimant delayed for a month before resigning. Finally, the reason given for the resignation is inconsistent with the reason advanced by the claimant connected to the meeting but is consistent with the claimant's accepted view throughout her employment in 2019, namely that she believed that the only way to her safeguard health and safety was for X to be dismissed, and, as she accepted, she presented the respondent with an ultimatum that either he was dismissed or she would resign. The respondent refused to dismiss X and the claimant resigned. That is entirely consistent with those accepted facts, and the disputed facts have no bearing upon it.

123. On balance, I do not accept that the claimant's recollection is accurate. Rather, in my judgment it has been moulded both through the prism of her increasing exasperation, frustration and anger that the respondent would not align with her demands but was focusing upon a return to work and the mechanism to secure it in circumstances which the claimant regarded as utterly unacceptable, and by her repetition of that elements of the incident which caused her the greatest upset. It is likely, as Mr Lovett recalled, that he made reference to the need for the claimant to focus on the future rather than dwelling on historical matters given that the purpose of the meeting was not to consider the claimant's grievances against X, but rather to identify the mechanism by which her return to work could be expedited. In my judgement, in the circumstances described above, Mr Lovett had reasonable and proper cause for making such comments.

124. I bear in mind, in reaching my conclusion both as to which account to prefer and more generally as to whether Mr Lovett had reasonable and proper cause for his conduct, that Mr Lovett was striving, even as the meeting was closing, to find a way through the impasse by reaching for a compromise to take matters forward: offering the claimant a stress risk assessment and/or a referral to OH. If Mr Lovett were as immovable, aggressive, and truculent as the claimant suggests, and had made the comments as critically and spitefully as she insinuates, I am certain Mr Zebe-Chaka would have intervened. Secondly, Mr Lovett would not have sought to continue to pursue the compromise. Lastly, I am certain that the claimant would have complained about it and/or referred to it in her letter of resignation. She was not shy of expressing her views and feelings forcefully to the respondent in writing.

<u>Did the respondent fail to offer direct support to the claimant in the email of 27 September 2019?</u>

125. The claimant had requested that Mr Zebe-Chaka should send her a written list of the measures which the respondent had discussed with the claimant during the meeting on 27 September to safeguard her and prevent a recurrence of X's outburst. That was precisely what the email of 27 September provided. The email was neither requested nor intended to set out the support measures for the claimant, although reference was made to the proposal for a workplace stress risk assessment. Moreover, the email must be considered in the context of the letter setting out the discussion at the informal absence review meeting which was sent on 7 October 2019, which provided the overview of the meeting and the potential support measures. The

respondent therefore had reasonable and proper cause to send the email in the form it did on 27 September 2019.

126. There was in my judgement no breach of the implied term through the action of sending the email on 27 September, or in relation to its contents, nor could those matters have contributed to a series of events which cumulatively amounted to a breach. This was no more than reasonable conduct.

Did any proven conduct cumulatively amount to a breach of the implied term of mutual trust and confidence?

127. It follows from my findings above that I am not persuaded that the respondent's conduct, such as I have found had occurred, cumulatively or individually amounted to a breach of the implied term of mutual trust and confidence.

128. Even if I am wrong about that, I would have found that the claimant did not resign in response to the alleged breaches, but rather because the respondent refused to dismiss X despite the claimant's insistence that she would not work with him. The claimant, in my judgement, had an unwavering and unassailable view that X should have been dismissed because of his conduct in December 2018 and, it was the respondent's refusal to dismiss X which led C to lose all trust and confidence in the respondent and resign.

129. Given that the constructive unfair dismissal claim has failed, it follows that the claim for breach of contract in respect of notice must also fail as the claimant was not dismissed but resigned.

130. It is part of the tragedy of this case, the circumstances of which can only lead one to be deeply sympathetic towards **X**, who had devoted 16 years of unblemished service to the NHS and he was not at fault in any way in respect of the incident that occurred in December 2018, that she was to resign, and to maintain her resignation, in circumstances where the respondent had identified through the receipt of an occupational health report the appropriateness of redeployment, which she accepted during the course of the hearing would have been an acceptable solution. Had she met with the respondent as requested to discuss the report and reconsider her resignation, I suspect she would have continued her long and successful career with the respondent.

Employment Judge Midgley
Date: 20 April 2021

Judgment & Reasons sent to the Parties: 23 April 2021

FOR THE TRIBUNAL OFFICE