EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms H Cullen	**The Hillingdon Hospitals NHS Foundation Trust**

Heard at: **Watford (by Cloud Video Platform)**

On: **12 to 14 April 2022 (3 days)**

Before: **Employment Judge French**

Appearances:

For the Claimant: In person

For the Respondent: Mr S Sudra, Counsel

JUDGMENT having been sent to the parties on 27 April 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim for constructive unfair dismissal brought by the claimant by way of a claim form presented on 23 March 2020. The respondent denies the claim on the basis that there has been no breach of contract to entitle the claimant to resign.

2. The claimant had originally also brought a claim for unauthorised deductions from wages but during the course of the proceedings she confirmed that she accepted that the respondent had now paid her the correct amount in relation to holiday pay and that claim was therefore settled. I therefore dismissed that claim upon that confirmation.

Preliminary matters

3. At the outset of the hearing there were a number of preliminary matters that I had to deal with to include an indication from the claimant that she wished to postpone the proceedings starting. Having discussed that with her in more detail on 12 April, she was unsure in relation to her position given the fact that

she had waited a long time to come before the tribunal, and was aware that any postponement would likely result in a significant delay. Her concern however was that she had not been sent the cross examination of the respondent or their submissions and considered that she was at an unfair disadvantage in that regard. I will note, for the purpose of my judgment that the claimant believed there was a tribunal direction requiring cross examination to be sent at least seven days in advance but this was not the case. The respondent had sent the cross examination I understand three days in advance and the submissions had been sent I understand one day in advance. In any event, the claimant did not pursue the postponement application further and I did not need to deal with that.

4. I went on to look at reasonable adjustments to be made for the claimant as a result of an email that she sent to the tribunal dated 10 March 2022. I do not go into the detail of that email but confirm that it was agreed that we would look to take a break every 40 minutes and before each stage of the proceedings. Again, I will note for the purpose of my judgment that actually as the case progressed and when checking with Ms Cullen whether she required a break at the 40 minute point, there were often points where she indicated that she happy to continue, and that her preference was to do so, so as not to interrupt her trail of thought and therefore we did so, taking convenient breaks at alternative opportunities.

5. By way of reasonable adjustments, it was also agreed that I would advise the claimant in relation to procedure at each stage. The claimant also requested that she be allowed to take a recording of the proceedings and this was discussed in more detail with the parties. Mr Sudra observed that in terms of her ability to rely upon that, my colleague, Judge Hyams during a preliminary hearing, indicated that any recording would need to be sent to the respondent in terms of each section and that this would likely hinder her in terms of her ability to prepare the case. Indeed, I also made the observation that if she were having to rewind large parts of evidence on a tape, it would not necessarily be easy for her to ascertain a particular point of evidence that she was looking to look back on.

6. Having considered the matter, the request to take a recording was refused it being observed that recordings of proceedings would not usually be allowed and that in all the circumstances this was unlikely to assist the claimant. I explained to the claimant that she could be afforded with additional time for notetaking and I also noted that she had two witnesses in attendance who indicated that they would be happy to assist her in her notetaking. Ms Cullen also had her camera off throughout these proceedings save at the point that she gave evidence, where it was agreed that all other parties would turn their cameras off. Ms Cullen was also concerned about giving her address during her evidence and I confirmed that she would not be required to do so. The respondent did also offer the opportunity for their witnesses to go first in order that the claimant could have more time to prepare for cross examination but she confirmed at the outset that she was happy to proceed first.

7. In terms of other matters, during the course of the proceedings it became evident that the claimant's address had been included in the bundle of

documentation. I made a direction pursuant to Rule 50 that there should be no disclosure of the claimant's address by any party and that is a formal order of this tribunal. I requested that any copies of the bundles, electronically are deleted or paper are confidentially destroyed and suggested that if the witnesses had paper versions, that arrangements were made for them to be returned to the respondent's solicitors for them to destroy. The respondent's solicitors will retain copies of the bundles by way of it being legal evidence.

The issues

8. In terms of the issues in the case I do not intend to rehearse those at this time save to say that they are as per the order of Employment Judge Matthews, dated 20 May 2021 following the preliminary hearing that took place on 19 May 2021 and they appear at pages 126 to 128 of the bundle.

Evidence

9. In terms of the evidence, I had a bundle consisting of 615 pages. I was provided with a chronology, reading list and cast list. I also had witness statements of Hannah Cullen, Lynne Simpson (Complaints Manager) and Louise Bryn (Deputy Head of Clinical Coding) for the claimant, and witness statements of Liz Munoz (Overseas Visitors Manager), John Mitchell (Emergency Care Manager) and Wendy Fiddes (Head of Employee Relations) for the respondent. I was also provided with written closing submissions from the respondent as well as hearing from both the respondent and Ms Cullen by way of oral submissions.

Fact Finding

10. The claimant was employed by the respondent between 1 November 2004 and 28 October 2019. At the time she left her employment she was employed as an Overseas Manager.

11. The claimant had a period of compassionate leave for five days from 3 June 2019 following the death of her grandmother. I do not go into the details here but this was complicated by external matters and caused significant stress on the claimant at a time where she was also having to deal with her grief over the loss of her grandmother.

12. There was a text message exchange between the claimant and Ms Munoz, her line manager at page 249 of the bundle where the claimant refers that she may make a holiday request for the period 10 to 14 June 2019. Ms Munoz replies at page 250 and says that she had booked leave for that week for which the claimant thanks her. The claimant does not respond at that stage to suggest that the annual leave should not have been booked or that there had been no request by her.

13. There is then a sick note from 17 June 2019 stating that the claimant had been signed off for bereavement. The claimant subsequently makes contact with the respondent to say that she was actually ill for her annual leave period between 10 to 14 June and asked that it is noted as sick leave. That was part

of the unauthorised deduction claim which has been resolved but the claimant indicated to me that this was still relevant to the matters in issue because it was her assertion that it forms one of the breaches, namely that she was forced to take annual leave.

14. I note that this breach was not alleged as part of the agreed issues in the case but I do make a finding on it nonetheless. I do not accept on the facts before me that the claimant was forced to take annual leave. She clearly gives an indication of her intention to take leave in the text message exchange. Although she refers to "may" take annual leave, it is clear that Ms Munoz took it as a request and actioned it in that way and I consider that she was entitled to do so. She confirmed this by text to the claimant and the claimant did not object to it by way of saying I did not request annual leave. In fact, she accepted it in her response and thanked Ms Munoz.

15. At this time, I note that she was off with bereavement and could not have necessarily known that she would subsequently fall sick during that annual leave period. It did subsequently turn out that she was sick during that period to which she asked HR to amend the record to be marked as sickness instead of holiday. On the evidence before me I find that there was no evidence that she was forced to take that period as holiday.

16. As a result of the claimant's length of sick leave, on 1 July 2019, Liz Munoz made a referral to occupational health. This was in accordance with the respondent's internal procedures on sick leave. The claimant's case is that it was largely the handling of this process that breached the implied term of trust and confidence and lead to her resignation.

17. I therefore move on to the allegations on the list and address each one in turn.

Issue 1.1.1

18. Issue 1.1.1 is an allegation that Mr Mitchell stopped communication with the claimant and effectively shunned her. Mr Mitchell was the claimant's previous line manager for a period of two years and eight months. The claimant describes having a good personal relationship with him and he also describes having a good relationship with the claimant. It is clear on the evidence in the bundle that she makes contact with Mr Mitchell on 7 June explaining that she is going through a difficult time and asks him to contact her. He replied to say that he was in an executive meeting and that he would do so. I find that he did fail to subsequently call her. The claimant then contacted him on 9 June and whilst I find that Mr Mitchell did not call the claimant back on 9 June it is clear that there was a conversation for one hour and thirty minutes between the parties on that date.

19. The claimant's assertion is that that was the last contact that she had with Mr Mitchell and on the evidence before me I agree with that. However, what I do note is that the contact that Ms Cullen was trying to have with Mr Mitchell was one of a personal nature. He was not her line manager and she was

contacting him in a personal capacity for support. I find that there was no obligation on Mr Mitchell to have continued contact with the claimant.

Issue 1.1.2

20. This is an allegation that regarding the sick leave process and a meeting for that to be discussed, that the claimant requested that this take place at her home address. I find that she did make such a request. This was done by way of email at page 274 of the bundle dated 15 July. What is clear from that email, however is that she gave alternatives. She did not say that she was only happy for it to be held at home. Having received that email Ms Munoz took on board the comments that had been made and arranged an alternative venue. I therefore find that the respondent did accommodate the request of the claimant as she had offered, namely an alternative venue.

Issue 1.1.3

21. This is an allegation that the incorrect referral form was used by Liz Munoz when the referral to occupational health was made. On the evidence of the respondent it is not disputed that the form used was an outdated version. The referral form used appears at pages 262 to 265. The correct form is at pages 183 to 184 of the bundle. I was taken to the differences in the two forms and I note that they are largely similar. I do not place any weight on the differences in terms of my findings.

22. The claimant also states that the referral to Occupational Health should have been discussed with her and she should have been sent the form. I find that she was not sent the form. Ms Munoz accepts that in her witness statement and states that this was an oversight.

23. The claimant has also made reference to the fact that the referral should not have been made until there had been a period of 21 days sick leave. Her assertion was that if you used the respondent's date, 17 June 2019, a referral that was made on 1 July was sooner than that 21 day period. In that regard I do take the view that the claimant cannot have it both ways; she is saying that she was sick from either 3 or 10 June 2019 so a referral on 1 July based on that period would not have been an issue in any event. I also note of the policy at page 170 which does not say that an employee must have been off sick for 21 days but rather, as soon as the manager becomes aware that the employee will be off sick for 21 days, the referral should be made. Ms Fiddes also gave evidence in that regard that it is the sickness review meeting that should take place in 21 days and that they would want the Occupational Health report for that meeting and therefore, it is important that the referral is made as quickly as possible and I accept her evidence in that regard.

Allegation 1.1.4

24. In terms of 1.1.4, this is an allegation that the respondent did not contact the claimant's general practitioner and they should have done so. The respondent accepts that no contact was made with the GP. Their evidence was that it would have been for Occupational Health to contact the GP and in

any event, they did not have written consent from Ms Cullen. Ms Cullen's evidence was that she believed her managers could make contact based on the oral consent that she provided during the first sickness meeting.

25. I do not accept the claimant's evidence in that regard, namely that she did not know that she would need to give written permission. She worked in the health industry, she knew in that role in answer to my questioning, that she needed written permission to disclose records and there was no reason why that would not be true of her. Ms Simpson made a similar assertion and I do not accept her evidence for the same reasons. I would suggest that it is common knowledge that written consent is required and even if that is not the case, I take the view that both would have known because of the particular roles that they work in. In any event, I accept the evidence of the respondent on this point that it would have been for Occupational Heath to follow up anything with the GP and not for the claimant's manager or HR. In that regard, the oral consent had not been given to Occupational Health and therefore, even had oral consent been sufficient, this would not have allowed Occupational Health to have followed up on it.

Allegation 1.1.5

26. This is an allegation that the claimant was refused her request to record the sickness absence review meeting. The respondent accepts that it refused the claimant's request. The evidence of the respondent was that it would not have been standard practice to have recorded such a meeting and I find that the evidence of Ms Fiddes was very persuasive on this point. Whilst she stated that there was no particular policy in place to say that the recording should not be made, or indeed neither did she deny that such a recording could have been made, but in her 20 years of practice she stated that the recording of a sickness absence review meeting had never been undertaken by her. This was for the reasons that the meeting was supposed to be an open and honest one promoting the parties to speak open and freely, and that often a recording can hinder that and I accept her evince on that point. I note that in refusing the request to record the meeting the claimant was reminded that's she could bring someone with her; that she did do so; they took notes for her and she said that she received a copy of those notes.

Allegation 1.1.6

27. This is an allegation that the first sickness absence review meeting letter said 'If' you return to work, rather than 'upon' your return. The claimant took me to pages 287 and 288 in terms of the wording used at the meeting itself. I note that the wording at 288 is illegible in that you cannot read whether it reads "when" or "upon" but I accept the claimant's evidence in relation to this meeting, namely that the discussions that took place referenced "when" and "upon" her return to work. Indeed, the very purpose of that meeting was to look at how that would be managed and how they could assist her.

28. The letter that was subsequently sent to her, all parties accepted that this was a template letter, it was not there was a standard letter that had to be followed in its entirety and it was open to amendment. In that regard, Ms Munoz's

evidence was that she changed the word to "if" because she did not wish to put undue pressure on the claimant in terms of her returning to work. I accept her explanation in that regard but I do note that the claimant was caused sufficient concern by it, that she sent an email to Mr Munoz on receipt of the letter indicating her concerns in relation to that wording.

Allegation 1.1.7

29. This is an allegation that the second sickness review meeting was advertised on a screen for anyone entering the building to see, which caused the claimant stress, anxiety and embarrassment. All parties agreed on the evidence before me that it was not appropriate for such a message to be displayed. Indeed, that is supported by Ms Raj-Sohanta when Ms Bryn overheard her asking reception to take it down.

30. Ms Munoz indicated in relation to that that she had not intentionally caused the information to be displayed. She explained that she had only used the venue on one prior occasion, she was not aware that screens would display the purpose of the meeting and that she had been keen to give the reason for the meeting so as to ensure, firstly that an adequate room was provided which was of particular importance given the claimant's previous concerns but also that rooms could be cancelled and she wanted to ensure that this did not happen. I accept the explanation provided by Ms Munoz in that regard.

31. It is further noted that on the claimant's own evidence, she accepts that she did not see this screen at any point and it is also agreed that the screen did not refer to the claimant by name, and therefore it did not identify her. I take that from the evidence of Ms Bryn, the only witness before the Tribunal who did see it and who gave no indication that it made reference to the claimant's name.

Allegation 1.1.8

32. This is an allegation that the claimant was sent a job advertisement whilst on sick. This vacancy was not suitable for her given her working hours and the fact she had previously discussed being offered a band 5 role.

33. There are a number of aspects to this particular complaint and I will deal with each one in turn. The first is that the claimant states that she was sent it and this caused her distress at a time she was sick and unwell. Ms Munoz's evidence was that the reason it was sent is that she did not wish for the claimant to miss out on such an opportunity. It was first sent to the claimant on 20 August when it was sent by email to her and to others. The claimant did not reply at that time to suggest that she was distressed by receipt of it. It was then subsequently sent to the claimant following the stage 2 meeting.

34. The claimant states that the respondent should have known that she did not want to work full-time and as such this vacancy would have been no interest to her. In that regard Mr John Mitchell gave evidence indicating that whilst he was aware that the claimant only worked part time, people's circumstances do change and somebody who works part-time may wish for

the opportunity to go full-time or vice versa. In terms of sending the advert to the claimant, I find that it was entirely proper for the respondent to do so. Indeed, I consider that they could have been criticised had they failed to do so because this would have effectively excluded her from applying to a role which may have been of interest to her.

35. The other aspect of this allegation is that it should not have been sent to the claimant because there had previously been discussions about a Band 5 role. On the evidence of Mr Mitchell, I understand he indicated that there may have been such discussions. On the evidence of the claimant, she stated that there had indeed been such discussions.

36. It is clear on the evidence before me, in terms of the evidence of all the parties, that the claimant was well liked in her role and extremely capable. She had acted up in a Band 5 position and no doubt would have likely been successful in any application for such a role. However, on the evidence before me, I cannot see that there had been a formal vacancy or offer of this role and, therefore, I do not accept that the respondent should not have sent a Band 4 vacancy role simply because there had been discussions regarding a Band 5 role. Therefore, I find that there were indeed discussions about the claimant possibly moving into a Band 5 role if and when such a role presented itself. I am not satisfied that there was any agreed date for that role and despite those discussions, I see no reason why a Band 4 vacancy should not have been shared with the claimant.

37. The other aspect to this allegation is that if it had been filled it would have meant that on the claimant's return to work, the department would have been overstaffed. The respondent denies this and states that after the claimant resigned there were three members of staff recruited. The claimant does not accept this position pointing out that the first recruit was the Band 2 person who moved into the Band 4 role that was advertised so that was one in the same person. In that regard Ms Munoz's evidence was that, that person was the same person but she still saw it as a recruitment because it was somebody moving into a permanent position with an increase in hours.

38. In terms of the recruitment of the second Band 4 person, this was a replacement of someone who had retired and I accept that. That does not however mean that it was not a recruitment; somebody new had still been recruited, albeit I accept that it was not an additional role. The other person that was recruited I understand was in a credit control position. Ultimately, regardless of whether or not there were three new recruits or two recruits who were existing members of staff at the time, the issue is whether or not the respondent would have been overstaffed if the claimant had returned to work. I make findings on that in terms of my conclusions later but I will say that I do accept the evidence of Ms Munoz that one of the people that was recruited were recruited to work additional hours. The other person was recruited into a different role so there was nothing to suggest that the respondent would have been overstaffed at that time.

39. Ms Munoz gave evidence in relation to her budgets and the requirements for the department and indicated that they were looking to recruit more in order to work more cost effectively.

40. I will say in addition under that head of complaint, 1.1.8, the claimant did raise the point that she had not been advised that Ms Paul had been recruited whilst she was on sick. That did not form the basis in 1.1.8 but I do address it because it was raised by her on several occasions during the hearing. In that regard, Ms Munoz gave evidence that a number of changes were taking place in the team at that time and she did not feel that she should, or needed to, update the claimant on those changes whilst she was on sick leave. Those were matters on which the claimant would have been updated when she returned and I consider that course of action to be entirely proper. Indeed, I reiterate that at a time when the claimant was signed off with stress and bereavement, it would likely be that criticism could be made had Ms Munoz contacted her in order to update her on changes in the department to include recruitment of an individual.

Allegation 1.1.9

41. This is an allegation that there were no weekly touch points or telephone calls from the respondent and no communication in the final weeks before resignation. The evidence of Ms Fiddes in this regard was that a contact plan should have been agreed at the outset and there is no evidence before me that this was done. Ms Munoz said that she tried to make contact with the claimant but was unsuccessful. The claimant denies that attempts were made. On the evidence before me I do find that there was not any significant contact between the parties and I was not persuaded by the evidence of Ms Munoz that she had called the claimant and that these calls had gone unanswered. Despite the fact that there was little contact, the explanation that has been provided for that is that the respondent did not want to put pressure on the claimant and be seen to harass her and I do accept that explanation.

42. I go on to look at the suggestion that the real reason that the claimant resigned was that she was unhappy and was looking for another job as reference in the statement of Ms Munoz. In that regard I am not satisfied on her evidence alone that this is the case. Even if those comments about being unhappy at work had been made, the evidence of Ms Munoz was that they were made in May 2019, the claimant did not resign until October 2019 and her position could have changed. I accept the evidence of the claimant that she was pleased the department finally had a new manager and was looking forward to working in the team in the future. I do also note that whilst the claimant secured employment in December 2019 that was some two months after her resignation and it is not the case that she started a new job within a number of days or weeks.

43. It was also suggested by the claimant that in relation to the first sickness review meeting, that the conduct of it was inappropriate, dismissive or rude. I accept the evidence of the claimant and her witness, Ms Simpson, that that was their perception of it. I go no further and make no finding on whether it

actually was an interrogation because I note that it was not one of the claimant's allegations with regard to the breach of contract as per the agreed list of issues.

44. I do also note the following in terms of my fact finding namely that the respondent had a grievance policy; it would have been open to the claimant to have used that policy in relation to the complaints that she has made and she failed to do so. In her resignation letter itself, she made no complaint, she did not suggest that she had been forced to resign or indeed, that she was resigning for any of the reasons in the list of issues before the tribunal.

The Law

45. During delivery of my oral Judgment I noted that the claimant had previously stated that she struggles with legal jargon. I indicated in the circumstances that I was satisfied that the law was fairly summarised in the submissions prepared by Mr Sudra which the claimant had had for some time and I applied the law as set out in those submissions. That is rehearsed here as follows:

46. The implied term of trust and confidence is an obligation on both parties to a contract of employment not, without reasonable and proper cause, to act in a way which is calculated or likely seriously to damage the relationship of trust and confidence which exists, or at least should exist, between employer and employee.

47. If the employer breaches the implied term, an employee is entitled to terminate the contract of employment. The question for the Tribunal to decide is whether the claimant was dismissed in accordance with the statutory provisions:

The Employment Rights Act 1996 (ERA) s.95 1(c) states:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if)—

…. (c) the employee 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.

48. In making its determination the Tribunal will have regard to the fundamental statement of Lord Denning in Western Excavating (ECC) Ltd -v- Sharp [1978] ICR 221 4 *'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 the employer's conduct. He is constructively dismissed.'*

49. The claimant relies upon the implied term of trust and confidence, which has been defined in Malik v. Bank of Credit and Commerce International SA [1997] IRLR 462 as: 'The employer shall not without reasonable and proper cause

conduct itself in a manner calculated and [read as "or"] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

50. In Omilaju v. Waltham Forest London Borough [2005] ICR 481 Lord Dyson (as he then was) said in paragraph 14.4 of his judgement: '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'.

51. In relation to repudiatory breach the relevant question for the Tribunal is not whether a reasonable employer would have concluded that there was no breach, but whether on the evidence before the Tribunal, it considers that such a breach has occurred. The subjective view of either the employer or the employee is irrelevant to establishing whether there has been a breach of contract – Jones v Collegiate Academy Trust (2010) UKEAT 0011/10.

52. The fundamental breach need not be the sole cause of the resignation, provided it is an effective cause – Jones v F Siri & Son (Furnishers) Ltd [1997] IRLR 493. This means that 'the crucial question is whether the repudiatory breach played a part in the dismissal' and a claimant may claim constructive unfair dismissal 'if the repudiatory breach is one of the factors relied upon' – Ford v Abbycars (West Horndon) Ltd [2008] All ER (d) 331.

53. An employee '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' – Western Excavating. There is no prescribed time window within which an aggrieved claimant must resign, it is a question of fact in each case, and whilst a reasonable period will be allowed, time is of the essence

54. I do add to the law referred to by the respondent, two points. Firstly, This is a case where the claimant says there was a cumulative breach; she is not saying that one incident caused her to resign but rather all of the incidents together and in that regard I am referred to Lewis v Motorworld Garages Limited [1986] in which it was held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling the claimant to resign and claim constructive dismissal following what is effectively referred to as a last straw incident which in itself does not amount to a breach of contract. Secondly, once a breach has been established the tribunal then needs to consider whether the breach is fundamental. In this case it is an allegation of breach of the implied term of trust and confidence. In that regard, I have regard to the case of Morrow v Safeway Stores [2002] where it was held that a breach of that implied term is inevitably fundamental.

Conclusion

55. Turning to my conclusions, again, I go through each point as per the list of issues.

Allegation 1.1.1

56. As I have said, on the evidence before me I accept that there was no contact between the claimant and Mr Mitchell from 9 June, being the date of their telephone call, until the claimant's resignation. I do not however find that this amounted to him shunning her in the sense of an employee/employer relationship. Mr Mitchell was not her line manager. The contact between them was personal only and there is no obligation on him to maintain that contact. On that basis I do not find that that amounts to a breach of the implied term of trust and confidence.

Allegation 1.1.2

57. In relation to 1.1.2 regarding the request to have the meeting at home, it is clear from the documents that the claimant gave an indication that she would like to have the meeting at home or at an alternative venue. This indication was done by way of an email dated 15 July at page 274 where she gave two alternatives. She did not say that she was only happy for it to be held at home and having received that email Ms Munoz took on board the comments that had been made regarding the existing room and arranged an alternative venue. The respondent therefore accommodated the request of the claimant which was offered by the claimant in the alternative. The respondent acted on the claimant's own suggestion, found an alternative venue and again I do not find this to amount to a breach of contract.

Allegation 1.1.3

58. In relation to 1.1.3 that the wrong form was used in referring to Occupational Health, as I have already stated the respondents do not dispute that the wrong form, or version of the form, was used. On comparing the forms, they are different but it is my finding that there are little differences between the two. I also not that the referral form is the first step in the procedure, it is not the end of the matter, and it is for Occupational Health to pursue it further from there. Following the referral there were three appointments with the claimant where I understand matters were discussed in full. Whilst the wrong form may have been used; I do not consider that is would have had a bearing on the subsequent procedure overall.

59. Under this same point the claimant says that she was not shown a copy of the form before it was sent and the respondent accepts this. Ms Munoz, in her evidence, says that she indeed did not provide the claimant with a copy and this was simply an oversight. I accept that explanation and do not consider it to be a deliberate act by Ms Munoz.

60. The claimant also said that this did divulge confidential information without her consent, but in that regard, the referral was sent to Occupational Health, it was not sent to the team as a whole, and I do note that the claimant herself was in any event, copying in a number of individuals into the correspondence that she was sending to update the respondent as to her current absence position. Ms Munoz said that the information included in the referral was taken from the claimant's email that she had sent her and on comparing the

two documents, that is indeed correct. Ms Munoz therefore used the claimant's own words in the referral and had not given it her own comment. Again, for that reason, I do not consider that this impacted on the referral to Occupational Health in any way. Ms Fiddes also gave clear evidence at the outset of any Occupational Health meeting they would check that the individual was aware of the procedure and I have nothing before me on the evidence to suggest that this did not take place. I note that the claimant continued to engage with the process and attended three meetings.

61. Of most importance however is that at the time the claimant resigned, she was not aware of the incorrect form having been used. This is confirmed in the claimant's witness statement at paragraph 13. As such, the fact that the incorrect form was used would not have contributed to her resignation because she simply was not aware of the fact.

Allegation 1.1.4

62. In terms of 1.1.4 that the respondent did not contact her GP, it is accepted that they did not do so. The claimant says that she gave her consent for this at the first absence review meeting and expected that this was sufficient to allow access. As I have already stated, I do not find this to be credible and consider that she was aware that she would need to give written consent. Further, even if the claimant had given permission to Ms Munoz and the Human Resources representative in the meeting, and even if that oral permission was acceptable in that the oral permission would have allowed access, the respondent's evidence is that it would not have been for them to obtain the medical records but rather a matter for Occupational Health. I do not have evidence before me as to why Occupational Health did not access the records but, equally, I have not been taken to anything to suggest the claimant raised directly with Occupational Health the issue of why her GP had not been contacted. There were three meetings between them during which matters were discussed and I find that the claimant would have no doubt raised all issues with them.

63. The claimant's complaint is that had her GP been contacted, her position regarding her health would have been safeguarded as the history would have been on record. However, it appears to me that the history was on record by way of her own raising of it with Occupational Health. Also the updated medical certificate did not just say bereavement but said about stress also. Therefore, stress was noted on the record.

64. In all of the circumstances, there is no suggestion here that the respondents were not happy with the fact that the claimant was off for bereavement; they were trying to support her in whatever way they could, and that was the purpose for the sickness policy. I cannot find that a failure to contact the GP amounted to a breach of trust and confidence because on the evidence it did not alter the position in any way.

Allegation 1.1.5

65. In terms of allegation 1.1.15 being the refusal to take a recording of the sickness meeting, the claimant requested this due to her health at the time. I do not consider that her request was an unreasonable one. The respondent accepts that they refused that request and I heard form Ms Fiddes on the point. As I have already said, her evidence was that in her 20 years she had never recorded a sickness meeting. She described the purpose of the meeting as being one between the parties where they are encouraged to speak freely and that a recording can hinder this process and I accept her evidence on that point. I must look at whether or not the respondent had reasonable and proper cause for refusing the request and I find that they did. They noted that the claimant could be accompanied and somebody could take a note for her. Indeed, the claimant accepts that someone did attend and take a note. She states that she did not know if she would have somebody available to do this up until the last point but, in those circumstances when she renewed her request at the outset of the meeting for it to be recorded, a different decision may have been reached. As it was, she was accompanied, she was able to be assisted with somebody taking notes and she confirmed that she received a copy of those notes.

66. Looking at the evidence before me I am satisfied that the refusal to record the meeting was a reasonable one. I note that it was not trust policy to record the meetings as standard and whilst I accept that recording could have bene done and the Trust have facilities to do so, I do not consider that the failure by them amounted to a breach of the implied term.

Allegation 1.1.6

67. In terms of 1.1.6, namely the wording in the letter being “if” instead of “upon”, this was addressed in the claimant’s witness statement at paragraph 22 and, as I have said already, she was sufficiently concerned by the wording to immediately put her position on record by way of email dated 6 August at page 316 of the bundle.

68. At this stage however I note that the claimant did not know that the template usually says “upon” since this was discovered as a result of her data subject access request made by the claimant later on.

69. The claimant’s complaint is that the words were changed from “upon” to “if” but at the time she resigned she did not know that the template had been changed. I do acknowledge that she was concerned by the wording “If” hence her email on the subject but I do not consider that the choice of that wording amounts to a breach of the implied term. Ms Munoz gave an explanation that her choice of words at the time was because she did not want to put additional pressure on the claimant to return to work. She also confirmed that English was not her first language. She said that she used “if”, “when” and “upon” as interchangeable words and her intention was always that the claimant would return to work. It is not for me to establish today what her intention was but I do find that her use of the word “if” did not have any ill intent behind it. The use of the word was appropriate based on the explanation that she did not want to place pressure on the claimant. For those reasons I do not find it amounts to a breach.

Allegation 1.1.7

70. In terms of the meeting being displayed on the screen, the claimant did not directly witness this. The explanation by the respondent is that Ms Munoz had only used the room on one prior occasion, she was not aware that it had screens and did not know that the purpose of the meeting would be displayed. She only noted the purpose of the meeting as she wanted to ensure an adequate room was provided without risks of cancellation.

71. The evidence of Ms Bryn, the claimant's witness, was that on arrival she heard Ms Raj-Sohanta asking for the reason to be removed from the screen. This evidence is that this was not a deliberate act of the respondent to have the reason displayed. I do accept that being told about it may have caused the claimant distress but her name was not directly displayed, neither did she see the sign herself. I have to look at the alleged breach objectively in terms of whether that act was likely to destroy or damage the trust and confidence between the parties and I do not consider that it does.

Allegation 1.1.8

72. Turing to 1.1.8, I have already addressed this at some length but the first issue is that the claimant was caused distress and should not have been sent the job vacancy. She says it was because the respondent knew that she could not work full-time and there had been discussions about a Band 5 management role. The respondent says that the position was sent to her so as not to miss out on the opportunity. The initial email on this included two other people and was sent in August. I accept the evidence of the respondent that this was purely to ensure that the claimant did not miss out. I do not accept the claimant's assertion that the respondent should have or would have known that she would not want that job. As Mr Mitchell said, people's positions and their circumstances change and that knowing there was a full-time vacancy available the claimant may have wanted to apply. The fact that the vacancy was emailed to the claimant is not unreasonable in my view and the respondent had proper cause for doing so.

73. The claimant also takes issue with the fact that the vacancy was earmarked for another person and so should not have been sent to her but I do not accept that assertion because the respondent, as an employer would need to ensure that all potential candidates are given a fair opportunity to apply.

74. Regarding the Bad 5 job I have already stated that I find that there were discussions regarding the potential for the claimant to have such a role but there was no immediate vacancy and I do not find that that is a reason why the claimant should not have been sent the Band 4 role that she was.

75. In relation to the issue of over staffing, I have addressed that at length in terms of my fact findings earlier. I do not consider that if the claimant had returned to work, the recruitment of somebody into the Band 4 role would have meant that the department would be overstaff and as such none of the circumstances of the allegation 1.1.8 give rise to a breach when looked at

objectively. The respondent, in my view, was acting with reasonable and proper cause in sending the job vacancy.

Allegation 1.1.9

76. In terms of 1.1.9, the evidence of Ms Fiddes was that a contact plan should have been agreed at the outset and there is no evidence before me that it was done. Ms Munoz said that she tried to make contact with the claimant but was unsuccessful. The claimant denies that attempts were made. On the evidence before me I do find that there was not any significant contact between the parties and I was not persuaded by the evidence of Ms Munoz that she had called the claimant and that these calls had gone unanswered.

77. Despite the fact that there was little contact, the explanation that has been provided for that is that the respondent did not want to put pressure on the claimant and be seen to harass her. As Mr Sudra pointed out in his submissions, many complaints come before this tribunal for that very reason, namely where somebody is on sick leave and an employer unnecessarily contacts them when they do not want to be contacted. It is a very difficult balancing act therefore for the respondent and had they contacted the claimant on a number of occasions, it could have been open to the claimant to have presented a claim for constructive dismissal on those grounds.

78. As I say, the respondents were in a very difficult predicament. Ms Munoz sought advice from the Human Resources Department who told her to await the Occupational Health report. This was based on the periods that the claimant had been signed off for. Ms Munoz also wrote to the claimant and said that she was happy to take her call at any point if she wanted to. The claimant did not respond to that either by email or call and I find that the respondent was entitled to take that as an indication that the claimant did not want to be contacted. She was not engaging.

79. After her resignation the respondent, at page 390, invited the claimant to speak to them and she refused. She was well within her right to do so but I do find this supports the fact that the claimant would not necessarily have wanted significant contact with the respondent and the respondents had acted upon this.

80. It is not for me to establish what the claimant thought in these circumstances but objectively I do not consider that a lack of contact in the circumstances amounted to a breach.

81. The claimant's case is that all of these matters acted cumulatively to cause a breach of trust and confidence and I therefore stand back and look at whether putting all of those matters as a whole it does amount to a breach of the implied term and, on that point, I find that it does not. I understand why in the mindset of the claimant at the time, she may have seen these breaches as amounting to constructive dismissal but that is not the test. In correct application of the law, I am not looking at whether the claimant thought that there were breaches but rather whether the employee has without reasonable

and proper cause done something which looked at objectively, has caused loss and trust of confidence.

82. In all of their actions the respondent had reasonable and proper cause. They were following the sickness policy. I have given detailed reason for each allegation and in all of the circumstances I do not consider that a breach has occurred.

83. On the basis that I have found that there has been no breach of contract, I go no further in terms of whether or not the claimant resigned because of that breach or indeed whether or not she affirmed the contract.

84. The claimant was not entitled to terminate her contract as a result of the respondent's conduct and as such, the respondent did not dismiss the claimant within the definition of Section 95(1) ERA 1996. The claim for unfair dismissal is therefore not well-founded and is dismissed.

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Employment Judge French

Date: 5 July 2022.

Sent to the parties on: 8 July 2022

For the Tribunal Office