# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr L Humby**

**Respondent:** **Barts Health NHS Trust**

**Heard at:** **East London Hearing Centre** **On: 16 & 17 September 2021, 2 December 2021 (in chambers)**

**Before:** **Employment Judge O'Brien**
**Members:** **Mrs B Saund**
**Ms S Harwood**

**Representation:**

Claimant: In person

Respondent: Mr J Mitchell of Counsel

# JUDGMENT

**The judgment of the Tribunal is that:**

1. **The claimant's complaint of constructive unfair dismissal fails and is dismissed.**

2. **The claimant's complaint of victimization fails and is dismissed.**

# REASONS

1 On 4 July 2020, the claimant presented complaints of constructive unfair dismissal and victimisation contrary to s27 of the Equality Act 2010. The core of the claim concerns the respondent's appointment of the claimant to a band 5 role following a restructure whereas he had until then been in a band 6 position. He alleges that the respondent's treatment of him both prior to and during the restructuring process constituted a fundamental breach of contract and/or was victimisation because he had previously raised a grievance and brought an Employment Tribunal claim under the Equality Act 2010. The respondent resists the claims.

## ISSUES

2 The case has a lengthy procedural history which need not be rehearsed in full. For the purposes of this judgment, it suffices to note that the claimant expressed on 25 March 2021 his intention to amend his claim, and that matter was dealt with as an application to amend by Employment Judge Russell at a preliminary hearing on 2 June 2021. Judge Russell permitted the claimant to amend his claim to include certain victimisation detriments but not others. She also found that certain detriments had been presented out of time and that time should not be extended. Others she found might form part of an act extending over a period and held that that issue should be resolved at this final hearing.

3 The claimant then applied on 8 July 2021 for his particulars of claim to be replaced by a draft attached to that application. Judge Russell refused the application insofar as it sought to reintroduce matters which she had on 2 June 2021 refused to permit by way of amendment or which she had found to be out of time. To the extent that the application proposed new amendments, Judge Russell considered that it was not practical to hear the application ahead of the main hearing and left that matter to us.

4 The new amendments were identified by Judge Russell as comprising the following paragraphs of the claimant's draft: 27-35; 66-70; 78; 79-85 if said to form part of the constructive dismissal; 87(i), (iii), (v), (x) and (xii); 88-89; 90(vii), (ix) and (xiv).

5 In deciding whether to permit these applications we bore in mind the factors set out in **Selkent Bus Co Ltd v Moore [1996] IRLR 661**, as well as the overarching need to balance injustice and hardship (**Vaughan v Modality Partnership [2021] ICR 535**).

6 Paragraphs 27-35, 66-70, 87(i), (iii), (v), (xii) sought to expand significantly the ambit of the claimant's current claim (with paragraph 87 referring specifically to the constructive unfair dismissal claim). They would involve a materially wider factual enquiry than the respondent had anticipated, and would take longer time to hear and determine. If part of the reason for the claimant's resignation, as alleged, there was no good reason why the substantive allegations made within these paragraphs could not have been made from the outset or in any event substantially earlier, in particular before Judge Russell on 2 June 2021. Balancing injustice and hardship we refused these amendments.

7 Paragraph 78 alleged a new protected act. Allowing the amendment would necessitate an enquiry into not only whether the grievance in question was a protected act but whether it could and did play any material part in the relevant decisions. Hitherto it had been clear that the claimant relied on only three protected acts, despite earlier case management hearings: his two 2018 employment claims and a grievance raised on 10 October 2017. The claimant in effect chose not to raise this matter earlier. The balance of justice and hardship favoured refusal of the application.

8 On the basis that paragraphs 79-85 did not expand the existing causes of action, their addition by way of amendment was permitted by consent.

9 The claimant clarified that the Specialist Clinical Coder post referred to in paragraphs 87(x) and 90(xiv) was the Specialist Clinical Coding Officer post referred to in the respondent's draft list of issues at paragraph 7a of that document. To the extent that paragraphs 87(x) and 90(xiv) concerned the posts pleaded to in paragraph 29b of the amended Grounds of Resistance, to which paragraph 7a of the respondent's draft list of issues referred, the amendments were allowed by agreement. Insofar as the draft

amendments were intended to concern the post pleaded to in paragraphs 66-70 of the draft, permission was refused for the same reasons that permission was refused in respect of paragraphs 66-70.

10 Paragraphs 88-89 were permitted by consent.

11 Paragraphs 90(vii) and (ix) added new victimisation detriments. Permitting the amendments would significantly expand the scope of enquiry into whether the decision makers in question were aware and materially influenced by the claimant's protected acts. No good reason had been given for raising these detriments originally or at in any event earlier. Refusal would not undermine the claimant's existing claims. Balancing injustice and hardship, we refused these amendments.

12 The parties had agreed that subject to two amendments, set out in the claimant's email of 20 August 2021, and subject also to our decision on the outstanding amendments, a draft list of issues prepared by the respondent for the preliminary hearing on 2 June 2021 accurately summarised the legal issues we had to decide.

13 Consequently, the issues to be decided by the tribunal are as follows:

<u>Victimisation</u>

13.1 Did the claimant do a protected act, or did the respondent believe that the claimant had done, or may do, a protected act? The claimant relies on the following:

13.1.1 Filing an ET1 against the respondent on 22 January 2018 and 27 February 2018;

13.1.2 Raising a grievance complaint on 10 October 2017.

13.2 Did the claimant suffer any of the following alleged detriments and if so, did the respondent subject the claimant to any of the alleged detriments because he did a protected act?

13.2.1 The Clinical Coding Auditor post and the Specialist Clinical Coding Officer posts were advertised externally when they should only have been advertised internally;

13.2.2 The claimant was not assessed against the person specification for the post of Clinical Coding Auditor role even though the claimant was the only applicant interviewed for the post;

13.2.3 A Specialist Clinical Coding Officer post was created for MS that was not advertised to other candidates or at all;

13.2.4 A Clinical Coding Engagement Lead post was created for VR or, alternatively, once he had been offered that post the Clinical Coding Board Lead post that he had already been offered in the restructure should have been re-advertised;

13.2.5 The respondent constructively dismissed the claimant.

Constructive Unfair Dismissal

13.3 Did the respondent commit a fundamental breach of the claimant's contract of employment amounting to a repudiation of that contract?

13.4 Did the respondent act in a way calculated or likely to destroy or seriously damage mutual trust and confident between employer and employee, as follows:

13.4.1 The Clinical Coding Auditor post and the Specialist Clinical Coding Officer posts were advertised externally when they should only have been advertised internally;

13.4.2 The claimant was not assessed against the person specification for the post of Clinical Coding Auditor role even though the was the only applicant interviewed for the post;

13.4.3 A Specialist Clinical Coding Officer post was created for MS that was not advertised to other candidates or at all;

13.4.4 A Clinical Coding Engagement Lead post was created for VR or, alternatively, once he had been offered that post the Clinical Coding Board Lead post that he had already been offered in the restructure should have been re-advertised;

13.5 Did the respondent commit a fundamental breach of the claimant's contract of employment amounting to a repudiation of that contract by unilaterally assigning him to a band 5 role?

13.6 Did the claimant resign in response to either such breach?

13.7 If so, did the claimant delay in resigning and thereby, affirm his contract of employment?

13.8 If not and in the alternative, did the claimant resign prematurely?

13.9 If the was constructively dismissed, what was the reason or principal reason for his dismissal and is it a potentially fair reason within s.98(1)(b) and s.982(c) ERA?

13.10 Was any such dismissal fair within the meaning of s.98(4) ERA?

Remedy

13.11 To what basic award is the claimant entitled under s.119 ERA?

13.12 What compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by the claimant under s.123 ERA?

13.13 In particular:

13.13.1 Has the claimant reasonably mitigated his losses?

13.13.2 Should there be a Polkey reduction?

13.14 Should any basic and/or compensatory awards be reduced by reason of any culpable or blameworthy conduct of the claimant pursuant to ss.122(2) and/or 123(6) ERA?

13.15 If the Tribunal finds that the respondent unlawfully victimised the claimant, is he entitled to an award for injury to feelings, and if so, at what level and quantum?

## EVIDENCE

14 Over the course of this hearing, we heard evidence on the basis of written witness statements. The claimant gave oral evidence on his own behalf. On behalf of the respondent, we heard oral evidence from: Paula McConnell, managing director of iROC Ltd (a consultancy providing clinical coding expertise and services to the respondent); Deborah Szul, Clinical Coding Training Manager; and Kamaljit Kaur Johal, Investigation Services Manager.

15 The Tribunal was also provided with over 1,000 pages of documentary evidence contained principally in two bundles.

16 The parties each made oral submissions, supplemented by submissions in writing which we took into account when determining the issues as stated above.

## FINDINGS OF FACT

17 In order to determine the issues as agreed between the parties, we made following findings of fact, resolving any disputes on the balance of probabilities. We have limited ourselves to finding sufficient facts necessary to determine the issues between the parties, bearing in mind Judge Russell's decision on timeliness and both her and our decisions on the claimant's applications to amend.

### Background

18 The claimant began his employment with the Trust as a Clinical Coding Officer on 8 November 2004.

19 Clinical coding is the classification of medical and healthcare concepts using a standardised classification system. The NHS operates on a 'payment by results' system whereby care is translated into codes by clinical coders such as the claimant. This code determines the tariff commissioners pay providers such as the Trust, for the clinical care and treatment provided to admitted patients.

20 The claimant was promoted to a band 5 Senior Clinical Coding Officer in 2010, and to the role of Clinical Coding Quality Lead on 16 January 2014.

21 Clinical Coding Quality Leads were newly created posts. The purpose of the post was to manage a team of coders coding the activity of a particular Clinical Academic group (CAG) and to work with clinicians and service managers within that CAG to improve the quality, accuracy, timeliness, and completeness of the coding of its activity.

22 In that role, the claimant initially managed the Surgery CAG coding team at the Royal London Hospital. Between July 2015 and April 2016, the claimant was based at Whipp's Cross and co-coordinated the coding team at that location. In April 2016, the claimant was moved back to the Royal London Hospital to co-lead the Surgery CAG coding team.

23 On Tuesday 11 July 2017, the claimant was notified that he would be based again at Whipps Cross from the following day. The claimant was unhappy with this move and raised a grievance on 10 October 2017, asserting amongst other things that he was not being permitted to do his job (in particular the managerial aspects). He further asserted that this was having a detrimental effect upon his mental and physical health, in the context of previous and existing health issues (which were said to be a history of depression and a recent diagnosis of obstructive sleep apnoea).

24 The claimant subsequently submitted a claim to an Employment Tribunal on 22 January 2018 alleging breaches of the Equality Act 2010.

25 The claimant made a further claim to the Employment Tribunal on 27 February 2018 alleging discrimination on the grounds of disability.

26 On 25 September 2018, Ms McConnell met with the claimant to discuss a number of matters of concern to her, including his performance and his behaviour at work. Following the meeting, Ms McConnell sent him a lengthy email seeking to record the events of the meeting which included the following paragraph

> 'We confirmed that you had occupational health appointment on 11th October and you stated that you were still okay to attend this. However you asked why you had been prevented from attending a dermatology meeting recently. I explained that following advice from HR, and due to the occupational health referral, the impending grievance case and the employment tribunal case, it was not appropriate to give you more management/team leader duties until these had all been completed or resolved. I explained that the decision was made to ensure that no further undue pressure was placed on you tool these had concluded.'

27 This was followed two days later with a further email in the following terms, to which we have been referred to no response from the claimant:

> Hi Lee,
>
> Just for avoidance of any doubt, the primary reason for the recent amendment to your workload is in response to concerns around your performance/health and wellbeing and whilst OH advice is being sought. My mention of you having raised a grievance and ET was in regards to the stress that you have stated currently feeling, but has no bearing on the decisions made by management.
>
> I hope this clarifies the basis of the decision.
>
> Kind regards
>
> Paula

28 The claimant was moved to the respondent's corporate headquarters at Prescot Street in February 2019. However, he did not return to managerial duties before termination of employment.

29 The respondent's Clinical Coding Services went through a process of restructure in 2019, the business case for which was prepared by Ms McConnell on 7 October 2018. The business case set out the significant benefits expected from the reorganisation. At this time, the claimant's role was a Band 6 role, and he had reached the highest pay point for that band.

30 Ms McConnell also drafted the staff consultation document, which set out the proposed structure, roles and timetable for consultation. It was not envisaged that any redundancies would be necessary as there were more, rather than fewer, posts in the proposed new structure. However, the number of full time equivalent (or WTE, to use the respondent's terminology) posts for the Band 6 roles were to decrease from 15.33 to 14. That said, it would appear that only 13 WTE of the posts in the old structure were filled at the time.

31 Nevertheless, the restructure involved the clinical coding function being divided into two teams: the operational coding team and the data assurance team. Therefore, whilst there were 11 WTE CAG Lead/Quality Lead/Coordinator populated roles in the existing structure, ring-fenced for those role-holders there would be only 6 WTE Clinical Board Coding Lead roles in the proposed structure. The reform team took HR advice and decided that Band 6 staff would be required to apply for posts in the new structure.

32 The consultation document said as follows (amongst other things) for the process for filling posts in the new structure:

> The process for filling posts within the new structures will follow the processes contained in the Trust's Managing Change policy, Ringfencing and slotting-in, together with internal appointments via Expressions of Interest in the first instance for the new posts.
>
> Where current post-holders meet approximately 70% or more of the new requirements outlined in the job description and person specification, they will automatically slot into a same-band post. Once this process is complete and all relevant posts filled, the following processes will apply.
>
> Where only one person expresses an interest in a role and there is no other competition, an informal interview will be held to assess the candidate's capability (based on previous experience/skill-set) and the training and developed that would be required to move into the required role.

33 The respondents managing organisational change policy said the following about redeploying employees at risk of redundancy:

> Redeployment: suitable alternative employment options (SAE) must be brought to the attention of employees 'at risk' of redundancy in writing or by electronic means before the date of termination of their contract of employment and with reasonable time for the employee to consider it/them. The employment option should be available no later than four weeks from that date. Where the employee fails to make any necessary application for the suitable alternative employment option(s) made

available to them to consider, the employee will be deemed to have refused suitable alternative employment. The process for redeployment can be found at appendix 4.

Pay protection: the trust has an agreed pay protection policy which applies to all consultations that started on or after 3 April 2012. The policy details the short and long term pay protection terms that are in place and when they would apply.

34 Suitable alternative employment was defined in that document as:

Work within the trust that is on broadly similar terms within the same range of skills required as the current employment where the individual meets the essential criteria person specification. It may be on any site operated by the trust subject to consideration of the individual's personal circumstances such as travel caring responsibilities for mutually agreed flexible working arrangements that are in place or that could facilitate SAE.

35 The document went on to state that, 'a post may be considered as suitable alternative employment if it is banded/graded on the same band/as the staff member's current post, or the next lower band/grade.'

36 The consultation document was circulated on 1 March 2019, with an open staff meeting on 12 March 2019 and individual consultation meetings over the period 20-29 March 2019. A final open staff meeting took place on 4 April 2019 with the consultation closing on 9 April 2019.

37 The claimant attended the open meeting but was on leave over the period allocated for individual consultation meetings (although he appears to have told Ms McConnell only about his leave from 18-22 March 2019, and so she was unaware that she was to make alternative arrangements for him), and submitted his observations on the proposals only at 10:52pm on 9 April 2019, after the end of business on the last day of consultation. Nevertheless, Ms McConnell responded to the claimant's questions, although she made clear that his concerns would only be noted (which we took to mean that they would not be substantively actioned).

Clinical Coding Engagement Lead

38 The three Band 7 Clinical Coding Engagement Lead posts in the new structure were advertised internally on 16 May 2019. The email stated that the competition was to close on 23 May 2019. However, the closing date was later extended to 24 June 2019 in order to permit an application by JR, who had erroneously been told previously that he did not need to apply for the role.

39 The claimant applied for the post on 23 May 2019 and, on 29 May 2019, was invited to attend an interview on 19 June 2019, although the interview date was subsequently changed to 25 June 2019, at noon. On 29 May 2019, the claimant was sent the subject of a presentation he was required to prepare for his interview. On 21 June 2019, Ms Szul emailed the claimant asking for his presentation slides to be submitted by close of play on 24 June 2019. He was unable to do so, but emailed it instead at 9:33am on 25 June 2019.

40 The claimant was not successful in this application, having scored lower overall in interview than the other three applicants.

Clinical Coding Auditor

41 Two Clinical Coding Auditor posts in the new structure were advertised on or around 10 June 2019 with a closing date of 17 June 2019. We accept on balance that at this stage the advertisement was for internal candidates only (taking into account in particular the 'Trac' recruitment software records and Ms McConnell's evidence), although we did note that Mr Jobling appeared at the time to believe that it had been open for internal and external candidates.

42 As it was, none of the five candidates shortlisted for the post were considered suitable and so the posts were readvertised on or around 18 June 2019 with a closing date of 27 June 2019, subsequently extended to 4 July 2019 when insufficient applications had been received to fill all of the posts. From this point, applications were sought from both internal and external candidates. The claimant had submitted an application on 19 June 2019; however, he did not get a response and so applied again on 4 July 2019. He was by then one of six applicants (4 external and 2 internal), of whom four were shortlisted, including the claimant and the other internal candidate, CH. However, CH already held the position of Clinical Coding Auditor in the Trust and so did not need to apply for these roles but instead could slot into a third clinical coding auditor post in the new structure. Consequently, CH withdrew their application on 8 July 2019.

43 On 24 July 2019, Ms Szul emailed the claimant thanking him for his application and asking him to provide a 15-minute presentation topic as part of the application process by "close of the day" on 13 August 2019. At that point, it was anticipated that the two external candidates would also be interviewed and they were similarly asked to provide their presentations by the same deadline. However, the external candidates subsequently withdrew their applications on two August and 10 August 2019 respectively.

44 The claimant provided his presentation at 10:29pm on 13 August 2019. He was interviewed by Ms Hooper, by then a Band 7 Audit Manager, and Ms Szul on 14 August 2019 on a formal basis. Ms Szul in her witness statement accepts that this was a mistake, due to her lack of familiarity with the provisions in the consultation document to the effect that an informal interview should be undertaken when only one person expresses an interest in a role. That was also the outcome of the claimant's grievance on this point. Ms McConnell on the other hand is now of the view that the process followed had been in accordance with consultation document, given that the post had been advertised externally and, subsequently, other candidates had initially been shortlisted for interview. We set out our own conclusions on this point below.

45 The claimant was assessed as being unsuitable for the post. He had come across as underprepared and admitted as much at the interview. He had submitted his presentation very late in the day, said that he had rushed to complete it and said that it might contain spelling mistakes. He had not fully answered the interview questions and one answer had been incorrect. He had come across as reluctant to feedback coding errors to individual coders.

46 One of the posts was filled after two more recruitment rounds, and the second after yet another. The claimant did not apply in any of these further recruitment rounds, because he had been told he was unsuitable for the post.

<u>Specialist Clinical Coding Officer</u>

47 Two Specialist Clinical Coding Officer roles were advertised on 18 July 2019, with the advert published on NHS jobs for internal applicants only. In total, three posts were

required; however, one was already filled. TK had had been appointed as a clinical coding specialist coder in January 2019 and so was slotted into one of the roles in the new structure. Both of the appointees to the additional two roles were internal applicants.

Clinical Coding Board Lead Expression of Interest

48 On 14 August 2019, Ms McConnell asked for expressions of interest in the Clinical Coding Board Lead posts giving a deadline of 23 August 2019. Applicants had to submit a brief description of their recent experience in their current role and their perception of how they met the essential criteria in the person specification. Applicants were informed that they would have to complete a questionnaire to allow a review of their understanding of the impacts on users of coded data and how performance models work. They were told there would also be a short coding test. Finally, there would be an interview which would follow the same format as a formal interview but without any presentation further tests.

49 The claimant submitted his expression of interest on 23 August 2019. He was on annual leave from 27 August to 6 September 2019. Ms McConnell emailed the claimant on the morning of 9 September 2019 requiring him to complete the attached questionnaire for return by 9am on 11 September 2019. It appears that the candidates who were not on leave on 6 September 2019 were given the questionnaire at around 12:30pm that day to complete over the weekend and to hand in by noon on 9 September. All candidates were told that the questionnaire had to be completed within their own time The claimant did not complete his by the deadline given and was given a further day to complete the questionnaire. He eventually submitted his completed questionnaire on the 17 September 2019, explaining the various issues he had had in completing it earlier.

50 On 19 September 2019, Ms McConnell met with the claimant, together with Nicky Sung (Associate Director of Data Assurance) and told him that his application would not be progressed to the next stage of the selection process because the knowledge assessment had been submitted significantly late.

51 The claimant claims that this was a confrontational meeting at which, in particular, Ms Sung told him that he was a 'troublemaker', always looking to cause problems and that he behaves like her children. Ms McConnell denies hearing the phrase 'troublemaker' or 'silly antics', the latter being a phrase attributed to the meeting in an email not sent by the claimant but apparently drafted on 7 November 2019. It is said in that draft email that the claimant had written down a number of phrases; however, we note that he has not produced this contemporaneous note. Moreover, the exact phrase 'troublemaker' is not one of those he quotes in the draft email; instead, he claims that 'thinking about causing trouble wherever I can' was said.

52 All in all, we are prepared to accept that the claimant was criticised at this meeting not following management instructions, bearing in mind the context of the meeting. However, we are not persuaded that either Ms McConnell or Ms Sung said that the claimant used the word 'troublemaker'. We are certainly are not persuaded that anything that was said was with his previous grievance and tribunal claims in mind.

Clinical Coding Performance Analyst

53 On or around 16 September 2019, the post of Clinical Coding Performance Analyst was advertised for internal applicants only. The claimant applied on 22 November 2019 and on 1 October 2019 was invited to attend an interview on 17 October 2019. On 2 October

2019 he was sent the subject for the presentation, which was to be submitted by 5pm on 16 October 2019. The claimant had over this period been unwell for two days and was also preparing for a hearing in the Employment Appeal Tribunal on 23 October 2013. Therefore, he asked if his interview could be postponed by a week. The respondent declined to do so, noting that he had on previous occasions required additional time to prepare for interviews. The claimant felt he would not be able to prepare adequately and so did not accept the invitation for interview.

Specialist Coding Lead for Obstetrics

54 One of the other individuals who expressed an interest in the Clinical Coding Board Lead role had been MS. MS performed well in the selection process and she would have been offered one of these posts. As it was, by then (but after the restructure consultation) a need had been identified for a band six Specialist Coder for the Maternity service. Ms McConnell was aware that MS was a qualified specialist in obstetrics clinical practice and an obstetrics clinical coder, and so believed MS would have exactly the right skill set for this new role. Therefore, Ms McConnell informed MS at her Clinical Coding Board Lead interview that there was an option for her to be appointed specialist coder for the maternity service. Initially, MS continued with her application for Clinical Coding Board Lead, but then notified Ms McConnell on 18 October that she wished to consider the maternity service post. On 21 October 2019, she accepted that role and it was agreed her job title would be Specialist Coding Lead for Obstetrics. Eventually, this became a permanent posting. Consequentially, MS was no longer in consideration for one of the Clinical Coding Board Lead roles.

Clinical Coding Board Lead Recruitment Competition

55 On 25 October 2019, Ms McConnell notified the Department that the respondent had appointed to 3 out of the six Clinical Coding Board Lead posts and that two of the posts would be advertised again internally on 28 October 2019. She further informed the Department that the decision had been taken to convert one of the Clinical Coding Board Lead post to specialist coder of the maternity services (i.e. the post to which MS had been appointed). The subsequent advertisement for internal candidates for Clinical Coding Board Lead opened on 9 November 2019 and closed on 17 November 2019. The claimant applied again in this recruitment round and was interviewed on 5 December 2019. Again, the claimant was unsuccessful, having scored less than the two successful applicants.

Specialist Clinical Coder

56 Also advertised between 9 and 17 November 2019 was a further band six Specialist Clinical Coder post. The claimant applied and was interviewed alongside another internal applicant and an external applicant. The interviews took place between 12 and 19 December 2019. The claimant and the other internal applicant were unsuccessful, and were not considered appointable on the strength of their performance. Therefore, when the successful candidate subsequently withdrew, it was necessary to re-advertise the post. Eventually, an external applicant was appointed.

Additional Clinical Coding Engagement Lead

57 In November 2019, the respondent also advertised for another Clinical Coding Engagement Lead post, as more support was needed for clinical engagement and review and validation especially around cardiology coding. A new system, Lighthouse, had been implemented, which had not been in place prior to or during the restructure consultation.

The claimant and two others applied for the role and all three were notified on 18 December 2019 of the details of the presentation they would have to provide. All three internal applicants were interviewed on 7 January 2020. The claimant scored 58 overall placing him middle of the candidates. The successful candidate, VR, scored 67. VR had been one of those successful in the earlier clinical coding board lead expressions of interest exercise, and consideration was given to whether it would be necessary now to recruit appoint a further clinical coding board lead. However, VR suggested that he could manage undertaking both roles, and the respondent has decided to allow him to do so for a trial period. The trial was successful and so no recruitment exercise was undertaken to appoint a further clinical coding board lead.

Senior Clinical Coding Officer

58 There remained no further band six or seven positions in the new structure for which the claimant could apply. Therefore, consideration was given to appointing him to one of the remaining band five posts, Senior Clinical Coding Officer. On 23 January 2020, the claimant was invited to a meeting with Ms McConnell and Martha Sinclair at which he was notified of this. He asked if he could be redeployed into a different role at the same banding. Ms McConnell said she thought not but would check with HR.

59 On 6 February 2020, the claimant attended another meeting with Ms McConnell at which she confirmed that the advice from HR was that he was not eligible for redeployment because another post was available within the department, albeit one at a lower banding. She notified him that he would be appointed as a band five senior clinical coder with effect from 24 February 2020. In a letter dated 11 February 2020, Ms McConnell confirmed the same, describing it as 'suitable alternative employment'. The claimant was notified that his salary in the new role would be £39,145 but that he would have 18 months' pay protection, and so for that period his salary would continue to be £44,044. The letter confirmed that the claimant would have the opportunity for a 4-week trial period. Attached to the letter was a form to complete confirming that the claimant wish to accept the offer of alternative employment.

60 The claimant did not return that form. Rather, he entered into correspondence with Ms Atkinson of HR about, amongst other things, his likely pay point should he be able to obtain alternative employment at his existing band. Ms Atkinson did not offer any guarantee that he would be restored to the same pay point and salary. In the end, the claimant decided to reject the offer of the band five post.

61 The claimant was chased for the form on a number of occasions by Ms McConnell. When the claimant was notified on 21 February 2020 that he was expected at the Royal London Hospital from 24 February 2020, he replied asking whether he would be co-leading the surgery CAG or another. This prompted Ms McConnell to reiterate to him on 24th of February that the post he was now occupying was a band 5 senior coder without any leadership responsibilities. The claimant stated in his reply that he had rejected that post. Ms McConnell in turn explained unambiguously that this was the only post available to him and that there were no posts left for him to apply for in clinical coding at band six or above. She asked the claimant to advise, and he asked for a meeting.

62 Ms McConnell invited the claimant to a meeting the following day; however, that was rearranged on the basis that the claimant needed seven days' notice in order to arrange union representation. Ms McConnell therefore rearranged the meeting for 1pm on 3 March 2020. In addition to Ms McConnell and the claimant, Ms Atkinson would be attending as

well as a minute taker, Martha Sinclair. The claimant confirmed his attendance but cancelled four minutes after the meeting was due to start saying that he had been unable to receive proper advice from his trade union due to the shortness of notice and the change of union representative. Ms McConnell notified the claimant that, if he did not attend, the meeting would nevertheless proceed in his absence. She asked him for the name of his union representative in order that they might attend even if he would not, but the claimant refused to provide that information.

63 Miss McConnell and Ms Atkinson therefore met without the claimant or his representative. They discussed their understanding of the situation and Ms McConnell wrote to the claimant on 4 March 2020 summarising the events of the meeting and reiterating that the band 5 Senior Clinical Coding Officer post was suitable alternative employment. The claimant replied by email on 5 March confirming he had not accepted the offer of that post and considered that he remained a band 6 clinical coding quality lead. Ms McConnell replied reiterating that such a post did not exist and that he had been slotted into a suitable alternative post within the coding team.

The claimant's resignation

64 On 6 March 2020, the claimant sent Ms McConnell a further email confirming he had not accepted the offer of a band five post. Ms McConnell responded stating that, if the claimant was refusing to accept the alternative employment, he was declaring himself redundant. She said that, if that were the case, he would need to provide written notice of termination. The claimant declined to do so but instead engaged in a course of correspondence denying the respondent's right to unilaterally change his contract, culminating in an email sent by the claimant at 2349 on 23 March 2020. In that email, the claimant described himself as 'working under protest for two weeks for two weeks now and clearly… not getting anywhere'.

65 The email continued:

> 'As the trust is still insisting that it has the unilateral right to change my contract and substitute a band 5 post for my contractual post as a band 6 clinical coding quality lead and I have not been able to persuade it otherwise I have no alternative to but to leave. I don't want to leave this trust but it appears that I have no choice.
>
> I believe my notice period is 6 weeks, although I have worked for the trust so long that I am not sure and don't immediately have the documentation at hand. I am not of course required to give notice as it is the trust that is attempting to unilaterally change my contract but I don't want to leave without notice.
>
> These are, however, unprecedented times as we are currently fighting a national and international pandemic. Many of us were expecting a lockdown similar to those announced in several continental European countries to be announced last Friday and I have been very conscious over the last two weeks as I have been considering how to respond if your position didn't change that we were heading in the direction that that would be needed. That didn't happen last Friday, but further restrictions have been judged necessary tonight, and I have delayed sending this email to consider what was announced. I am still doing that. I am currently able to work from home at a time when, formal restrictions apart, that is what everyone who is able to do so needs to do. There may therefore need to be some flexibility either way, but six weeks seems a sensible timeframe, although the exceptional circumstances that

we find ourselves in may mean that it proves sensible to lengthen or curtail it, depending upon what unfolds over the next few weeks.'

66 Ms McConnell responded on 24 March 2020 asking him to bear with her while she sought advice and formulated response. However, on 9 April 2020, the claimant confirmed he would work his 6-week notice period such that his last day with the respondent would be 1 May 2020. Ms McConnell reiterated that she wished to take advice before responding substantively. She discussed the matter with Tony Ewart, director of performance, who wrote to the claimant on 24 April 2020 formally accepting his resignation.

67 From 3 April 2019, the claimant began applying for jobs at other trusts. In particular, the claimant applied on 12 December 2019 for the post of Senior Clinical Coder at St George's University Hospitals NHS Foundation Trust. He received a conditional offer for the senior clinical coder post on 22 January 2020, which he accepted on 4 February 2020. St George's made an unconditional offer for that post on 23 March 2020, the day he resigned from the respondent. On 14 April 2020, the claimant's start date in his new post was confirmed as 4 May 2020, the next working day after his last day with the respondent.

## THE LAW

### Constructive Dismissal

68 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer. An employee is dismissed by his employer amongst other things 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 (s95(1)(c) ERA).

69 To establish such a constructive dismissal, the employee must prove that the employer was in fundamental breach of contract, that he resigned in response to such a breach, and that he did not act prior to resignation in such a way as to affirm the contract (**Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**).

70 In **Malik v BCCI [1997] IRLR 462**, the House of Lords confirmed that a term is implied into every employment contract that the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test is objective.

71 A breach of the implied term of mutual trust and confidence is always such a fundamental breach (**Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347)**.

72 It is an implied term of any employment contract that the employer would provide and monitor for his employees, so far as is practicable, a working environment which is reasonably suitable for the performance by them of their work (**Waltons and Morse v Dorrington [1997] IRLR 488**).

73 The repudiatory breach or breaches in question need not be the sole cause of the employee's resignation provided they are an effective cause. Accordingly, if an employee leaves both in order to commence new employment and in response to a repudiatory

breach, the existence of the concurrent reasons will not prevent a constructive dismissal arising (**Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493**).

74 The breach will be an effective cause if the employee resigned in response, at least in part, to the fundamental breach by the employer (**Nottinghamshire County Council v Meikle [2004] IRLR 703**).

75 At common law, an employee accepting a fundamental breach must resign without notice or otherwise will be taken to have affirmed the contract for the period of employment covered by the notice. Section 95(1)(c) ERA varies the common law contractual principles discussed above for the purposes of a statutory claim of unfair dismissal by giving an employee the right to resign on notice without being treated as having affirmed the contract. That said, post-resignation affirmation is capable of being considered under s95(1)(c) ERA (**Cockram v Air Products plc [2014] IRLR 672**). In that case, an employee who had given 7 months' notice when the contract only required 3 months was taken to have affirmed the contract.

76 Conduct which has been affirmed cannot be revived by a later last straw; the employee must show repudiatory conduct which entirely post-dates the earlier affirmation (**Vairea v Reed Business Information UK Ltd [2017] ICR D9, UKEAT/0177/15/BA**).

77 Section 98 ERA provides:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> …
> (c) is that the employee was redundant
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), 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 size 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.
> …

78 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

79 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.' (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

80 Dismissal by redundancy is defined in s139 ERA, and in particular subsection (1) provides:

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
> (a) the fact that his employer has ceased or intends to cease—
> (i) to carry on the business for the purposes of which the employee was employed by him, or
> (ii) to carry on that business in the place where the employee was so employed, or
> (b) the fact that the requirements of that business—
> (i) for employees to carry out work of a particular kind, or
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
> have ceased or diminished or are expected to cease or diminish.

81 A fair redundancy normally requires adequate warning and consultation, the identification and application of a fair process (including the use of selection criteria which are as objective as reasonably possible) and an reasonable attempts to find alternative employment for the displaced employee (**Williams v Compair Maxim Ltd [1982] IRLR 83**). The question in each respect is whether the employer acted within the range of reasonable responses.

82 Of the meaning of 'consult', Glidewell LJ said in **R v British Coal Corpn (ex parte Price) [1994] IRLR 72**:

> 'It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt all or any of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council, ex p Bryant reported, as far as I know, only at [1988] Crown Office Digest p 19, when he said:
>
> "Fair consultation means:
> (a) consultation when the proposals are still at a formative stage;
> (b) adequate information upon which to respond;
> (c) adequate time in which to respond;
> (d) conscientious consideration ... of the response to consultation."'

83 The Tribunal is not required to look behind the business reasons which give rise to the alleged redundancies, save, where the matter is genuinely in dispute, to satisfy itself that the redundancies were not a sham. However, where a business reorganisation is relied upon instead as some other substantial reason under s98(1), the employer must demonstrate that it has discernible advantages to the business (**Kerry Foods Ltd v Lynch [2005] IRLR 68**).

84 For the SOSR dismissal to be fair, the employer must still follow a fair procedure and the dismissal must still fall within the range of reasonable responses. In that respect, the considerations in **Williams v Compair Maxim** remain a reliable touchstone.

**<u>Unlawful Discrimination/Victimisation</u>**

85 Section 27(1) of the Equality Act 2010 (EA) provides that:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

86 Bringing proceedings under the Act and making an allegation (whether or not express) that a person has contravened the Act are both protected acts (s27(2) EA).

87 Pursuant to section 136 EA, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary.

88 The leading case on the approach to be taken by Tribunals in discrimination cases remains **Igen Ltd v Wong [2005] IRLR 258**. In particular, it is important to bear in mind that employers would rarely be prepared to admit such discrimination, even to themselves, and that in deciding whether a claimant has proved a prima facie case, the Tribunal's analysis would usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

89 It is now settled law that the claimant must prove facts from which a tribunal could conclude in the absence of an innocent explanation that discrimination and/or victimisation (as the case may be) had happened before the burden shifts to the respondent to provide an innocent expiration for the acts in question (**Adoyele v City Link [2018] IRLR 114**).

90 Considerable guidance has been given by the appellate courts to Employment Tribunal's on the circumstances in which it would and would not be appropriate to draw inferences in discrimination cases.

91 It is insufficient for the claimant to show merely a difference in characteristic and a difference in treatment; there must be 'something more' for the burden to shift (**Madarassy v Nomura International plc [2007] IRLR 246**). Similarly, unfair or unreasonable treatment of itself is insufficient to shift the burden of proof onto the respondent **Bahl v Law Society [2003] IRLR 640** per Elias J at para 100, approved by the Court of Appeal at **[2004] IRLR 799**).

## CONCLUSIONS

92 The claimant's victimisation case comprises not only 4 discrete detriments but also the detriment of being constructively dismissed. Therefore, it seems to us convenient to deal first with the claimant's constructive unfair dismissal claim.

### Constructive unfair dismissal

93 The claimant relies for his constructive unfair dismissal claim on an alleged breach of the implied term of mutual trust and confidence, as well as an allegedly express breach of contract by unilaterally changing his role to one of a band 5 Senior Clinical Coding Officer.

94 In respect of the four elements constituting the alleged breach of trust and confidence we find as follows.

Clinical Coding Auditor post and the Specialist Clinical Coding Officer posts were advertised externally when they should only have been advertised internally

95 The Clinical Coding Auditor post was initially advertised internally; however, no applications were received during that period and so it was readvertised for both internal and external candidates. This particular allegation must, therefore, fail. We note in any event that the claimant was the only candidate to be interviewed and so, even if we had accepted that the post had never been advertised only for internal candidates, we would have found that the claimant suffered no disadvantage.

96 Similarly, the two unpopulated Specialist Clinical Coding Officer posts proposed in the restructure were advertised internally, and the shortlisted candidates were all internal candidates.

97 Consequently, trust and confidence was in no way undermined in this regard.

The claimant was not assessed against the person specification for the post of Clinical Coding Auditor role even though the claimant was the only applicant interviewed for the post

98 We are satisfied that the claimant was genuinely assessed against the person specification for suitability in the Clinical Coding Auditor role, and so the issue as literally drafted must fail.

99 However, the claimant has made clear that his real complaint is that he was formally interviewed whereas he should have been informally interviewed and allowed to demonstrate that he met the person specification. It is his case that this was what the respondent's consultation document required after he became the only candidate in the running.

100 We note that Ms Szul accepted in her witness statement that she had acted an error by interviewing the claimant formally, and also that that was the conclusion of the respondent's investigation into the claimant's grievance on the point. However, the respondent does not accept that this in anyway affected trust and confidence. Moreover, Ms McConnell takes the view on reflection that there was in fact no breach of the respondent's policy.

101 We have considered the consultation document and, whilst it is prescriptive that an informal interview should be undertaken where only one person expresses an interest in a role and there is no other competition, that was not the situation that the claimant found himself in. Indeed, the consultation document is silent as to what should happen if the field narrows to 1 after a formal selection process has begun (in particular one which has sought applications from external candidates) and candidates have been shortlisted for interview.

102 Therefore, whilst the panel might well have changed the format of the interview had the particular passage of the consultation document above been brought to their attention, we are not satisfied that the claimant could reasonably and objectively have considered trust and confidence to have been substantially undermined by their failure to do so.

103 We should add that we are entirely satisfied that the claimant was scored objectively in this exercise and was justifiably found to have failed to meet the required standard. We are not persuaded, despite the claimant's protestations, that the panel would have reached any other conclusion had the format of the interview been informal. Indeed, we find that the

claimant himself accepted that he was unsuitable for this role from the fact that he did not reapply when it was readvertised.

A Specialist Clinical Coding Officer post was created for MS that was not advertised to other candidates or at all

104 As is evident from our findings of fact above, we are satisfied that a need was identified for the post in question during the restructure process at around the time that MS was being considered for the clinical coding board lead role. The role was not created for her; rather, she was headhunted for the role, being in management's view and ideal candidate with exactly the right skills and experience. The claimant accepted as such, as well as that she was considerably suited for the role than him.

105 It became apparent that the claimant's real issue was that no similar role was created for him. However, he did not in our judgement identify any such opportunity for the respondent to do so. In particular, the claimant did not identify any role for which there was a business need and for which he was the only candidate so ideally suited as MS was for hers.

106 It follows that this allegation was not made out, and the respondent's actions did not in any event undermine trust and confidence.

A Clinical Coding Engagement Lead post was created for VR or, alternatively, once he had been offered that post the Clinical Coding Board Lead post that he had already been offered in the restructure should have been re-advertised

107 We accept that the respondent identified the business need for a further Clinical Coding Engagement Lead post after completion of the consultation process, as set out in our findings above. A recruitment process was followed in which three people were interviewed, including the claimant and VR. The claimant himself accepts that VR would have done better than him in the recruitment process. The claimant has provided no evidence beyond rumours that VR was thinking of leaving.

108 As for the fact that VR was allowed to take up the post and continue undertaking the duties of the Clinical Coding Board Lead post he had successfully secured through the expressions of interest process, we accept the respondent's evidence that this was VR's own suggestion. Given the manifest likely budgetary savings, it was entirely understandable that the respondent would agree to VR undertaking both roles for a trial period, which appears to have been successful.

109 Consequently, we find that the additional Clinical Coding Engagement Lead post was not created for VR. Moreover, we find that there was no need to re-advertise his Clinical Coding Board Lead post because it had been agreed, reasonably in our view, that he could trial undertaking both roles. Therefore, we find that trust and confidence was in no way undermined in this regard.

Did the respondent act in a way calculated or likely to destroy or seriously damage mutual trust and confident between employer and employee more?

110 None of the allegations as stated in the list of issues were made out. Even taking into account the claimant's intended meaning behind those allegations, as clarified before

and during the hearing, we do not find that the respondent either intended, or acted in a way likely, to significantly (let alone seriously damage) mutual trust and confidence.

Did the respondent commit a fundamental breach of the claimant's contract of employment amounting to a repudiation of that contract by unilaterally assigning him to a band 5 role?

111 The claimant was notified on 24 January 2020 that the respondent was considering placing him in a band 5 Senior Clinical Coding Officer role. We accept that at that time no band 6 positions remained available for the claimant to undertake in the restructured coding department. In particular, his previous band 6 role no longer existed. He had not been undertaking management duties for at least 18 months. Even if he had, the senior clinical coding officer role was broadly similar to that he had been previously undertaking, albeit without managerial duties and perhaps undertaking slightly less complex coding tasks. It was only one band below the claimant's existing band, and we accept fell within the respondent's definition of suitable alternative employment. Moreover, the claimant was on the top pay point of band 6 and his pay was to be protected for 18 months. Taking all of these factors into account, we do not consider that the respondent's unilateral assignment of the claimant to a band 5 role on 24 February 2020 was a breach of contract. Even if it were a breach of contract, we do not consider that it was a repudiatory breach of contract.

112 That is sufficient to dismiss the claimant's constructive unfair dismissal claim. However, for the sake of completeness, we shall make findings on the other substantive issues agreed between the parties.

Did the claimant resign in response to either such breach?

113 The claimant resigned in order to take up a band 6 Senior Coding Officer role at St George's. That in itself is does not prevent the alleged breaches from playing a material part in the claimant's decision to resign. The question must be why the claimant decided to take that role. In respect of the alleged breach of trust and confidence, we note that the claimant was prepared on 21 February 2022 continue working, albeit continuing in his original band 6 role. We are not persuaded, therefore, that the events alleged to constitute the fundamental breach of trust and confidence continued at that point to have any material effect on the claimant's decision-making processes.

114 We note that the claimant had begun the application process for this role well before he was notified that he was to be re-banded. However, we also note that the conditional offer from St George's was made on 22 January 2020, but that the claimant only accepted that offer on 4 February 2020, after being notified of the likelihood of being re-banded. Moreover, he resigned on 23 March 2020, the day that the unconditional offer was made. All in all, we are persuaded that the claimant did resign in response to being re-banded.

If so, did the claimant delay in resigning and thereby, affirm his contract of employment?

115 Even if we had accepted that the matters said to constitute a breach of trust and confidence had been made out and that they formed part of the reason why the claimant resigned, we would have found that his continual willingness after each of those events to continue engaging in the restructure process and his preparedness to continue working for the respondent on 24 February 22, albeit it is original band 6 role, constituted affirmation of the contract and waiver of that breach.

116 As for re-banding of the claimant to band 5, even if we had found that to be a fundamental breach of contract, we take into account the fact that the claimant was willing in his email of resignation to extend his period of notice beyond the six week period the parties agree was contractually applicable. That was in our judgement was an act incompatible with the claimant considering that he was no longer bound by the contract of employment and so constituted affirmation of the contract and waiver of the breach.

<u>If not and in the alternative, did C resign prematurely?</u>

117 For the reasons given above, we would have found not.

<u>If C was constructively dismissed, what was the reason or principal reason for his dismissal and is it a potentially fair reason within s.98(1)(b) and s.982(c) ERA?</u>

118 The claimant resigned because he was re-banded. The reason why he was re-banded was because his old role had been disestablished. In other words, the respondent's need for individuals to carry out the type of work undertaken by Clinical Coding Quality Lead post-holders had ceased. Therefore, if we had found that the claimant wad dismissed, we would have found that the reason for dismissal was redundancy.

119 In the alternative we would have accepted on the strength of the witnesses' evidence and the consultation documentation that the proposed restructure afforded the respondent material benefit such as to make it some other substantial reason such as to justify the claimant's dismissal.

<u>Was any such dismissal fair within the meaning of s.98(4) ERA?</u>

120 In brief, we find that the respondent had consulted meaningfully with the workforce in general regarding its proposed restructure. The claimant attended the first open consultation and failed to notify the respondent that he was unavailable throughout the period of individual consultation meetings. He submitted written representations after normal working hours on the final day of the consultation period which were nevertheless responded to by Mr McConnell.

121 The respondent implemented a redeployment process in which the claimant participated fully and which fell well within the range of reasonable responses. The two roles for which the claimant has identified possible divergence from that policy arose from business needs identified after consultation closed. One the claimant applied for nevertheless (albeit that he was assessed to be unappointable) and the other was filled by an individual the claimant himself accepted was a better fit than he.

122 After the claimant was unsuccessful in securing a new post at the same or higher band than his existing role, the respondent offered alternative employment (indeed a role which we consider to be suitable alternative employment, certainly as defined by the respondent's own redeployment policy) together with 18-months' pay protection.

123 Reminding ourselves that it is not far as to substitute our own view, we find that the respondent acted well within the range of reasonable responses. Consequently, had we found the claimant to have been dismissed we would have found his dismissal to have been fair.

**Victimisation**

124 It is not in dispute that the claimant's grievance complaint on 10 October 2017 and his complaint to this tribunal on 22 January 2018 and 27 February 18 were protected acts.

125 As for each of the alleged detriments and their causes, we find as follows.

Clinical Coding Auditor post and the Specialist Clinical Coding Officer posts were advertised externally when they should only have been advertised internally

126 For the reasons given above in the context of the claimant's constructive unfair dismissal claim, this allegation is not made out.

127 The claimant was not assessed against the person specification for the post of Clinical Coding Auditor role even though the claimant was the only applicant interviewed for the post

128 Again, for the reasons given above in the context of the claimant's constructive unfair dismissal claim, the allegation as stated is not made out. As for the claimant's clarification, that his complaint is in fact that he was formally rather than informally interviewed, we reiterate our finding that he was ultimately no worse off and so find that he suffered no detriment. We will in any event consider the reason behind the treatment below, having made findings on all of the claimant's victimisation allegations together with the other matters from which inferences might be drawn, in order to take a holistic view.

129 A Specialist Clinical Coding Officer post was created for MS that was not advertised to other candidates or at all

130 For the reasons given above in the context of the claimant's constructive unfair dismissal claim, this allegation is not made out. It is, however, accepted that the role in question was not advertised. That said, for the reasons given above we do not consider that the claimant thereby suffered any detriment; he accepted in evidence that MS are was considerably more suited for this role than him. Moreover, he failed to identify any role into which we were persuaded that he should similarly have been headhunted.

131 A Clinical Coding Engagement Lead post was created for VR or, alternatively, once he had been offered that post the Clinical Coding Board Lead post that he had already been offered in the restructure should have been re-advertised

132 For the reasons given above in the context of the claimant's constructive unfair dismissal claim, this allegation is not made out.

The respondent constructively dismissed the claimant

133 For the reasons given above, we find that the claimant was not constructively dismissed.

134 Therefore, two of the claimant's five alleged detriments have been made out or partially made out: his interview on 14 August 2019 was conducted formally rather than informally; and the specialist clinical coding Officer post into which MS was appointed was not advertised. However, neither of these did we accept were a detriment to the claimant.

Causation

135 In any event, we have taken a holistic view all of the circumstances found in order to decide if there was the necessary causal link.

136 In particular, we take into account the fact that Mr McConnell informed the claimant in an email on 25 September 2018 for that, 'following advice from HR, and due to the occupational health referral, the impending grievance case and the employment tribunal case, it was not appropriate to give you more management/team leader duties until these had all been completed or resolved. I explained that the decision was made to ensure that no further undue pressure was placed on you tool these had concluded.' However, we also take into account her subsequent email on 27 September 2018 that, 'My mention of you having raised a grievance and ET was in regards to the stress that you have stated currently feeling, but has no bearing on the decisions made by management.

137 We also take into account the fact that the claimant was criticised by Ms Sung on 19 September 2019 for not following management instructions. As is evident from our findings of fact, we do not accept that Ms Sung called the claimant a 'troublemaker', or in any event that anything said at that meeting was said with the claimant's grievances and employment tribunal claims in mind, as opposed to his non-compliance with instructions.

138 We find that neither Ms McConnell nor Ms Sung played any part in the decision as to the ultimate format of the interview of 14 August 2019. Neither does it seriously appear to be suggested that they did.

139 Similarly, there does not appear to be any suggestion that Ms Sung was materially involved in Ms McConnell's decision effectively to headhunt MS for the role eventually described as Specialist Coding Lead for Obstetrics.

140 The claimant also complains that he was criticised by Ms Szul for having made spelling mistakes in his presentation for the Clinical Coding Auditor post. However, it appears to us that it was the claimant himself who raised with Ms Szul the possibility that he might have made spelling mistakes in his presentation because he had been rushing. The fact that this appears to have mutated into an assumption that the claimant had in fact made spelling mistakes signifies nothing, in our view. Moreover, Ms Szul appears to have paid no material role in Ms McConnell's decision to headhunt MS for the Specialist Coding Lead for Obstetrics role.

141 Taking into account all of the above as well as the circumstances as we have found them, we conclude that there no prima facie case that the two matters established were materially caused by the claimant's protected acts.

142 Even if we had been persuaded that there was something more such as to require the respondent to provide an innocent explanation, we accept Ms Szul's explanation for conducting a formal interview (that she was unaware of the relevant provisions of the consultation document) and Ms McConnell's explanation for why the Specialist Coding Lead for Obstetrics role was not advertised (that MS was an ideal fit and should have been given the opportunity to decide whether she wanted to take it up). In neither case did the claimant's protected acts have play any part in the decisions in question.

143 It follows that the claimant's victimisation claim also fails.

**Employment Judge O'Brien**
**Dated: 28 July 2022**