EMPLOYMENT TRIBUNALS

Claimant: **Mrs Carmen Josephine Clark**

Respondents: **United Lincolnshire Hospitals NHS Trust**

Record of an Attended Full Hearing heard at the Employment Tribunal

Heard at: **Lincoln** **On: 11, 13 & 14 April 2022**
Nottingham **On: 4, 5, 6 July 2022**
Reserved decision On: 14 July 2022 (in chambers)

Before: **Employment Judge P Britton (sitting alone)**

Members: **Mr A Blomefield**
Mr C Goldson

Representation

Claimant: **Mr D O'Dempsey, Counsel**
Respondent: **Mr J Crozier, Counsel**

JUDGMENT

1. The claim for detrimental treatment on the grounds of whistleblowing pursuant to section 47B of the Employment Rights Act 1996 (the ERA) is dismissed.

2. The claim for automatic unfair dismissal because of whistleblowing pursuant to section 103A of the ERA is similarly dismissed.

3. The claim for constructive unfair dismissal pursuant to s95 of the ERA is dismissed.

4. That means all claims brought before the Tribunal are dismissed.

REASONS

Introduction

1. The claim (ET1) was presented to the Tribunal on 6 November 2020. It is comprehensive and had been drafted for her by Mr A Bemani, solicitor at the Royal College of Nursing. Set out was how the Claimant was employed by the Respondent Hospital Trust as a Band 7 Ocular Plastic Advanced Clinical Practitioner (ACP) between 1 April 2015 and 3 July 2020. And in a fully pleaded particularisation essentially there were 3 claims as follows:

   1.1 Detrimental treatment on the grounds of whistleblowing pursuant to section 47B of the Employment Rights Act 1996 (ERA).

   1.2 Automatic unfair dismissal pursuant to s103A of the ERA and on the basis that the resignation, this being a constructive unfair dismissal claim in that respect, was occasioned in that a primary reason for the need to resign was in effect ongoing detrimental treatment of the Claimant because of whistleblowing.

   1.3 Constructive unfair dismissal pursuant to section 95 (1) (c) of the ERA.

2. By an equally full response (ET3) all the claims were resisted. In the run up to the hearing there was prepared by the parties a final list of issues which the Tribunal of course has before it. The Tribunal had a substantial amount of documentation prepared by the parties via the Respondent before it running to two principal and then a subsidiary ring binder and then a further set of documents introduced during the hearing by the Claimant covering communications inter alia with her representative in the RCN during the course in particular of what we shall refer to as the Band 8a; job description and re-evaluation issues. In so far as the Tribunal may refer to a page in the bundle it will use the prefix Bp.

3. We heard sworn evidence first from the Claimant and thence for the Respondent first from Mr Mohit Gupta who is and was at the material time a Consultant Ophthalmologist Clinical. He had also served as Director for Head and Neck at the Respondent until 2019. He was the Medical Director of the Team in which the Claimant worked at all material times. Then we heard from Sally Robinson, Head of Contracting and Partnerships at the Respondent and who heard the Claimant's grievance, and finally we heard from Tracey Wall a Divisional Nurse Medicine (Urgent and Emergency Care) at the Respondent and who heard the Claimant's appeal following the outcome of Ms Robinson's decision as to the grievance. All witnesses gave evidence in chief by way of a written witness statement. Both Counsel supplied us with detailed written closing submissions which they then added to orally on the last day of the hearing before us. We reserved our decision.

Findings of fact

Background and Mr Gupta's early concerns

4. The Claimant took up her post with the Respondent on 6 April 2015. This was as a band 7 Oculoplastic Advanced Nurse Practitioner (ACP). Prior thereto she had extensive experience as a specialist ophthalmology nurse and her previous post was at Moorfields, the renowned eye hospital in London. Having taken up her post with the Respondent, she was primarily based at the Pilgrim hospital in Boston. Apart from her contract of employment she had of most importance to us a job description. Within the Respondent Trust as within the NHS per se considerable emphasis is placed on job descriptions and which in turn are driven by Agenda for Change (ACP) of which the Tribunal is well aware and so jobs are banded using the ACP structure primarily as per the job description.

5. On 19 May 2015 the Claimant had added to her original job description by the Respondent the role of a Nurse Medical Prescriber: that would of course enhance her position.

6. By 10 November 2016 Mr Gupta had concerns (Bp 221) as to the amount of work that the Claimant was actually delivering, and he discussed this with Linda Keddie the relevant Head Nurse at the time of the Nursing Department. By 22 November 2016 (Bp 894) he was wanting a review of the Claimant's current job description and inter alia involved was another Senior Nurse, Bev Duncan.

7. As it is at that stage the job description issue went away for the time being in that it wasn't taken forward although it is obvious from the evidence of Mr Gupta that what he was concerned about didn't disappear. Already on the radar, so to speak, had been his desire to have the Claimant undertake a more independent role in a context where the demands on the Ophthalmology department were forever changing. When the Claimant had started in her role there was an emphasis in what she would do on minor surgical procedures, such as her undertaking suturing; but this in turn was because the Respondent had a contractual arrangement with the Primary Care Trust for the purposes of undertaking such surgical procedures. But then the PCT cancelled the contract. This appears to have been early 2017. In that context Mr Gupta was about seeing if the Claimant could upskill in that he had a need for a Senior Nurse to undertake in substitution for a Doctor intravenous eye ball injections ie for Macular degeneration treatment. The Claimant was reluctant to take on that role for reasons she then made plain and indeed was to repeat on following occasions ie 11 July 2019 as an example (Bp 329); and also before us. Her primary stated reason was concern as to tendon problems with her hands and also anxiety as to her competency given "eyeball injections". So, although Mr Gupta would have liked her to enhance her position by undertaking that role and therefore upskilling her and thereby also giving her more professional independence, she declined so to do. Another concern he had already was that the Claimant was undertaking too much work assisting Mr Lewis, another Ophthalmic Surgeon, in his Oculoplastic work, Mr Gupta was of the firm opinion that this did not need a Band 7 nurse. So those were the kind of issues already surfacing by the end of 2016.

The whistleblowing

8. On 3 February and then 24 March 2017, the Claimant raised what the Respondent accepts would be Public Interest Disclosures (PIDs) pursuant to section 43B of the ERA. These are at Bp 260 and 259. In essence that Ms Anupma Kumar (AK) another Consultant Ophthalmologist surgeon in the team, was unprofessional inter alia including in her manner towards patients who were unwilling therefore to be treated by her and also as to her clinical skills. But those were concerns not confined to the Claimant and indeed what then happened is that Mr Gupta incepted in effect a formal complaint against AK, him being one of 11 complainants including the Claimant. And we learnt during the course of this hearing via Mr Gupta that a medical disciplinary investigation was incepted against AK in the course of which not only was Mr Gupta one of those interviewed but so was the Claimant on 16 August 2017, (Bp 276). As to that interview the Claimant also relies upon it as a PID but it adds very little going as it does to the context of the concerns viz AK as to whether she cherry picked patients.

9. We learnt during the course of this hearing that on 24 May 2018 the Medical Director tasked with investigating matters, who we gather was Dr Sambra , concluded that the findings warranted action against AK and she entered into a Behavioural Agreement (BIA) on that date, which was to last for a year. That document was put before us (Bp 1020). We have not seen any ancillary plan of what tasks she was specifically charged with doing that others might have been doing but we will come back to that issue in due course.

10. As to the other PIDs initially relied upon, the Claimant accepted in cross examination that the disclosure on 11 January 2018 (Bp 275) (item 7(d) in the list of issues) was not relied upon as a PID. And as to the final one relied upon namely the grievance letter of 31 March 2020 (Bp669) (item 7(e) in the list of issues), the Claimant is no longer pursuing a claim based upon that there was a detrimental treatment because of whistleblowing in relation to the handling of the grievance including the appeal. What it means is that the Tribunal is in effect dealing in terms of Public Interest Disclosures (PIDs) and for the purposes of any causal link to what thereafter happened with those two disclosures on 3 February and 24 March 2017.

11. As to detriments this brings us to first the AK issue. On 11 January 2018 the Claimant also raised concerns (Bp283) that AK had not been referring patients to her post op. We gather this was mainly to do with cataracts. So she was querying as to whether this was because the Claimant had made the PIDs to which we have now referred.

The Band 8A issue

12. At around the same time, we get the introduction of what we will call the Band 8A issue. Where that becomes engaged is that the Respondent had (see interview with Alan Roebuck in the grievance investigation[1]) introduced an incentive whereby nurses

[1] The grievance to which we shall come is dated 31 March 2020. AR was interviewed on 7 July 2020 (Bp763) as part of the investigation conducted by Sally Robinson.

at inter alia Band 7 who undertook successfully a master's degree which would be funded by the Trust would then be eligible to be appointed a Band 8A. For the purposes of undertaking the studies there would need to be study leave, and so on the 25 January 2018 the Claimant was asking Mr Gupta (MG) for that study leave and referring to that it could easily be accommodated in terms of her work because she could simply free up some of the slots. Although MG agreed to that proposal as to which see 20 February, (Bp 289) it brings back in again, however, the issue of what the Claimant ought to be doing because he made clear that he didn't agree with the Claimant that there was spare capacity in the Doctors clinics to absorb these patients. indeed he told us that there was a very substantial waiting list of over 200 patients and that other members of the team were having to work at weekends to accommodate the backlog. So, we can see that coming back into the equation at that stage. As to the Claimant's concerns not just on the AK front but being under utilised this was also being flagged up by her to Bev Duncan[2] as of 20 February 2018. But at that stage the Claimant did not want to pursue any complaints that she might have, and this becomes a theme as well.

Back to the AK issue

13. Although the Claimant never knew the outcome in relation to AK in terms of the BIA it became clear before us that she certainly knew there had been an investigation and that something had been put in place, but she was never told what it was.

14. On 22 November 2018 the Claimant again raised her issues about not being provided with referrals by AK and Bev Duncan again discussed it with the Claimant. But the Claimant at that stage again was finding "the situation manageable" (Bp331). On 9 January 2019 an informal meeting was held by inter alia Bev Duncan with the Claimant and the latter listed at length her ongoing concerns viz AK. But on 4 March 2019 she wanted to "hold off for a few weeks just before (AK) went on leave, she suddenly became quite approachable and friendly…" (BP 333) .

Back to MG's concerns

15. But MG's concerns as to what the Claimant was not doing, so to speak, and what he wanted her to do had not gone away. It again brings back in the issue of what should the Claimant be doing because at this stage,(see Bp 333), there was also a discussion going on as to whether the Claimant could be used on the Glaucoma front because there was a demand for additional skilled nursing and so perhaps, she could undertake training under MG's wing for the purposes of then becoming an Independent Nurse Clinician for the purposes of Glaucoma treatments. We can deal with that issue again at this stage because MG told us that although he had raised that suggestion with the Claimant as a way of upskilling her, rather like he previously raised the intravenous eye injection issue, the Claimant never took it up and so she didn't free herself up to come along and take part in his Glaucoma sessions as others did ie Junior Doctors. The Claimant basically on this issue seemed to us to be denying that there ever was the offer of the Glaucoma work. We didn't get a satisfactory explanation

[2] The outpatients matron in the department.

from her as to why she didn't take up MG's offer. That in turn interfaces back on the Mr Lewis issue because another theme that appears again and continues through to 11 July 2019 is that the Claimant did not agree with MG that she ought not to be assisting Mr Lewis. She did not accept that this was an assisting role that therefore only required say a Band 5 Nurse or a Junior Doctor perhaps in training. And she was very clear on that in her evidence before us as well. In other words, there was a fundamental disagreement between her as the Band 7 Nurse and MG as the Senior Consultant Clinician on whether or not her support in theatre for Mr Lewis was something that was commensurate with a role of a Band 7. On all that evidence we simply conclude on the basis that MG of course was the principal Clinician, that he his therefore the person best placed and in terms of seniority to decide who does what and in terms of his desire to get the Claimant away from spending too much time with Mr Lewis and get her into an independent role to justify being a Band 7 in terms of clinical duties ie whether it be Glaucoma or follow ups on Macular treatment. This profound disagreement between the two of them resolves itself for us on the basis that MG had the right to manage albeit he needed to consult the Nursing hierarchy and in so doing because of the division in that respect between the line management of the Claimant by in fact a Matron which by 2019 is actually Ann-Marie Chappell, (AMC) as opposed to what the Doctor may want which in that sense has to go through the Medical Directorate to then negotiate with the equivalent nursing head in the hierarchy. The exception is job description re-matching viz Agenda for Change (ACP) as to which we will come back to.

16. But the point being that this disagreement about what the Claimant should do to justify her Band 7 role which had surfaced in 2016 was most definitely back by 2019. As to the Claimant's concerns about AK and which can be differentiated in that respect although she had raised continued concerns about AK's manner towards her and the issue of referrals as at 4 March 2019 and Bev Duncan having said this matter now needs to go to HR, she again made plain that she wanted to hold off that happening as "*Ms K has suddenly become quite approachable and helpful*".

17. As of 7 June 2019, and the Claimant realising that she was under utilised but with her own views on where she should therefore be focussing on, she raised concerns as to which see Bp 774. Coincidentally by 24 June 2019 MG in concert with such as Donna Arnold, a Sister in the team and AMC were into further discussions about the need to change the Claimant's job description. And that can again be seen clearly from the correspondence trail (Bp 423). Against that background on 4 July 2019 the Claimant was invited to a meeting as to which see Bp 329, and which was to take place on 11 July 2019. The purpose of that meeting was stated to be to discuss "your job plan and respective changes to the plan". Inter alia it was stated that she would not be required to have present with her a Trade Union representative as the meeting was informal. It was made plain that at the meeting MG and AMC would be present. This was clearly a critical meeting. But it is not minuted and there are no notes to assist us.

18. However, from the evidence before us including such as the e-mail of AMC the day after, there is no doubt that the discussion centred upon what MG wanted the Claimant to do and conversely that the Claimant disagreed and intended that she should be able to stick to her job description which inter alia included the surgical assisting role to which we have referred. The Claimant initially told us in her statement that MG shouted at her during the meeting and which MG in due course denied albeit accepting that the meeting was a difficult one with a frank exchange of views. Following a question from this Judge the Claimant accepted that it wasn't MG shouting at her as such, but it was a robust exchange of views and in that sense, voices may have been raised on either side. The bottom line put simply is that this meeting demonstrated the clear impasse and it focussed more than anything else on the Lewis issue. The Claimant simply did not accept that she should agree not to assist Mr Lewis. And was not receptive to MG's proposals for a more independent role but with the quid pro quo that she no longer undertook the work with Mr Lewis. That impasse was so obviously still present before us and we have referred to MG's professional right to decide what he considers clinically is best for the efficient performance of his team and the maximum utilisation of their skills for which read the Claimant.

19. What then happened is that MG in concert with AMC and assisted by Danielle went down the route of preparing a revised job description. Advice was sought as to how to handle the situation. Also involved in this part of the exercise was Catherine Capon (CC), Lead Nurse Trauma and Ophthalmology. It is crucial to set out exactly what was asked for and what the reply from HR was. So, the day after "the informal" meeting with the Claimant, AMC wrote to Alexandra Williamson who is an Employee Relations Advisor at the Lincoln County Hospital of the Trust. She wrote (Bp 352);

"Ophthalmology have an Oculoplastic Acute Care Practitioner (CNS) that Mr Gupta the Clinical Lead would like to change the JD and job plan for. We all met informally to discuss Mr Gupta's proposed changes, but the staff member was not in agreement with them. Can you please let me know what the process is now if Ophthalmology wants to proceed to making changes to the role and JD"?

And the reply from Alex Wilkinson was

"*From what you have explained in your email I believe that would entail a consultation with the person concerned.*

Your initial step if you are looking to change the JD is to make your amendments and submit it to the job matched prior to anything at all changing.

I have copied Sharon and she will be able to support you with the consultation".

Sharon was also in HR.

20. So, on this issue as to process HR clearly gave AMC and therefore MG advice as to the way forward. When we cross reference to the statement of Sally Robinson and her undertaking of the grievance appeal and her outcome, she is therefore wrong to blame a procedural failure at the door of line management and imply at least that there was no involvement of HR. On the point about this way forward it also cannot be

sustained that the Claimant and her Royal College of Nursing representative, Lucy Pearson, were not aware of the process to be therefore followed. This can be seen as of 23 July 2019 (Bp 354) and AMC to the Claimant;

"*I have spoken to Sharon Cook in HR. My understanding is that the suggested changes to the JD are made, the JD then goes to the panel for matching. Once this has happened then we meet formally for the consultation with the proposed amended JD.*

I will keep you updated".

And this was to be repeated to Lucy Pearson by Sharon Cook in her email of 9 August 2019, (Bp 478) and in talking about the timescales and that therefore;

"…*We are unable to arrange a meeting to discuss the potential changes to the role until the revised JD has been AFC Banded…".*

21. And the Tribunal has noted in the additional bundle of documents which commences at Bp 895 and specifically the email exchange between Lucy Pearson and the Claimant which is at the same time as that we have now referred to and thus 26 July particularly, that the Claimant had copied in Lucy Pearson viz the email, she had received from AMC on the process of 23 July and Lucy Pearson had advised the Claimant as follows (Bp1029) -;

"*...It does appear they are consulting you regarding the proposed changes to your job description given that the informal meeting was held with yourself initially. The formal meeting she has referred to will be a further opportunity to consult with you regarding the proposed changes that will be made to your JD. The role of the job matching panel will be to look at your current job description and match it against the proposed JD to consider what will remain of your existing JD.*

I can appreciate how you feel about this process, but we can look at the amended JD once they propose to meet with you formally. I am happy to attend any further meetings with you so that you feel supported through the process".

22. So, on this issue it is to be noted that thereafter and perhaps not surprisingly given that advice from Lucy, that the RCN never challenged that the approach being taken as a process by the Respondent was wrong. Mr O'Dempsey in his submissions seeks to argue that the fact that might have been the position of the RCN doesn't matter. We conclude that it does and thus is a material factor on the issue of whether the Respondent was acting reasonably on this issue and the interface to the s95 ERA constructive dismissal claim. This is because the Claimant had the services of the RCN which the Tribunal knows to be highly competent in relation to representing its nurses and inter alia on matters procedural and is expected to know one might say by heart the AFC protocols and processes and particularly in relation to the position where somebody is in a role and the issue isn't about a new post but about a desire to change the job description of the incumbent. Thus if it wasn't in agreement with the process being taken it would have said so.

23. The other issue is that although Sally Robinson and thence Tracey Wall were to find that there were delays in the process and appear to suggest that the wrong process was being followed by reference to the use of the word "review", that they never said what policy should have been followed in their outcome letters and they seem to have ignored the clear evidence that although there were delays to which we shall come, and although Lucy Pearson might have had to ask as to what was going on she was always promptly replied to and kept informed as to the progress that was happening or not as the case may be and a brief explanation. So, in that sense this isn't a case where the Respondent is not informing the Claimant of the process its going to apply or ignoring communications from the RCN rep.

24. Put simply then what happened is that MG with the assistance of inter alia AMC put together the revised job description (JD). What then has to happen under AFC and as per what Alexandra Williamson had advised, is that the JD has to go forward for what is known as matching. We had before us by the end of these proceedings the matrix which is used for that purpose and it engages various criteria which are in the job description and a scale of points to be applied to any such element of the JD. It is an objective test. It seems there is a first-round matching exercise followed by a next stage at which a matching panel reviews the scoring and which it can thus change. This panel consists of not just members of the management team but also staff members all of whom are trained in what is quite a complicated process. All come uninvolved with the history behind the revised JD. Thus, they are objective. There is no evidence before us in this case that the matching panel other than dealt with matters in that way. In any event what happened is the that the proposed job description was submitted for matching in accordance with the AFC protocol. It is quite clear looking at the contemporaneous correspondence trail that MG did not want to see the Claimant downgraded. Thus, the accusation of the Claimant as per the list of issues that MG was about demoting the Claimant doesn't hold up under scrutiny[3].

25. In relation to what was going on the viz the JD, the initial matching came back circa 14 November 2019. Unfortunately for the Claimant the JD was graded at Band 6.

26. On 11 December AMC met with the Claimant to give her the bad news, but (see Bp 562) in the exchange between the Claimant and Catherine Capon (CC)[4] it is quite clear that the Claimant was making plain that AMC had advised that it was going back for the second stage review before the panel as to which we have now rehearsed viz the process.. The Claimant's concern was that the process was;

> "…Obviously I am concerned that this process is *no closer to resolution, and as yet I have not seen or contributed to the new JD. Knowing that when it is released it is unlikely to be the end of the process is only adding to my stress, particularly now,in the light of the first banding".*

---

[3] See our subsequent findings at paragraph to support this conclusion.

[4] Lead nurse Trauma &and Ophthalmology Clinical Business Unit

And CC in replying to her and apologising for the delay and being aware of the stress it was causing the Claimant said;

> "…*Both myself and Ann Marie have been chasing HR, however, as you have stated there have been some issues regarding the job matching, I totally understand this must be frustrating but we need to ensure its done correctly, following the right process...".*

27. At around this stage the Claimant went off sick with stress between 18 December and the 7 January 2020 and there was an Occupational Health Report. There is at this stage also in the documentation a risk assessment completed by the Claimant which clearly flags up the issues that we rehearsed including her feeling that she now has difficulties working with MG basically because of the impasse point that we have gone to.

28. We also can see from the email traffic and the evidence of MG that the resubmitted job description for the purpose of the second stage added into it ie with a particular focus on such as independence and Glaucoma with the aim to ensure that the Claimant got kept as a Band 7. MG inputted to this. So, the picture we get is that although there may have been too many people engaged ie at HR and Senior Nursing level, nevertheless the Senior Nurses ie AMC and CC and MG were not about seeking to demote the Claimant. The issue of course then comes back to whether the correct process was being followed.

29. It is to be noted that as of 16 January 2020 MG was still concerned that the Claimant was cancelling clinics ie again to yet another example of the problem with the Lewis issue. By January 2020 the Claimant has completed her MSc.

30. On 25 January 2020, in other words before any outcome from the second part of the banding exercise, the Claimant applied for a Band 7 role at another hospital trust at Chesterfield. By 4 March she was formally offered the job subject to the usual checks, (see Bp 1063). On 25 February 2020 the Claimant had a meeting with Angela Mason (AM) who had now taken over as the Matron from AMC. Also present was CC and a person from HR and the Claimant had her rep Lucy Pearson. This meeting can be found in terms of a note at Bp 639. Although classed as a formal welfare meeting because of course the Claimant had had a period of sickness, the meeting very much focussed on the issues we have now gone to. The Claimant was making the point that as she had now completed her MSc that, "*Don Roebuck told me it was an ACP funded role query Band 8A".* She felt that given what had happened so far that she had *"wasted 2½ years of her time".* She referred to the stress and that she had applied for a role elsewhere. Then it was back again on the issue of working with Mr Lewis and again it can be seen that the impasse point was remaining. The point to be made again is that Lucy Pearson did not say in that meeting that the wrong process was being followed. And cross referencing to Bp 596 and the Claimant's email of 21 January to AM , she clearly thought that because she has now completed her MSc she should in effect now be banded there and then as an 8A. As to that issue we are quite persuaded

on the documentation and other evidence before us that although there was an expectancy that getting the MSc would mean the Claimant was eligible for a Band 8A role it did not follow that she would automatically get one. This was encapsulated in the evidence on the point by Tracey Wall, namely that of course it would require that there was a Band 8A role available with the skills match to the Claimant's specialism in Ophthalmology. There is no evidence that there was such a vacancy at that time and MG was not wanting in that sense to create an 8A role when there was no business case to be made. So if the Claimant had stayed, she would get an 8A role only as and when one became available which matched her skill set. Turn it around another way, there was no contractual commitment to provide the Claimant with an 8A role on completing her MSc.

31 . By the meeting of 25 February, the Claimant had received the draft revised JD that was in matching as at 6 February.

32. On 5 March she received a follow letter from AM relating to the meeting of the 25th and that they would be having another meeting once the matching decision came back. But it was overtaken by events because on the same day in the evening AM emailed (Bp646) the Claimant to inform her that stage 2 of the JD evaluation had unfortunately come back as a Band 6:

"...*Today I received an email from HR regarding the job description and the outcome is that it is a Band 6. I am very sorry as I know this is not the outcome you want. Please let me know if I can support you in any way. I will liaise with the Business Unit and find out what the next step is for them and keep you updated. You will be supported by HR through the process.*

I am at Pilgrim next week so will pop into the department to see you but if you wish to speak to me tomorrow please call as I am at Lincoln".

33. Finally, on that point on the 10 March, Lucy Pearson at the RCN knowing of course what had happened emailed the Claimant and inter alia informed her that she had a right of appeal against the matching (Bp 1060);

" …*I completely understand your frustration with the outcome, you can appeal the outcome and I would like you have suggested request a copy of the scoring. I would also suggest that a meeting will need to be held to discuss it further in addition to your well being meeting that we are in the process of arranging. I would suggest therefore that you also request an update from Angie re this further to our email below".*

34. As to the significance of the appeal we shall next come to. Before we do the Claimant having received the notice of the Band 7 and of course having already been offered the job by Chesterfield and having cleared checks on 9 March, resigned the employment on 18 March on notice effective 3 July 2020. And of course, she then raised her grievance on 31 March (Bp 669). Sally Robinson met her to discuss on 22 June 2020 and then undertook what seems to have been an extensive round of interviews and inter alia interviewed MG on 20 July (Bp 807) and gave her outcome to which we have already referred on 20 August. The Claimant appealed that, and the appeal hearing was heard by Tracey Wall on 6 November 2020. She didn't uphold the

additional points raised as per the grievance although she agreed with Sally Robinson that there had been the shortcomings as to delay and communication.

35. Going back to the list of issues, it is essential to stress that in relation to the handling of the grievance by Sally Robinson as to which in particular as to her conclusions there were some shortcomings or the handling of the appeal by Tracey which didn't rectify the same, it is no longer maintained by the Claimant that that constitutes detrimental treatment by way of whistleblowing. The second point to make is that the Claimant had of course prior thereto resigned in any event. The Claimant says that her acceptance of the role at Chesterfield was provisional in that she could have later refused it, but that cannot be the case post 18 March because she unequivocally resigned and obviously therefore accepted the post at Chesterfield. So, whatever happened thereafter is irrelevant in terms of the Claimant remaining in the employment because the die was cast, and she had committed herself.

6. That brings us then to matters of policy. The over arching AFC policies before us start with chapter 11 and then go through into chapter 12. Suffice to say, that it became clear before the Tribunal that those policies really don't apply when seeking to deal with the issue of wishing to revise the job description of an incumbent. They are more focussed on the creation of new roles or such as the initial recruitment process or reorganisation. So engaged became the Respondents own policy of: review of job descriptions and job evaluation process and engaged in particular is section 12 ie Bp 214 and which in his written and closing submissions Mr O'Dempsey focussed on. This policy makes clear at paragraph 4.4 that not only is it required for banding new roles but also can be engaged ;

"For banding existing roles where there has been a clear and significant change. In the first instance where a job has changed the post holder requesting a banding review must submit evidence to their line manager showing which skills and responsibilities have changed".

37. But of course, as Mr Crozier in his submissions points out, there is a lacuna because that paragraph refers to the post holder requesting a band review. But of course, it wasn't the post holder in this case who was requesting a review it was MG who wanted a revision to the job description and was going down the route he was post 11 July 2019 because the Claimant wouldn't agree to his proposals ie the impasse point. That therefore brings us to paragraph 17.1 which is where you get to after the JD has gone through the matching process and comes back after the second stage, it reads;

"Should the post holder not agree with the outcome the individual can lodge an appeal. In order to progress through this route, the job holder must be able to provide sufficient information to justify the need for the job to be rematched and/or re-evaluated. Such a request must be made within 3 months of notification of the original panel decision".

38. And then set out is quite a complicated process by which that then happens. The point being, however, that if that process is incepted, then the existing banding remains until the outcome. The point then focusses back again to that it is obvious that

Lucy Pearson knew about this process because she refers the Claimant to the right of an appeal as we have already referenced.

39. But the Claimant didn't exercise that right of appeal.

40. Was there a breach of process in this case? Mr O'Dempsey submits that implicit in any event is that if it is the employer who is initiating the review, then before it goes down the route for matching/evaluation there should have been a formal meeting with the Claimant to discuss the proposed revision to the JD at which she would be accompanied by her RCN representative. By so doing the Claimant would have appreciated the significance and thus might have moved forward from the impasse issue thus thereby avoiding the need to submit a revised JD. So, Mr O'Dempsey says that not having happened and the Claimant being told that the 11 July 2019 meeting was "informal" the Respondent acted unreasonably.

41. The Tribunal agrees with him. In that sense it mirrors the findings of Sally Robinson although in referring to the need for a review she never set out what policy was engaged. But is it a fundamental breach of inter alia the implied term of trust and confidence thus establishing a chain of causation justifying the resignation? The point then becomes that the Tribunal has to look at this matter in terms of the well known authorities encapsulated in that sense in ***Malik v BCCI [1998] AC20*** but flowing all the way through from ***Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27CA*** and thence ***Lewis v Motorworld Garages Ltd [1985] IRLR465 CA*** and thence reiterated in ***Woods v VMW Car Services (Peterborough) [1981] IRLR347 EAT ("Woods")*** and finally if any more was needed reaffirmed by their Lordships in ***Malik v BCCI [1997] IRLR462HL*** that;

> "*The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. If conduct objectively considered is likely to cause damage to the relationship between employer and employee a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant in judging the employee's claim that the implied terms has been breached…*

42. And encapsulated apropos **Woods**;

> *" It is clearly established that implied in a contract of employment is a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee".*

43. So, conjoin that in with the contractual provision, so to speak, at chapter 12 to which we have referred, and which can be imported into the contract of employment as per usual practice in Employment Law and what we have is as to whether the failure to hold a formal meeting and that which happens thereafter so constitutes a fundamental breach? First, the Respondent was acting with reasonable and proper cause in wanting via MG to change the Claimant's job description for the reasons we have found. The failure was the holding of the informal meeting on 11 July 2019 as

opposed to a formal one. But there is no evidence that this was deliberate. The weight of the evidence is that MG had hoped that the impasse could be resolved. And thereafter the Claimant knew what process was going to be followed. Her RCN rep at no stage challenged that this was not the correct process. The same goes for the Claimant who of course was receiving advice from the RCN. The Claimant basically lost her trust and confidence as was clear from her evidence before us when she got the news of the first stage assessing of the revised JD at Band 6 . She made that plain before the Tribunal. That is why when she returned from leave sick, she started to look for other jobs and thence went through the interview process with Chesterfield.

44. And viewed objectively as to the JD review process albeit Lucy Pearson might have had to chase as to the time being taken, there wasn't an inordinate delay in giving her any reply thereto. The Claimant was kept in the loop, and she knew that it was going to go back for review as per the process post the initial banding. And in circumstances where from our findings none of the key players ie MG or such as AMC or CC or AM viewed objectively were bent on demoting the Claimant.. Unfortunately for the Claimant post submitting the initial revised JD, for which there was justification given what the Claimant did not want to do, it went through an objective evaluation process and which came up with an unforeseen outcome. But there is no evidence before us that this process was tainted. Nothing to suggest those involved in the evaluation exercise had anything against the Claimant. We gathered that it is an anonymous process as to the identity of the post holder whose JD is under review. And of course, the Claimant was then clearly told that she had a right of appeal but instead resigned rather than exercise it. It may be that it could be said that the "last straw" was obtaining the confirmation of Band 6 from AM on 5 March 2020, but it is also equally clear that the Claimant had already made her mind from the evidence as we find it so to be by the time she had gone for her interview with Chesterfield. She confirmed to the Tribunal that she had actually verbally accepted the Band 7 role at Chesterfield when first offered to her subject to the checks to which we have referred.

45. The Claimant finally told us that she would not have resigned if she had realised that she had pay protection whilst the process went on. Thinking in other words that she would be on Band 6 thenceforth and would not have the Band 7 pay protection whilst the process went forward. But in her grievance (Bp669), she in fact had referred to band pay protection and that she had the same. When this issue revealed itself post the conclusion of her evidence, she was recalled by the Tribunal. She endeavoured to suggest that although she knew from friends in the nursing world that pay protection could apply, she did not realise it applied in terms of her job with the Respondent until she put in her grievance. in other words, it seemed to be that she was suggesting that she wouldn't have resigned if she knew she had pay protection. This Tribunal, bearing in mind the Claimant's very extensive years of practice as a Senior Nurse and that she had been so clear in her original evidence that she didn't know of pay protection, are unpersuaded by her explanation.

Conclusion so far on constructive unfair dismissal

46. Thus so far, we find on the constructive unfair dismissal front that the Respondent was acting with reasonable and proper cause. Yes it did fail to undertake the formal meeting on 11 July 2019 rather than stating it to be informal, but viewed overall on our findings of fact viewed objectively it did not act in a way which seriously undermined trust and confidence thus entitling the Claimant to resign but overall was acting with reasonable and proper cause given the impasse, and in respect of which the Claimant never changed her position. Indeed, we conclude on the evidence that had the meeting on 11 July been formal it would have made no difference; and tellingly in her evidence she was never asked as to whether it would have. As to Mr Crozier, doubtless that is because it was not so asserted in her lengthy witness statement.

Back to the Whistleblowing

47. An issue emerged before the Tribunal when MG was giving his evidence, and which goes to the reason why the Claimant had work in terms of clinical referrals viz AK removed from her. Mr Gupta made plain to the Tribunal that in the context of the Claimant raising her concerns and which of course goes to circa 11 January 2018, that knowing there was an investigation he made enquiry of Mr Samra and learned that there had been put in place by then an edict to the effect that AK would not delegate patient referrals and would see them herself as part of the improving of her skills including such things as bedside manner. Thus, that is why the Claimant wasn't getting the referrals. He went on in any event to explain in some detail that this would have very little impact on his concerns about what the Claimant was not doing given the very limited number of referrals that were coming through in any event from AK and his desire that the Claimant upskill in the areas that we have already now referred to. In any event he didn't tell the Claimant as to the edict. He told us this was because he understood that this was confidential and as it related to a Doctor in terms of protocol and the hierarchy in respect thereof, he could not therefore inform the Claimant as a nurse. It is to be regretted that he did not consider whether he could reassure the Claimant in a way that did not breach the protocol and perhaps he should have sought advice from HR so that the Claimant could be reassured that the reason why the referrals were not happening had not got to do with AK being about victimising the Claimant because of the concerns the Claimant had raised in February and March 2017.

48. This point came up again in the appeal hearing. During an adjournment of about 15 minutes Tracey Wall through her HR person made enquiries, bearing in mind Ms Wall is very Senior Nurse indeed in the hierarchy and appears therefore to be able to cross the protocol divide so to speak. The same information viz the Dr Samra edict was given to her. She did not inform the Claimant or her RCN representative. She accepted this was an oversight or a shortcoming but again sought to argue that it was because of the confidentiality/protocol issue.

49. Mr O'Dempsey quite rightly was deeply sceptical of this evidence. In neither case had the witness put this crucial evidence in their witness statement. In that respect the answer effectively given first by MG is that he hadn't really given any close regard to the statement prepared for him by the Solicitor.The inference being that he is a very busy doctor with a great many responsibilities. The same impression was given by Tracey Wall. And so, what Mr O'Dempsey is asking us to find is that they are lying. Mr Crozier submits that given their seniority and their length of service it would be nonsensical for a Tribunal to find that they would put their careers at risk and indeed possibly their liberty by lying.

50. Well, the Tribunal has had to form a view upon this. It' observed the demeanour of both these witnesses. Mr Gupta having in effect volunteered this evidence when being cross examined, consistently remained firm on the point and he was repeatedly questioned about it. And we found him an honest witness on all issues relating to his concerns about the way he needed to go forward in terms of the impasse and what he required in terms of the Claimant. Also, that he appeared to bear the Claimant no malice in terms of what happened and in terms of the JD issue and that the Claimant in her own evidence had accepted that in terms of the JD issue MG was not motivated by way of any whistleblowing and therefore seeking to support victimisation by AK. And as to Tracey Wall, although there were some shortcomings in her evidence, she was consistent on this point.

Conclusions on whistleblowing

51. The Tribunal concludes having given the issue considerable thought, that it does not accept that these witnesses were lying, and it therefore accepts the truth of what they say. It follows on the balance of probabilities that the reason why AK did not provide referral work to the Claimant is because of the Samra edict. Therefore, it follows that there is no causal link between any whistleblowing and moving through to the job description exercise and the resignation.

52. Finally and on the issue of whether nevertheless AK inter alia cold shouldered the Claimant and whether that could in any event constitute isolated acts of detrimental treatment because of whistleblowing viz s47B of the ERA[5], as per the submissions of Mr Crozier it follows that therefore the last identifiable date when it could be said that the Claimant was raising victimisation by way of whistleblowing is really 22 November 2018 following through to the Claimant's referencing these wider issues on 9 January 2019 (see Bp 333). But then on 4 March 2019 she was not wanting the Respondent ie Bev Duncan to formally pursue it on her behalf. Then of course matters get superseded by the material events on the job description front starting as to 7 June 2019 and which we have rehearsed. What it means is that we are with Mr Crozier that the last reliance on victimisation, so to speak, pursuant to whistleblowing and relating to AK and in effect bullying or harassment or isolation cuts off at 4 March 2019. That brings us back to that the claim was presented to the Tribunal on 6 November 2020. There is a 3 month time limit for presenting a whistleblowing claim pursuant to section

[5] We have not rehearsed the law in detail as it is set out in the written submissions of both counsel.

47B from the last act complained off. So that would mean the claim on presentation in relation to this now isolated alleged victimisation was 15 months or so out of time. The Claimant has advanced no argument as per Mr Crozier's submissions to show why it would have not been reasonably practicable to have brought that claim within time or that there is a continuing act which it can hitch onto. It follows that we are with Mr Crozier that is therefore out of time and therefore it has to be dismissed.

Overall conclusion

53. it follows that all claims are dismissed.

____

Employment Judge P Britton

Date: 25 August 2022

<u>Public access to employment tribunal decisions</u>

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.