Case No: 3300435/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr L Johnson

Respondent: South Central Ambulance Service NHS Foundation Trust

Heard at: Reading (via Cloud Video Platform)
On: 6-7 October 2022

Before: Employment Judge Caiden

Representation
Claimant: In person
Respondent: Mr A Allen KC (Counsel)

RESERVED JUDGMENT

1. The Claimant's application to amend his ET1 to include an alleged failure by the Respondent to deal with the Claimant's complaint in 2016 adequately, in particular not addressing certain issues of the complaint, is refused.

2. The Claimant's complaint of constructive unfair dismissal is not well-founded and is dismissed.

CVP hearing

The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46.

The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal. The participants were told that it was an offence to record the proceedings.

The Tribunal was satisfied that none of the witnesses from whom evidence was heard was being coached or assisted by any unseen third party while giving their evidence.

REASONS

A) Introduction

1. By an ET1 presented on 14 January 2021, the Claimant claimed he had been unfairly constructively dismissed. This matter was due to be heard over a three-days that was due to commence on 5 October 2022. Unfortunately, the parties were informed that owing to judicial availability the hearing had been shortened to a two-day hearing which took place on 6-7 October 2022 by way of Cloud Video Platform.

2. At the hearing the Claimant represented himself and the Respondent was represented by Mr A Allen KC of Counsel. The Tribunal was provided with two hearing bundles, one entitled “Hearing Bundle” which ran to 550 pages without index, and one entitled “Additional Hearing Bundle” which had 8 further pages which were paginated 551-559. All page references made in these reasons relate to the Hearing Bundle. The Tribunal was also provided with a cast list, chronology, and Respondent’s position statement. These documents had been drafted by the Respondent and the Claimant provided two emails in response to these documents which in so far as material raised whether a further issue should have been included in the list of issues.

3. In terms of witness evidence, the Tribunal heard from a total of six witnesses: the Claimant, Mrs Saunders, Ms Pickard, Miss Dymond, Mrs Douglas-Todd, and Mr Hancock. A witness statement bundle of 48 pages contained their respective witness statements which having taken their respective oaths and affirmations, and made minor corrections to, were confirmed as being true to their respective knowledge and belief. It is right to record that Mr Allen noted that there was mention of matters post-resignation in the Claimant’s witness statement and that the Respondent was not waiving any privilege in so far as reference was made to such discussions.

4. Upon conclusion of the witness evidence, the Tribunal was provided with the Respondent’s Written Submissions (a 10-page document) which referred to case law, one of these reported cases being provided separately to the Tribunal (namely *Leach v The Office of Communications* [2012] IRLR 839).

5. The Tribunal confirms that it considered all the documents that had been provided and took particular care on pages within the hearing bundle which it was referred to during live evidence and were referred in the witness statements.

B) Application to amend

6. At the commencement of the hearing, having ascertained that the Tribunal had all the paperwork the parties expected it to have, the issues were discussed, and the Claimant stated that he felt there was an issue missing in the Respondent’s list of issues. Following discussion with the Claimant it was confirmed that in essence the Claimant was alleging that a complaint he had made in relation to Mrs Saunders was upheld in 2016 but in fact it did not take any relevant action and the relied upon alleged repudiatory breach was therefore failure by the Respondent to deal with the Claimant’s complaint in 2016 adequately, in particular not addressing certain issues of the complaint.

The Tribunal invited the parties to address it as to whether this was canvassed in the ET1 noting in particular that there was reference to *"I made a formal complaint of bullying by a manager who previously bullied me (complaint upheld*) *Trust policy requires complaints to be dealt with within 28 days*". Upon hearing the respective submissions and considering the matter, the Tribunal concluded that the Respondent was correct in its submission that the sought-after matter for inclusion in the list was not properly set out in the ET1 as an alleged repudiatory breach. The reference to the complaint not being dealt with in 28 days was to the 2020 complaint, not the 2016 one, and the extracted sentence was only background material to the fact that a complaint had been previously made against Mrs Saunders <u>not</u> that it was not adequately dealt with.

7. In the circumstances, the Claimant was invited to make an application to amend if he wanted to pursue the 2016 complaint not adequately being addressed as a freestanding repudiatory breach (the Respondent having accepted in its submissions that reference to it as part of the background was permissible). The Claimant stated that he did want the matter to be considered as a repudiatory breach and made his application. He stated that the fact that the Respondent did not take any relevant action following the 2016 complaint being upheld meant that he was excluded because of the previous conduct findings and that this was a continuing course of conduct. It all flowed to the new complaint it was alleged, that Mrs Saunders refused to work with him, and it greatly impacted him.

8. Objecting to the amendment, Mr Allen explained that the matter was considerably out of time to be raised, that it had not been canvassed in witness evidence, it was still not clear precisely what the amendment was and that allowing the amendment would mean the trial would need to be delayed and there would be difficulty responding. Additionally, reference was made to the resignation letter not canvassing this matter.

9. The Tribunal refused the application to amend and gave its reasons for doing so orally at the time in brief and sets them out here. Firstly, the Tribunal reminds itself that applications to amend an ET1 are at the discretion of the tribunal. In exercising or refusing to exercise such discretion rule 2 of the overriding objective applies and following *Selkent Bus Company Ltd v Moore* [1996] IRLR 661, a tribunal should carry out a careful balancing exercise should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The Tribunal further notes that *Vaughan v Modality Partnership* [2021] ICR 535 stresses the importance of the real practical consequences of the consequences of allowing or refusing the amendment in approaching the core balancing exercise of the balance of injustice and hardship. Applying this to the application to amend:
    9.1. the main concern is that if the application were allowed the trial would be prejudiced in that it was unlikely that any hearing could be concluded in the 2 days that remained of what was originally a 3-day listing. There was some force in further scope of the precise amendment being unclear but even if it were limited to simply not adequately addressing the complaint that had been upheld, there would still be evidence required over what occurred post-complaint. The Respondent would need to take further instructions and in so far as matters relied upon mental decision making and discussions that evidence may be difficult to retrieve, so in fact the Respondent itself may face forensic prejudice;

9.2. in contrast, refusal of the amendment did not deprive the Claimant of the very claim he was making. His constructive unfair dismissal claim could still progress and, there would need to be one of the more recent matters which were clearly part of the claim that needed to be made out for it to succeed (as the 2016 issue in isolation was quite stale and unlikely to found by itself a successful constructive dismissal claim). His case theory of a continuing course of conduct was also not put at jeopardy and he could still rely upon the 2016 matter by way of background.

9.3. Accordingly, on balance having regard to all factors and the overriding objective, the amendment was refused.

C) Issues

10. Having refused the application to amend, the Tribunal returned to the list of issues to discuss these with the parties and consider the pleadings. Some amendments were made to the list provided by the Respondent, but all agreed that the following were the live material issues in a liability only hearing:

10.1. Repudiatory breach issue: Whether there was a breach of the implied term of mutual trust and confidence, that is did the Respondent, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between it and the Claimant? The factual allegations that were said to amount to a breach individually or cumulatively were:

10.1.1. Matters complained about in the Claimant's 2020 complaint and investigated by Mrs Douglas-Todd (all of which the Respondent denied factually), namely:

10.1.1.1. The Claimant was excluded by Mrs Saunders from an area of his work:

10.1.1.1.1. by Mrs Saunders not inviting the Claimant to Covid groups in Spring 2020 – most importantly the Covid 19 people group prior to the 20 May 2020 invitation;

10.1.1.1.2. on 11 May 2020, Mrs Saunders telling the Claimant that she would be seeking external advice from Asima Chowdhury at SECAS;

10.1.1.1.3. on 22 May 2020, Mrs Saunders told the Claimant not to contact staff as she had other ideas.

10.1.1.2. On 28 May 2020, Miss Dymond telling the Claimant that "*the problem with you is that you are difficult to work with*";

10.1.1.3. (as a result of the matters above), HR leadership had essentially expressed a vote of no confidence in the Claimant without offering evidence to support this.

10.1.2. Matters relating to the process after the complaint but prior to the communication of the resignation of:

10.1.2.1. Delay in the progress of the complaint (the outcome was not communicated until 21 October 2020);

10.1.2.2. A failure to add an additional issue or issues to the complaint –set out in the Claimant's appraisal form on 10 August 2020 – primarily excluding him from a section on Diversity in a People

Plan completed (he says) on 9 September 2020 (the Respondent denying there was any agreement to add this matter);

10.1.2.3. A failure to carry out a risk assessment recommended by Occupational Health on 21 August 2020;

10.1.2.4. The manner in which Mr Hancock dealt with C at the meeting on 21 October 2020 when he was delivering the result of the investigation

10.2. Reason for resignation issue: Did the Claimant resign in response to the breach?

10.3. Affirmation issue: Did the Claimant affirm the contract before resigning?

D) Findings of fact

11. The Tribunal heard and considered much evidence. It made the following findings of fact on the balance of probabilities of those areas that were material to the decision it had to make.

12. The Claimant started employment with the Respondent on 8 September 2009 and his employment ended following his resignation from his post with notice given on 30 October 2020 (p.481) which expired on 31 January 2021.

13. Throughout his employment with the Respondent, he was employed as an Equality and Diversity Manager (the Tribunal note the title changed to be "Equality, Diversity & Inclusion Manager" but it remained the same role and the old title was still sometimes used) and whilst initially a Band 8A of Agenda for Change pay scale moved to Band 8B (p.102). Whilst the Claimant's employment contract, pp.36-37, uses the term manager the Tribunal accepts that in fact he was, as the Claimant describes himself in his witness statement, the "*lead*" for Equality and Diversity in the Respondent organisation and that he was part of the Senior Leadership Team. In terms of the value the Claimant had within the Respondent and the esteem he was held the Tribunal further accepts that he was seen a key individual in relation to his role and well respected for his Equality and Diversity specialism. There were no formal performance issues that the Respondent had with him, and both Mr Hancock (the Chief Executive Officer) and Mrs Saunders (Executive Director of Human Resources and Organisational Development at the material time) spoke of the Claimant in complimentary terms in live evidence.

14. Upon Mrs Saunders promotion to Executive Director of Human Resources and Organisational Development ("HRD") in 2015, she formally commenced line managing the Claimant. Prior to the promotion, Mrs Saunders and the Claimant had a good working relationship.

2016 complaint

15. The positive working relationship between Mrs Saunders and the Claimant took a turn for the worse when the Claimant raised a formal complaint against Mrs Saunders which was investigated by Mrs Douglas-Todd (an independent investigator whom at the time was Managing Director of Diversa Consulting Ltd) under the auspices of the Respondent's Dignity at Work Policy. Mrs

Douglas-Todd on 29 August 2016 produced her report into the complaint and this:

15.1. rejected the complaint of equal pay, the Claimant complaining that as a male he was being paid less than HR Managers who were all female;
15.2. upheld at least one aspect of the bullying and harassment complaint, namely an incident where Mrs Saunders accepted that she shrugged her shoulders at the Claimant during a meeting but classified it as being a consequent of her actions and perceived impact by the Claimant and not intentional bullying;
15.3. upheld an allegation that the grievance policy had been breached in that the grievance had not been resolved promptly;
15.4. upheld an allegation that the pay band review had been protracted.

16. One of the key recommendations of the report was that there should be a mediation between Mrs Saunders and the Claimant. It was common ground that this mediation never occurred. In fact, what happened was the Claimant moved from the HR Directorate to the Clinical Directorate, which meant that whilst his role remained the same, and he would still have interactions with HR, he was no longer line managed by Mrs Saunders.

17. As an aside the Tribunal notes that whilst the shorthand 2016 complaint was used by the parties, that relates to the year of the outcome and some aspects of the complaint dated back to around 1 July 2015 (and were initially raised around that time).

<u>Covid-19 and its effects on BAME workforce</u>

18. The Covid-19 pandemic led to the first lockdown in England that commenced on 23 March 2020. The Government required non-essential businesses and workers to stay at home. As the Respondent's business was an essential service and provided first line clinical care during a global pandemic its frontline workers were not only at work but incredibly busy, and as widely acknowledged by the public were putting themselves at considerable risk.

19. The Claimant, who was not a front-line worker and consistent with others in the Respondent who were not, worked from home since the imposition of the first lockdown. During this period, he noted that there was an increasing body of evidence that Covid-19 was having a disproportionate impact on Black, Asian, and Minority Ethnic ("BAME") people. Indeed, the Claimant noted that BAME NHS staff appeared to be dying at a greater rate when compared to the proportion of workforce that identified as white.

20. As a result of this concern that Covid-19 was having a disproportionate impact on the Respondent's BAME Workforce, the Claimant in April 2020 raised the issue at a Senior Leadership Team and him and Mr Holbrook (Freedom to Speak up Guardian) made phone calls to every one of the Respondent's BAME workforce to ensure that they were receiving adequate support and identify any steps the Respondent needed to take in relation to the particular risks they faced.

21. During this same period, so early in the first lockdown, the Respondent had several Groups formed or assigned to deal with specific issues that arose from

the Covid-19 pandemic. Indeed, there was a Covid Board that met periodically. The Claimant never attended the Covid Board and was never formally invited to attend it. Of the witnesses who gave evidence to the Tribunal, Mr Hancock (Chief Executive) and Mrs Saunders (HRD) had attended the Covid Board, although in relation to Mrs Saunders it was clear that it was only as and when, and she was reporting back issues that related to HR or workforce function. In relation to the HR function there was also the Covid-19 People Group.

Covid-19 People Group and risk assessments

22. Once or twice a week there were remote meetings that involved the Covid-19 People Group. These started at around the time the first lockdown was imposed and initially the Claimant was not invited, and did not attend, the Covid-19 People Group. Indeed, the terms of reference of the Covid-19 People Group listed some 10 people but did not include the Claimant (p.117).

23. In parallel with the actions that the Respondent was taken and its internal groups, there were other national organisations in the health sector that were meeting to deal with aspects of Covid-19 and the workforce. One such group was the Ambulance HRD Network and the National Ambulance BME Forum (also referred to as the National Ambulance Diversity Forum). The latter organisation had as deputy chair Asmina Chowdhury who was employed as an Inclusion Manager at South-East Coast Ambulance Service NHS Foundation Trust. These organisations also noted that the disproportionate impact Covid-19 was having on the BAME workforce. Indeed, in the bundle was a letter of 7 May 2020 in draft from the Chair of the National Ambulance BME Forum to Ambulance Service Colleagues setting out the support it had to such BME (Black Minority Ethnic) that included reference to NHS employers' guidance about risk assessments for staff.

24. At this stage it is convenient to deal with two factually discrete issues that are relevant to the claim, that is the allegations on 11 May 2020 that Mrs Saunders told the claimant that she would be seeking external advice from Asima Chowdhury, and that during this period and before the 20 May 2020, the Claimant should have been invited to the Covid-19 People Group (see paragraphs 10.1.1.1.1-10.1.1.1.2 above).

25. On 11 May 2020, there was a telephone conversation between Mrs Saunders and the Claimant. The subject matter of a BAME risk assessment, given the disproportionate impact Covid-19 was having on these ethnic groups, was raised and the Claimant was asked to do this task alongside Ms Pickard (Health, Wellbeing and Engagement Manager) and John Dunn. The Tribunal finds that Mrs Saunders did not tell the Claimant that she would be seeking external advice from Asima Chowdhury, or any words to the effect that Asima Chowdhury view on the risk assessment was being taken over the Claimant. The Tribunal finds that Mrs Saunders made at most passing reference to the work Asima Chowdhury was doing in National Ambulance BME Forum as that was related to the fact that the Claimant, and others, were being tasked with dealing with the BAME risk assessment issue. The reasons for reaching these findings on this critical aspect are:

    25.1. shortly before this date, 11 May 2020, there was email traffic between staff at the Respondent and those on the "*BME Forum*" which included Mrs Saunders and on some Asimina Chowdhury on 6-7 May 2020 and 11 May

2020 (pp.149-156 and pp.185-188). Therefore, it is likely that this work which related to the same issue that gave rise to the BAME risk assessment the Claimant was asked to do, as the subject matter expert on equality issues, would have been referenced and potentially including reference to the deputy chair that the Claimant would have known;

25.2. there is no contemporaneous or near contemporaneous document that expressly alleges that Claimant relied upon before the Tribunal, it was only nearly a month later, on 4 June 2020, that it featured as part of his internal grievance (p.216);

25.3. on 12 May 2020, the Claimant's email refers to "*we agreed you would get back to me with any other actions once you have sought further advice. As you know I am in the process of writing our BME risk assessment…*" and Mrs Saunder reply of the same date (both of which can be found on p.189) stated "*I am slightly confused as I have already received the risk assessment from Lisa which I understood had between written with you, John and OH….Re next steps, I have a meeting with Lisa to discuss next steps, but will lead to a certain extent by advice from yourself…As discussed yesterday, my understanding from NHS employers guidance (more of which is expected this week) is that we should proactively offer an individual risk assessment*". None of these emails refer to Asima Chowdhury, and pertinently Mrs Saunders' reply specifically refers to being led by the Claimant and notes national guidance;

25.4. on 11 May 2020 there was an email sent by the Claimant to Mrs Saunders that stated "*FYI. As discussed*" and included a chain from 27 April 2020 between the Claimant and Asimina Chowdhury (pp.178-184). The Claimant sought to rely upon this as evidencing that he was showing Mrs Saunders that there was no need to get 'advice' from Asimina Chowdhury as she was getting advice from him. However, the email to Mrs Saunders does not state anything, it is merely an update and the chain itself concerns the Respondent's approach to making welfare calls as opposed to anything directly about risk assessments;

25.5. indeed, there is no email from Mrs Saunders to the Claimant referring to Asimina Chowdhury at this time at all let alone advice and the Claimant was being tasked with producing a document;

25.6. in live evidence, Mrs Saunders confirmed she was not seeking 'external' advice and that she believed the Claimant may have been confused with references made with having regard to national guidance before doing any risk assessment (which is consistent with the email extracted at paragraph 25.3 above);

25.7. as an aside in live evidence the Claimant accepted that any sentiment that Mrs Saunders would be speaking to colleagues at national organisations, such as Ambulance HRD, about what is happening and sharing practice would be fine and it was only getting specific advice from Asimina Chowdhury who was junior to the Claimant that was objected to.

26. On 20 May 2020, the Claimant was invited to attend the Covid-19 People Group by email from Mrs Saunder (p.208). The Claimant alleges that he should have been invited to this much earlier and there is a dispute between the parties as to the nature of these meetings. In short, Mrs Saunders, and the Respondent's, position was that it was initially something that focused on resourcing issues, and it was only later that it turned to other matters such as staff shielding, self-isolation issues and so on. In contrast, the Claimant believes that it would have always had some 'equality' type element or input. The Tribunal finds that

initially the Covid-19 People Group did focus on resourcing issues, which would not necessitate the Claimant's attendance, and it was only circa 11 May 2020 that it turned its attention much broader to encompass 'equality' type elements or inputs. It reaches this finding for the following reasons:

26.1. the Claimant accepted in live evidence that he had no evidence to gainsay what the Respondent was saying occurred in the meetings prior to his attendance and further that if it was only about resources he would not be expected to be invited;

26.2. the terms of reference of the group (pp.116-118) appear 'resource' focussed. It is not exclusively about resources, but it does not have matters that on reasonable reading touch upon diversity, equality, and inclusion as such (the Claimant's role and expertise);

26.3. the email of 20 May 2020 corroborates and is consistent with this, it states in so far as material "*As you maybe* [sic] *aware I have a workstream looking at a range of Covid19 related workforce matters, the support for those staff identified in the vulnerable groups and BAME workforce is an increasing focus of this group. As such I would welcome your attendance at this meeting (which meets virtually every Wednesday, along with a short briefing on a Monday for any urgent matters) as our ED&I lead to continue to guide and develop this very important element of our agenda. I will send over under separate cover the ToR for the group (<u>which we are currently reviewing as we recognise its original focus has shifted slightly as we enter a new phase of the pandemic</u>) and will forward you the invite for next weeks* [sic] *meeting.*" (<u>emphasis added</u>);

26.4. in live evidence, Mrs Saunders stated that the focus shifted from a resourcing focus in the "*early part of May 2020*", and she denied the invite was related to Prof Helen Young passing along a complaint on 19 May 2020 (p.205), but that it happened before probably 11-12 May 2020. This also ties in with the date the Respondent assigned the BAME risk assessment to the Claimant, so such issues were likely to now be on the agenda at the Covid-19 People Group.

<u>21 May 2020 Senior Leadership Team meeting and BAME risk assessment</u>

27. On 21 May 2020, the Claimant attended a Senior Leadership Team meeting. It was also attended by Mr Hancock and Mrs Saunders amongst others. One of the matters canvassed was further contact with the BAME staff. It was after this meeting that the Claimant alleges that Mrs Saunders had been told not to contact staff as she had other ideas (see paragraph 10.1.1.1.3 of the issues). The Claimant's case being that the action of contacting staff had been expressly approved, or assigned, by Mr Hancock at this meeting, and that Mrs Saunders was side-lining the Claimant. Whilst the Claimant thought this meeting was on the 22 May 2020, he readily accepted in live evidence that he may have got the date wrong and the email of 21 May 2020, p.210, in relation to "*Just had a thought in the car on the way home 're contacting our BAME staff. Can we catch up (might be useful to include Simon too) before more emails are issued*" supports the meeting occurring on 21 May 2020 and not the 22 May 2020, and the earlier concession and this document are the basis for the Tribunal concluding that the meeting was on the 21 May 2020.

28. In terms of the content of this meeting it was explained by Mr Hancock in live evidence that there are no minutes of these meetings. They are not formal as such but a 'talking shop'. He denied expressly assigning such a task at the

meeting. The Tribunal accepts this evidence, there is nothing in the documents that supports the assigning of a task for which Mrs Saunders was allegedly overruling. Moreover, the Tribunal finds that the conduct after the meeting by Mrs Saunders was wanting to discuss a reflection post meeting that she had "*in the car*". It was not trying to take away the Claimant's role or side-line him – indeed, as already noted above, and below, he was specifically assigned the task of the BAME risk assessment and was being invited to the Covid-19 People Group because of such matters. Furthermore, the Tribunal accepts Mrs Saunders evidence that the concern as to contacting staff directly was because of a previous complaint by one staff member and what she termed "*governance issues*" so that it may be better to invite staff to contact the Claimant.

29. On 27 May 2020, the Claimant was asked for his input to the risk assessment to cover off the BAME aspects by the Covid-19 People group meeting and by email (pp.211-214). By 3 June 2020, the Claimant had completed his work in relation to the risk assessment (pp.219-221). The following day, 4 June 2020, Mrs Saunders asked the Claimant to submit an Equality, Diversity, and Inclusion paper to the Covid-19 People Group (p.275).

<u>Conversation with Miss Dymond</u>

30. Before the Tribunal the Claimant alleged that he had a conversation with Miss Dymond on 28 May 2020 and that she had said, during a short conversation, that Miss Dymond (Assistant Director of HR) told him "*the problem with you is that you are difficult to work with*" (paragraph 10.1.1.2 above). Miss Dymond was clear that whilst there was a telephone conversation, although the date was 3 June 2020 and it was a lengthy conversation of 30 minutes or so, she never made such a statement.

31. The Tribunal finds as a fact that Miss Dymond did <u>not</u> make the statement that the Claimant relies upon ("*the problem with you is that you are difficult to work with*"), but that there was indeed a discussion between them on 3 June 2020 of some 30 minutes. So, in short, Miss Dymond's version is preferred over the Claimant's account. This is because:
    - 31.1. Miss Dymond's phone records were disclosed and showed that <u>no</u> phone call was made on 28 May 2020 (p.359), they do show a call on 3 Jun 2020;
    - 31.2. the phone records also show that this call lasted 33 minutes and 23 seconds (p.359);
    - 31.3. people were working remotely and so it was more likely that phone calls happened on days that meetings occurred between the participants, Miss Dymond was not present at any meeting on 28 May 2020, but there was a Covid-19 People group the 3 June 2020, so it made sense for there to be a telephone call interaction on that day;
    - 31.4. the Claimant's account that it was a short call was contradicted by the telephone records (p.359), and so he was wrong about two factual elements of it, the date, and the length of time;
    - 31.5. the reliance the Claimant made on having mentioned a similar thing to another person does not mean that it happened. Of course, that is corroborative evidence of some nature but repeating a perception or erroneous account to several people does not mean the underlying perception or account is correct;
    - 31.6. it is unlikely that such a statement would be made by an experienced HR professional in a 30 or so minute call. In contrast, the Claimant's account does not have to be dishonest, but one can see how a mis-recollection can

occur as if two separate passages are combined or the difficulties discussed not being to do with an individual and so on.

Complaint against Mrs Saunders and Miss Dymond

32. On 4 June 2020, the Claimant submitted a complaint against Mrs Saunders and Miss Dymond (pp.215-218). In relation to its content, it suffices to note that it canvassed the matters the Claimant relies upon as being repudiatory breaches at paragraphs 10.1.1.1.110.1.1 above.

33. At the time of making the complaint the Claimant's line manager, Professor Young was designated to manage national covid services. As a result, Jane Campbell took over as the Claimant's line manager, but her role as Patient Care Director had significantly increased in terms of day-to-day workload owing to Covid-19 and the infection prevention and control to patients and staff. Dealing with infection control matters and clinical guidelines in relation to staff interactions with Covid-19 patients became a significant priority and a large part of her work.

34. In late July 2020, the Claimant escalated the complaint to Mr Hancock as he had been informed that no steps had been taken in relation to it. The Tribunal finds the reason for the lack of action was the Claimant's line manager being busy with Covid-19 effects that it was having to her ordinary job. It was at this time that Mr Hancock took over line management responsibility and indeed he made a referral to occupational health (10 July 2020: pp.316-323).

35. Mr Hancock contacted on 6 August 2020, Mrs Douglas-Todd to see if she would independently investigate the complaint, as she had done in the 2016 complaint, and she agreed to do so by the following day (pp.314-315 being an exchange of emails of this nature). In August (28th) the Claimant was interviewed by Mrs Douglas-Todd (pp.327-332 being a note of this meeting).

36. On 21 August 2020, Occupational Health produced a report following the earlier referral in relation to the Claimant. Material to the present dispute was that amongst other matters it recommended "*completing a Stress Risk Assessment as soon as possible to decipher which areas of Ludlow's role [the Claimant's role] triggered his current mental health difficulties*" (p.325). This is the basis of allegation at paragraph 10.1.2.3 above.

37. During September 2020, Mrs Douglas-Todd interviewed several individuals in relation to the complaint, including Mr Holbrook, Mrs Saunders, Miss Dymond, Ms Pickard. The Tribunal accepts the evidence that summer holiday, or summer period, had made concluding interviews more difficult as many people were away.

38. On 8 October 2020, the Claimant had an appraisal meeting with Mr Hancock. It was at this appraisal with Mr Hancock that the Claimant alleged additional issues had been raised which should have been added to his complaint that was originally presented on 4 June 2020 (see paragraph 10.1.2.2 above). However, the Claimant accepted before the Tribunal that the date he had ascribed, 10 August 2020, was wrong in live evidence and it became common ground that it was on 8 October 2020. There was after all the appraisal review form recording this date (p.423) which recorded that "*I was not party to this*

[People Plan which included a section on Equality and Diversity] (p.424) *and saw it for the first time at the Board meeting on 24 September, I am strategic lead for the Equality and Diversity for the Trust and yet again I have been excluded from a*[n] *important part of my role….*". The Tribunal finds the matter was raised during the appraisal that is akin to the matter set out as being a breach in paragraph 10.1.2.2 above, but there was no agreement or promise by Mr Hancock that this matter would be added to the complaint being investigated. The Claimant in live evidence stated initially there was an express agreement, or promise, that it would be dealt with as part of the complaint, but later stated "*My expectation was it would be dealt with*". The Tribunal finds that is what occurred, there was no express promise or agreement, but it was in fact at most an expectation only. Mr Hancock denied any agreement and stated that an appraisal was not the forum for adding to a complaint which after all the Claimant could do by getting in touch with Mrs Douglas-Todd (but which he accepted in live evidence he did not do), and he indicated to the Claimant was the correct course to adopt. The Tribunal accepts Mr Hancock's evidence. There is nothing in the form that stipulates an agreement is reached, there is no email or other document setting out such an agreement or promise at the time and it is indeed not an appropriate forum for adding to grievances. The section of the form was about well-being and concerns an employee has and any purported agreement one would expect to therefore be followed up or featured in some other documentation. Equally in the circumstances one would expect a manager to do as Mr Hancock stated he did, in essence refer the employee to the correct way of raising this if he wanted to add or purse it as a complaint (grievance).

39. On 21 October 2020, the Claimant and Mr Hancock had a meeting at which the outcome of the complaint was addressed. It is at this meeting that Mr Hancock was alleged to have dealt with inappropriately – allegedly by raising his voice/shouting at the Claimant, losing his temper (further and better particulars p.34). This is the crux of the repudiatory breach at paragraph 10.1.2.4 above. The Tribunal finds that Mr Hancock did not raise his voice, shout, or otherwise behave inappropriately. It reaches this finding because:
    - 39.1. there was no near contemporaneous document showing otherwise;
    - 39.2. it was common ground that the Claimant had not received at this stage the written report and made clear he needed to see it. The Claimant was provided with this, and it makes little sense for Mr Hancock to get annoyed or act in an inappropriate manner to such a request and to do all this in a short space of time given the meeting was not particularly long;
    - 39.3. it was common ground that the Claimant and Mr Hancock had a good relationship and mutual respect, so there appears no reason for Mr Hancock to suddenly lose his temper;
    - 39.4. there was a right to appeal any outcome and Mr Hancock was not personally involved in the complaint. It therefore makes little sense for Mr Hancock to be incensed and for a suggestion the Claimant would be told to 'move on' when there was a right to appeal under the procedure;
    - 39.5. others had given evidence of Mr Hancock's demeanour being mild and circumspect usually, and whilst someone can of course lose their temper, there did not appear to be any reason why Mr Hancock would do so on this occasion.

40. Soon after this meeting the Claimant was provided with the full investigation report. The full report was dated 17 October 2020 and rejected in essence the Claimant's complaint (pp.436-448).

Resignation

41. On 30 October 2020, the Claimant resigned by letter to Mr Hancock (p.481). This stated:

    Further to our recent conversation, I write with a heavy heat to tender my resignation from the post of Equality and Diversity manager at SCAS. I have served the Trust faithfully for the past 11 years and hope I have made some contribution to the Trust.

    I am resigning because my position at SCAS has become untenable, in light of issues beyond my control that I have had to face in the last 6 months. (my Complaint)

    I am mindful my contract of employment requires me to give three months' notice, my resignation will therefore take effect from the 1st November 2020, my last day of employment will be the 31st January 2021 (subject to A/L entitlement).

    I will endeavour to ensure a smooth hand over of my duties

E) Relevant legal principles

42. The Employment Rights Act 1996 ("ERA") at s.94(1) provides "*An employee has the right not to be unfairly dismissed by his employer*". By virtue of s.95(1)(c) ERA, an "*employee is dismissed by his employer if…(c) he employee terminated 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*". This is commonly referred to as a constructive dismissal, that is the employee resigns because of the employer's actions but the employer is treated as having dismissed the employee.

43. Section 98 ERA sets out whether a dismissal is fair or unfair, however in the present case the Respondent did not seek to advance any fair reason and never sought to advance that any constructive dismissal could be fair.

44. In terms of relevant case law, the Tribunal had regard to the following:
    44.1. the implied term of mutual trust and confidence – an employer will not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee – has two distinct parts and conduct which is objectively likely to destroy or seriously damage is not repudiatory if the employer had reasonable and proper cause for its actions (*BG plc v O'Brien* [2001] IRLR 496 at [23] and [35]);
    44.2. breach of the implied term is by definition repudiatory but not every act, even things unreasonable, amount to a breach of the term, one must focus on the severity required by the wording "*destroy or seriously damage*", so what is required is the employer making its clear that it no longer intends to be bound by the employment contract (*O'Brien* at [27], *Eminence Property Developments Ltd v Heany* [2010] EWCA Civ 1168 at [61],

Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 at [17]; *Lewis v Motorworld Garages Ltd* [1985] IRLR 465 (CA) at [26]; *Leach v The Office of Communications* [2012] IRLR 839 at [53]);

44.3. an objective contract approach is taken to determine if there was a breach and once a breach has occurred it cannot be 'cured' by the employer, the employee has the right to elect what to do (*Buckland v Bournemouth University* [2010] EWCA Civ 121; [2010] IRLR 445 at [22]-[23], [29] and [52]);

44.4. for a constructive dismissal claim to succeed the repudiatory breach found by the tribunal need only be part of the reason for resignation, it does not have to be the sole or principal reason (*Wright v North Ayrshire Council* [2014] IRLR 4 at [17]);

44.5. the relevant summary of affirmation in *Hadji v St Luke's Plymouth* UKEAT/0095/12/BA at [17], along with the approach taken in cumulative breach/last straw cases in *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978 at [51] and [2018] IRLR 833 and *Williams v Alderman Davies Church in Wales Primary School* [2020] IRLR 589 (EAT) at [31]-[33].

F) Submissions

45. Mr Allen's submissions on behalf of the Respondent were contained in written representations, as already referred to above, in addition to oral submissions which emphasised the key points. In brief, without detracting from the entire written document that was considered by the Tribunal along with the oral submissions, the key aspects were:

45.1. it was submitted that much of the case was a factual dispute, and that the Respondent's witnesses were credible and the Claimant by contrast had been shown to not be a credible witness (his term was "*inherently unreliable*"). Moreover, on finding some matters and issues in the Respondent's favour, as the Tribunal was invited to do, it would necessarily affect consideration of other matters that were in dispute;

45.2. not being invited to something is not the same as being 'excluded', which was the allegation brought in relation to the repudiatory breaches;

45.3. the complaint did not actually refer to the Covid Board rather it was focussed on the People Group, and at p.327 in the investigation itself "*As part of dealing with Covid pandemic SCAS set up a Covid 19 people group, but I was not invited to that board*". In essence therefore any passing reference to the 'board' was in fact synonymous for the People Group;

45.4. the delay before addressing the complaint was owing to the exceptional times and early months of the pandemic and not indicative of conduct calculated or likely to destroy trust and confidence;

45.5. the issue of lack of a stress assessment ignores that there was nothing in fact to "*decipher*" as the stress or mental health difficulty was all wrapped up in the complaint;

45.6. affirmation arguments were only being raised in relation to the failure to carry out a risk assessment and delay in progressing the complaint, it was accepted that all other matters were not waived/affirmed by the Claimant.

46. The Claimant made oral closing submissions only and acknowledged that the issues had been agreed at the start. He stated that the Tribunal had heard evidence that he had been excluded from meetings and that advice was sought externally, as well as him being described as difficult to work with. In his 11

years no such things had ever happened. Suddenly he had been cast as aggressive, confrontational, and misleading. This was all despite the numerous accolades. In fact, the Claimant submitted, in terms of credibility it was Mr Hancock who was the least credible witness as he did not know the answer to most things, despite being the national lead for well-being. Indeed, he agreed to frame it publicly as a retirement despite knowing that the Claimant was claiming it was a constructive dismissal and this leads one to question his values. Further, the grievance took considerably longer than it should have. That affected the Claimant's mental health, and this was confirmed by Occupational Health, which further confirmed not dealing with the grievance adequately and in good time. The Claimant therefore invited the Tribunal to find in his favour.

G) Analysis and conclusions

47. The Tribunal sets out its analysis and conclusion on the claims, having regard to the agreed issues which are set out at paragraphs 10.1-10.3 above.

Repudiatory breach issue

48. In approaching the issue of the repudiatory breach, the Tribunal will consider each act in turn individually and then considered cumulatively the effect the facts found would have on the implied term.

49. The first alleged breach to be considered is that the Claimant alleges he was excluded by Mrs Saunders not inviting him to Covid groups in Spring 2020 – most importantly the Covid 19 people group prior to the 20 May 2020 invitation (see issue at paragraph 10.1.1.1.1).

50. As set out at paragraph 26 and its subparagraphs above, the Tribunal has found as a fact that it was not until c.11 May 2020 that the Covid-19 People Group turned its attention to features broader the those on resourcing and considered issues that touched on 'equality type issues' that would have been useful to have the Claimant's input. The result of this factual finding is that for the period pre-11 May 2020 the fact that the Claimant was not part of the membership of the Covid-19 People Group was not a breach of the implied term of mutual trust and confidence. Firstly, objectively not inviting or making someone a member of a group where the individual has nothing material to contribute is not conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence. The live evidence of the Claimant reinforces this conclusion, he accepted that he would not have expected to be invited to such a group if the focus was on resources. Secondly, and in the alternative, there was reasonable and proper cause for the very conduct that is alleged to be something that may be calculated or likely to destroy trust and confidence: the nature of the group and its terms of reference did not materially encompass the Claimant's role. It is of course often the case that membership of groups or meetings is limited or focussed on those most likely to require contribution.

51. However, there then follows the period between 11 May 2020 – 20 May 2020. At this stage, as found on the facts above, see once more paragraph 26 and its subparagraphs above, there was a change in matters discussed, and these did touch upon things that a subject matter expert on 'equality' issues such as the Claimant was of real value. Not only was in effect this conceded by Mrs Saunders in live evidence but the entire purpose of the p.208 20 May 2020 email that "*welcome*[d]" the Claimant's attendance of this group. It follows for a period of approximately 2 weeks, so potentially 2 or so meetings (it met every Wednesday and potentially a short briefing on Monday for urgent matters) the Claimant 'missed' owing to a lack of invite.

52. The Tribunal has in mind the implied term having two distinct parts as emphasised in *O'Brien* (see paragraph 44.1 above). For this period, the only explanation offered by Mrs Saunders was in effect an oversight – it was her intention to invite the Claimant, but it just dropped off her "*mental to-do list*". The Tribunal acknowledges that Mrs Saunders was no doubt very busy during this period given it was the early stage of the pandemic in England and the first lockdown. However, this does not amount to a 'reasonable and proper cause'.

53. The next question therefore in the analysis is whether the lack of invite to 2 or so meetings was objectively conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. At this stage the Tribunal pauses to briefly deal with Mr Allen's submission that in fact what had occurred on the facts, as found by this Tribunal, did not amount to "*exclusion*" and that was the terminology in the list agreed at the start of the hearing and the Tribunal notes that was also the material term in the further and better particulars at p.32, which referred to "*excluded*": "*On the 19th May 2020 I wrote to my line manager Prof. Helen Young to complain about the fact that I have been excluded from all covid boards in my capacity as the strategic lead for equality and diversity for the Trust…*". This submission is rejected. Excluded simply connotes in everyday speech denying someone access to something and it is reasonable for a person who is not part of the membership and not invited to a 'meeting' or group to classify this as exclusion or being excluded. The fact that the Claimant did not insist on attending with Mrs Saunders and so had not been expressly precluded following such a request not does not materially make a difference. Furthermore, the issue with semantics do not cause any prejudice to the respective parties or cause a problem with the evidence before the Tribunal: the Respondent knew the case it was meeting and merely altering the language does not make a material difference as it was plain the issue was not being invited to the meeting deprived the Claimant of input he should have been afforded.

54. Returning to the main consideration, whether the lack of invite to 2 or so meetings amounts to conduct likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, the Tribunal reminds itself that the conduct must cross a threshold of severity to show that the employer does not in effect intend to be bound by the contract of employment (which is emphasised in *O'Brien, Heany, Woods, Lewis* and *Leach* see paragraph 44.2 above). In this case it concludes that there has been <u>no</u> breach on the facts. The Claimant was after all still included in his main role and tasked at the time with dealing with the BAME risk assessment aspects.

His role was still being used. Moreover, missing 2 or so meetings where he may have input does <u>not</u> go so far being conduct that would "*destroy or seriously damage*" the relationship in the sense of the employment contract not being upheld. In coming to this conclusion, the Tribunal acknowledges the genuine feelings of the Claimant and that in effect it may have been his complaint to Prof Young, which was passed on to Mrs Saunders, that prompted his invite and that he should have been invited earlier. But at this stage the conduct the Tribunal concludes did not amount to a breach and so the Tribunal is not impermissibly applying a cure doctrine (which following *Buckland*, see paragraph 44.3 above, would amount to an error). The Tribunal reminds itself that the test is objective so even if the Claimant's case were believed and Mrs Saunders did not want to invite him and only did so because of Prof Young's involvement that makes no difference to the objective analysis, it would have required either a much longer period of being absent of the group where equality type aspects were being canvassed or a refusal to include him following Prof Young's intervention to objectively be a breach to the implied term. But as set out that is not what happened in this case and so there is no repudiatory breach.

55. Finally, the Tribunal addresses a point it first raised itself with the parties during the hearing which was that the focus on evidence was on the Covid-19 People Group but the allegation in the issues was to "*Covid groups*" and there had been evidence of a Covid Board, which was a distinct group. The Claimant was never invited to the Covid Board, or indeed other Covid groups, that was the evidence before the Tribunal. Whilst that was factually not in issue, the Tribunal accepts the submission of Mr Allen that the use of Covid Board had been used a synonymous with the Covid-19 People group as evident from the Claimant's complaint at p.217 where there is no mention of Covid Board and at p.215 the only group mentioned being the "*people group*". The Tribunal did not have before it any evidence of other groups that the Claimant was alleging he should have attended or explanation why. In these circumstances the interpretation that the issues were in fact limited to the Covid-19 People Group was fair and it would not be proper, and the Tribunal was not able, to make findings that the Claimant should have been invited to the Covid Board, or any other group. Accordingly, the analysis of the repudiatory breach is limited to that for which specific evidence and extensive argument was made; namely lack of invitation to the Covid-19 People Group before 20 May 2020.

56. The above analysis is based on the facts found by a Tribunal being an 'individual' repudiatory breach. The Tribunal will, as foreshadowed, return to consider if the lack of invite could with other facts found cumulatively amount to a breach of the implied term of trust and confidence.

57. The second, third and fourth alleged breaches, see issues at paragraph 10.1.1.1.2, 10.1.1.1.3, 10.1.1.2 above, can be dealt with much more shortly. The Tribunal has not found the facts alleged by the Claimant that underpin the alleged repudiatory breaches (see paragraphs 25, 27-28, 30-31 above). Accordingly, there is no breach of the implied term and furthermore the findings of fact do not suggest material that cumulatively could be relevant given the innocuous nature of the events as found by the Tribunal.

58. In terms of the fifth alleged breach, "*HR leadership had essentially expressed a vote of no confidence in the Claimant without offering evidence to support*

this", see paragraph 10.1.1.3, this is not in fact properly considered a freestanding factual breach. It is an explanation for why the events individually or cumulatively should lead to a conclusion that a breach of an implied term of mutual trust and confidence when a cumulative approach is taken (although in fairness the same could be said for if an individual approach is taken).

59. Turning to the sixth alleged breach, the delay in progressing the complaint, 10.1.2.1 above, it is common ground that a complaint was first made on 4 June 2020 and only resolved on 21 October 2020. That is a little over four months and greater than the aspirations in the Respondent's policy. Whilst an excessive delay in resolving a complaint or a grievance could amount to a repudiatory breach, the Tribunal concludes that this has not occurred in this case (the material facts are set out at paragraphs 32-40). That is because:
    59.1. there was reasonable and proper cause in part for the delay and extra time being taken. In relation to the June-July period, about a month, this was because of the line manager having to deal with the mounting issues of Covid-19 and infection control, as already noted above, thereafter once an Mrs Douglas-Todd an independent investigator was used there was a delay owing to the summer period making interviews more difficult to arrange;
    59.2. the Claimant was interviewed, and the complaint was being addressed, the period the Claimant was kept in the dark was the initial 1-month delay and thereafter material progressed at a reasonable pace having regard to the accusations and the seniority of the people alleged to have done wrong, which necessitated going externally for the investigation;
    59.3. objectively in the circumstances taken some 4 months to conclude the investigation is not something that is conduct calculated or likely to seriously destroy trust and confidence. As noted, the matter was being dealt with and it was not simply swept under the carpet or there being an extensive attempt to ignore the Claimant.

60. Once again, the Tribunal will turn to consider later whether the delay when added to the other matters found could cumulatively amount to a breach of the implied term.

61. As regards to the seventh alleged breach, the failure to add to the complaint, paragraph 10.1.2.2, this fails to amount to a repudiatory breach as the key facts, the agreement was not made out. In the circumstances and given the facts found at paragraph 38 above, there is nothing that amounts to conduct calculated or likely to destroy mutual trust and confidence in an employee being told the way the matter could be escalated if he wished to add to the complaint and it was not right for it to simply be added. In so far as the Claimant had an expectation that it would just be added that was not a reasonable one, and there was reasonable and proper cause for the action of the Respondent, not simply adding to the complaint, the complaint had been ongoing (it was in fact near conclusion) and it was a separate process with the Claimant having the ability to go back to Mrs Douglas-Todd or use proper HR channels to raise the complaint.

62. With respect to the eighth alleged breach, paragraph 10.1.2.3, it was not disputed that no stress assessment was conducted as Occupational Health had advised (see paragraph 36 above). The Tribunal concludes however that the

Respondent had reasonable and proper cause for its actions in not requiring a stress assessment. The report required completing a Stress Risk Assessment to "*decipher which areas*" of the Claimant's role were triggering his mental health difficulties. Such an assessment is in effect a form of survey of an individual to get the individual employee's view of potential stressors / risks. It is of course in general a useful exercise but in this case the Claimant was clear that the reason for his stress was the alleged behaviour of two individuals and the outstanding complaint. Likewise, what flowed form this is that the steps to minimise it also seemed obvious without a formal stress assessment, namely; conclude the complaint process (an outcome), and find a way to either improve the working relationship or separate the parties / minimise their interaction. Accordingly, the failure to follow this Occupational Health recommendation, which at first blush would cause an employee distress or seem unreasonable, is not conduct in this particular case that amounts to a repudiatory breach of the implied term of mutual trust and confidence.

63. The ninth and final alleged breach, 10.1.2.4, fails on the facts which are set out at paragraphs 39-40 above. Mr Hancock did not act in an inappropriate manner, either as alleged or at all, in the meeting of 21 October 2020.

64. Having considered the matters individually, the Tribunal now turns to consider the matters cumulatively. In light of the above the matters that remain which as a factual basis require consideration (ie those where the facts which the Claimant relies upon are having found to have occurred) are:
    64.1. not being invited to the Covid-19 People group between 11-20 May 2020, meaning there were around 2 meetings which the Claimant missed;
    64.2. failure to carry out the stress assessment recommended on 21 August 2020;
    64.3. no addition to the complaint for matters raised in the appraisal hearing on 8 October 2020;
    64.4. it taking until 21 October 2020 to have an outcome to a complaint raised on 4 June 2020.

65. Stepping back, the Tribunal concludes that even these four matters taken cumulatively having regard to all the circumstances do not amount to objectively a breach of the implied term of mutual trust and confidence. The reasons and context for each has already been addressed but fundamentally these things taken as a group do not objectively demonstrate conduct by the Respondent of such severity that it "*destroy*[s]" or "*seriously damage*[s]" the mutual trust and confidence. But another way it is not conduct which shows the Respondent was not intending to be bound by the employment contract or to use the Claimant's terminology that the Respondent, or HR, had expressed a vote of no confidence.

<u>Reason for resignation issue</u>

66. Given the above, it is not strictly necessary for the Tribunal to determine this issue as no repudiatory breaches have been found. However, given the parties argued the matter and in case the Tribunal's judgment is successfully challenged, the Tribunal briefly sets out its reasoning on the reason for resignation issue.

67. In short, the Tribunal concludes that <u>every</u> alleged breach before it and found in the issues was part of the Claimant's reasoning for resigning. This is because:
    67.1. whilst resignation letters are not determinative (*Weathersfield v Sargent* [1999] IRLR 94 at [20]-[22] as there is no requirement to give the true reason at the time), it is consistent with the resignation letter (extracted at paragraph 41 above). Mr Allen seeking to limit it to only things found in the 'complaint' is not in the Tribunal's view a fair reading of "*my position at SCAS has become untenable, in light of issues beyond my control that I have had to face in the last 6 months. (my Complaint)*". The Claimant is relying upon all the things that he was dissatisfied in the last 6 months and not purely the complaint itself and the outcome. So, the delay in its progress is covered, the failure to add matters to the complaint, and the way its outcome was communicated. Moreover, the failure to conduct a risk assessment is also covered;
    67.2. the matters were all fairly recent and shortly before the resignation, so it is more likely that they were part of the mental process in the Claimant deciding to resign – they were more likely to play a part;
    67.3. the focus on cross-examination of the Claimant and in Mr Allen's submission as to the reason did not alight on one that was fundamentally <u>the only</u> reason for the resignation and so having regard to the law (*Wright*, 44.4 above) a constructive dismissal is still made out. The same is true for the alleged lack of credibility, there was no other reason outside the list that was shown on evidence (eg another job, a wish to retire);
    67.4. the fact that the Claimant resigned on notice, one of Mr Allen's points in his written submissions, does not advance anything. That is allowed under the statute and law, this is <u>not</u> a situation where the Claimant was giving more notice than required.

<u>Affirmation issue</u>

68. Once more it is not strictly necessary for the Tribunal to determine this issue as no repudiatory breaches have been found. However, given the parties argued the matter and in case the Tribunal's judgment is successfully challenged, the Tribunal briefly sets out its reasoning on the affirmation issue.

69. The Tribunal concludes that there has been no affirmation (or waiver) of any of the alleged repudiatory breaches which the Claimant relied upon as founding his dismissal before the Tribunal. Importantly, Mr Allen conceded that the Claimant's conduct did <u>not</u> amount to any affirmation for the balance of the complaint, that it was clear he was dissatisfied, and no great time had elapsed. However, a point was being made in relation to the delay in progressing the grievance and failure to carry out a stress risk assessment (that is paragraphs 10.1.2.1 and 10.1.2.3 above). But in respect of these:
    69.1. awaiting an outcome does not amount to affirmation in this context. The Claimant was not happy with the delay in resolving his complaint and the doctrine of not being able to 'cure' a breach and the facts of *Buckland* to a certain degree are opposite;
    69.2. the stress risk assessment issue as an omission, one had to wait some time and in effect a couple of months is not such a period that one is stating Occupational Health can be ignored.

Conclusion

70. Accordingly, the claim of unfair constructive dismissal is not well founded and is dismissed. Fundamentally, no relied upon repudiatory breach of contract was established, so whilst the Clamant did not affirm his contract and resigned for the reasons relied upon before the Tribunal a claim of constructive unfair dismissal fails.

Employment Judge Caiden

Date: 14 October 2022

RESERVED JUDGMENT AND REASONS
SENT TO PARTIES ON 3 November 2022

FOR EMPLOYMENT TRIBUNALS

Notes

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