EMPLOYMENT TRIBUNALS

Claimant: Mrs V Reid

Respondent: Bradford Teaching Hospitals NHS Foundation Trust

Heard by CVP (remote video link)

On: 24, 25, 26, 27 October 2022,
28 October 2022 (in chambers),
31 October 2022.

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person
Respondent: Mr C Breen, counsel

JUDGMENT having been sent to the parties on 2 November 2022 and a request from the claimant having been made in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides following

REASONS

Introduction and issues

1 This a complaint for unfair dismissal under general principles. The claimant resigned.

2 The issues are:

2.1 Did the respondent act in a way which was calculated or likely to destroy or seriously undermine trust and confidence?

2.2 If so, did it act without reasonable and proper cause?

2.3 Did the claimant resign as a consequence of the implied contractual term?

2.4 If so, did the claimant otherwise affirm the contract by the delaying her resignation and remaining in work from the last act which constituted part of the breach, thereby evincing an intention to keep the contract in existence?

2.5 If so, was there otherwise a potentially fair reason for the dismissal, the reason giving rise to the breach and was the dismissal fair?

2.6 What losses have arisen in consequence of the dismissal?

2.7 Did the claimant take reasonable steps to mitigate her losses?

2.8 Should the basic award be reduced because of conduct of the claimant before the dismissal?

2.9 Should the compensatory ward be reduced because of conduct of the claimant which caused or contributed to the dismissal?

Evidence

3 The Tribunal heard evidence from the claimant, Mrs Joanne Mullarkey and Mrs Debbie Ashcroft who had worked with the claimant on the team of Overseas Visitors Officers (OVO's). The respondent called Ms Julie Ward, Overseas Visitors Manager and Mrs Jacqueline Griffin, Deputy Director of Finance.

4 The parties produced a bundle of documents running to 822 pages.

Background/Facts

5 The respondent is a public health provider of hospital services for Bradford and the surrounding area.

6 The claimant was employed by the respondent from 1 February 2013. She became an OVO on 14 January 2019. Her employment ended upon her resignation by email dated 3 August 2020, for which she gave notice to expire on 30 August 2020.

7 In December 2019 four new appointments were made to the Overseas Visitor Office, Olivia Ellis, Joanne Mullarkey, Claire Jackson and Debbie Ashcroft. Julie Ward was and is the manager of that Department. She has held the post since 2009. The Department has the responsibility for charging overseas patients and advising staff on all matters relating to support and advice on overseas patients. Until late 2019 Ms Ward discharged the responsibilities alone, but there was then a need to expand the Department because of Brexit and other demands. This meant Ms Ward transitioned from administrator to manager.

8 The claimant was the last of the five new appointments to join the Department, about a month after the others. At the time of her arrival, Ms Ward made some inappropriate remarks to some of the team about the claimant. She said she had caused trouble in previous departments and she had had to leave her role as a medical secretary in medical ophthalmology. Although Ms Ward disputed this I found Mrs Aschcroft's evidence about what had been said to be credible. She had her own disagreements with Ms Ward which led her to leave the department. It was suggested this meant she had a motive to lie. Nevertheless, this was not a version of events I thought likely to have been concocted. Mrs Mullarkey confirmed that, at the time, Mrs Ashcroft passed on these comments to her.

9 In March 2019 the claimant attended the Bradford Royal Infirmary (BRI) site and not St Luke's Hospital (SLH). This was on the instruction of Ms Ward. Two of the OVO's, Ms Ellis and Mrs Mullarkey, were working at the BRI. They came to believe, from a conversation with their colleague Ms Ellis, that the claimant had said she had attended the BRI of her own volition because she thought they were struggling and she wished to assist them with the legislation. They knew this to be untrue. They believed the claimant had lied to justify why she had gone to the BRI when challenged about this by Ms Davies. Ms Ellis had told Mrs Mullarkey that this had come from Ms Ward, who told her this at her 1 to 1 meeting. Ms Ward had also expressed concern that the claimant had not gone to her but discussed the matter with Ms Davies. Mrs Mullarkey was so troubled about what the claimant had allegedly said that she emailed Ms Ward. She stated that the claimant had thrown her colleagues under a bus. In her evidence to the Tribunal, Mrs Mullarkey said she subsequently heard the claimant explain the actual reason she attended the BRI. She now believes Ms Ward had misled Ms Ellis.

10 In respect of precisely what Ms Ward had told Ms Ellis and what Ms Ellis relayed to Mrs Mullarkey, I never fully understood to what extent there may have been crossed wires, genuine misunderstandings, malicious or mischievous tales or a combination of all three. There was no doubt that bad feelings prevailed after this. A dinner was arranged by Mrs Ashcroft to attempt to build relationships. It did not go well.

11 In June 2019 the claimant made a complaint about Ms Ward which formed the basis of an investigation under the bullying and harassment policy. The claimant attended a meeting to discuss her concerns on 30 July 2019. Further complaints were raised about Ms Ward by other OVO's in August 2019. The claimant's complaint was combined with these. Ms Griffin said this became a disciplinary investigation. In additional written submissions, the solicitor for the respondent drew my attention to the heading of the report, which is *Disciplinary Investigation Report relating to Julie Ward.* I did not hear from Ms Malin, its author, and shall consider the approach she took in more detail when I analyse the issues.

12 The report addressed three issues. Firstly, a serious breach of the Harassment and Bullying Policy, specifically by providing inadequate training and support to the OVO's, providing conflicting advice, a rude and an

intimidating style of management of the team, speaking disrespectfully about the team sometimes in their presence, to staff in other departments and creating a hostile and stressful, unpleasant working environment in which the team had their roles verbally threatened. Secondly breach of the Trust's Information Governance Policy. Thirdly, as a result, potential risk to patient safety.

13 In November 2019 Ms Malin, the investigating manager, concluded her report. She found there had been inadequate training of the OVO's albeit the respective responsibility for this was difficult to establish. She found Ms Ward's management style could be interpreted as rude and intimidating such that some OVO's had reported panic attacks and sought counselling. This was not intentional but arose from a lack of awareness. She regarded there to have been a serious breach of the harassment and bullying policy; in particular unfair and destructive criticism, intimidating behaviour, verbal abuse, and abuse of power. She found instances of Ms Ward speaking disrespectfully of the team or individuals to others. She found evidence of Ms Ward creating an unpleasant working environment in which the team felt their roles had been verbally threatened. In respect of information governance breaches, the report is largely redacted. Ms Malin did not find there had been a risk to patient safety.

14 Ms Malin made nine recommendations. These included Ms Ward to undertake leadership and line management training, be assigned an experienced coach to supplement formal training, mediation between the parties if they agreed, team development to be sourced and implemented seeking the input of an experienced and qualified organisational development professional, Ms Ward to review training materials to ensure no confidential or patient information was identifiable and Ms Ward to liaise with other Trusts to strengthen the training, to provide a buddy scheme between Trusts and formal objectives to be set for the team and Ms Ward.

15 Given the seriousness of the findings, Ms Malin recommended a disciplinary investigation. On 21 January 2020 two of the five allegations were upheld: rude and intimidating style of management and creating a hostile and stressful, unpleasant working environment in which the teams had their roles verbally threatened. The panel concluded that the hostile environment had been created not only by Ms Ward but the wider management team. The panel chaired by the Deputy Director of Finance, Mr Quinlan, issued a verbal warning with a six-month operational period. It endorsed all Ms Malin's recommendations.

16 The claimant was off work through ill health from the beginning of August 2019 as a consequence of stress and bereavement, having lost her mother. At the beginning of September 2019 she had further absence as a consequence of a eustachian tube dysfunction.

17 The claimant attend work on 20 September 2019. She says that Ms Davies queried whether she had made up the illness at the return to work interview and, in the absence of any other evidence, I accept that.

18 On 22 October 2019 a Sister at A&E contacted Ms Davies to report that the claimant had told a receptionist that she would be walking out at 4:30 and not coming back so there would be nobody to book patients in. This led to appointments being cancelled. The Sister felt this was unacceptable and needed to escalate it.

19 Ms Davies met the claimant on 23 October 2019 to discuss this matter and accused the claimant of shouting in A&E. The claimant became frustrated at the suggestion she had shouted. She raised her voice and spoke over Ms Davies. She apologised. There followed a further period sick leave from 29 October 2019 until 6 January 2020.

20 On 6 January 2020 the claimant met Ms Davies one hour after attending work. Mr Davies said she was to have a disciplinary meeting to discuss the October matters. The claimant asked for a postponement and the right to representation. Ms Davies said it was an informal chat. The claimant apologised for her behaviour when she had shouted at Ms Davies and said she had had a panic attack and it was out of character. Mr Davies said that the claimant had shown her true colours, shouting in A&E. I only have the claimant's account of this meeting and accept it.

21 On 16 January 2020 the claimant received a letter recording an informal discussion under the disciplinary procedure. It concerned the meeting which had taken place on 6 January 2020. It recorded misconduct of the claimant in the form of shouting and aggressive conduct at the sickness meeting on 22 October 2019 with finger-pointing, standing up, pacing and leaving A&E the previous day. It recorded that the claimant had accused the Sister of lying. Ms Davies stated that any further instances of misconduct would be subject to the formal process. On the form she signed and returned, the claimant wrote that she had not accused the Sister of lying and had not shouted in A&E.

22 On 7 February 2020 a meeting was held with the OVOs. Mrs Griffin, Ms Davies and Ms Ward attended. Mrs Griffin informed Mrs Mullarkey, Ms Jackson, Mrs Reed and Mrs Ashcroft (Ms Ellis had left) that the investigation into the complaints had been concluded and some recommendations would be implemented. She said two of the recommendations would be considered in the future as they could not be implemented immediately. She spoke in general terms. She did not say what the findings of the investigation were in respect of Ms Ward nor explain each of the recommendations which had been made. She said that training would be provided. A written copy of the respondent's Personal Responsibility Framework (PRF) was handed to each of the OVO's. In an email sent shortly after the meeting, Mrs Griffin summarised actions to be taken including that Ms Ward would be based more in the OVO office and there would be a team session on the PRF.

23 Between the period from which the claimant was off sick in August 2019 to her return to work in January 2020 Ms Ward was removed as her line manager because of the investigation. She resumed that role after the February meeting. The claimant says that at the end of the meeting Ms Ward spoke to her privately and told her that she had not got into trouble following the

complaint and that they would see who was there in six months' time. The claimant says she laughed as she left the room. This was disputed. It had not raised by the claimant at the time with anyone or later. On balance I was unable to find this arose.

24 Further problems continued over the coming weeks. The claimant says she was repeatedly pulled up over performance issues. She said upon returning from the beginning of April she was criticised for a mistake of her colleague, Miss Jackson. There were complaints from a patient's family. The claimant had miscommunicated a letter to a four-year-old child and not its Guardian. The family were also concerned about information which the claimant had given. They believed it was incorrect. There was no investigation into the discrepancy in accounts. Another complaint was raised at the end of May. Ms Ward agreed to obtain a written statement from the family about an allegation of rude and intimidating behaviour of the claimant. This did not happen, albeit matters move swiftly from the end of June. Nevertheless, I would have expected Ms Ward or some other manager to have followed through with the complaint. If it was upheld, the claimant might have required training or possibly be the subject of disciplinary action. If not upheld, the claimant would have been entitled to know. None of that happened.

25 The claimant asked to work from home during lockdown. This was refused for operational reasons. She commenced working part-time in the PPE department and at the entrance to the Duke of York wing of the hospital.

26 On 28 May 2020 the claimant sent an email to Mrs Griffin stated she had been advised to inform her of an ongoing situation: that she was being victimised, bullied and unnecessarily micromanaged by Ms Ward. She gave some examples.

27 On 29 May 2020 Mrs Griffin replied. She stated she was sorry the claimant felt the need to send the email and she would take time to work through it. She asked if she needed to include an adviser in her response.

28 On 30 May 2020 Mrs Griffin had a telephone conversation with the claimant. It was agreed she could discuss the issues with Ms Ward. She said that she would then arrange a meeting with the claimant to go through matters.

29 The complaint was forwarded to Ms Ward later that morning. They arranged to discuss it the following Monday.

30 Having spoken to Ms Ward, Mrs Griffin prepared a response to each of the points the claimant had raised,. She sent a draft to the Human Resources Department. She then had a discussion with Ms Lewis, of that Department, on the telephone. Ms Lewis drafted a very different proposed response. Mrs Griffin adopted it and sent it to the claimant by email on 7 June 2020. In respect of eight numbered items taken from the claimant's letter (which were not easy to cross reference because the claimant had not used numbered paragraphs) she stated that some were statements with no substance. She expressed concern about the tone of each of the listed points. She wrote, '*if*

you have genuine concerns to raise, then I would suggest that in the first instance you should (if you felt you could not talk to Julie directly) contact HR or the staff advocacy team for advice.… Making such allegations is very serious, and whilst the Trust, as you are aware, take such concerns very seriously, I would urge you to consider very carefully the content of each of these points, take advice as above, and then decide how you wish to have your concerns addressed.… I am sure you will appreciate, the allegations within your email have caused distress for Julie, also…". She added that four of the matters were operational and she expected the claimant to discuss them with Ms Ward. She said that it was not reasonable to expect her to deal with those matters. The previous offer for a meeting was not renewed.

31 On 4 June 2020 Ms Ward made an official complaint that the claimant was bullying and harassing her on a daily basis. This covered a series of matters and included the two patient complaints.

32 On 11 June 2020 the claimant received a letter from Adrienne Lake, Assistant Director of Finance. It notified the claimant of Ms Ward's formal complaint and that she had been appointed the Commissioning Manager into it. She informed the claimant that it would be in the interests of all parties to move the claimant temporarily. She was transferred to work in the PPE department.

33 The claimant resigned by email on 3 August 2020, saying the previous 18 months had been the worst of her working life.

34 The investigation and conclusion to the disciplinary allegations continued even though the claimant left. She had asked for that to happen in her resignation letter. On 24 December 2020 Ms Lake wrote to the claimant to inform her that one of the 27 allegations had been upheld. This was about the claimant's negative body language, being very defensive, very frosty and glaring at Ms Ward throughout the meeting of 7 February 2020. Ms Lake also said there was evidence of insubordination by way of repeated questioning and challenging of Ms Ward, although this was not bullying and harassment. She said that the relationship between the two would not have been sustainable in the longer term had the claimant not resigned.

The Law

35 By section 94 of the ERA and employee has the right not to be unfairly dismissed.

36 A dismissal is defined by section 95 of the ERA and includes the employee terminating the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct, section 95(1)(c). This is known as a constructive dismissal.

37 In order for there to be a constructive dismissal, the employee must have resigned because her employer has committed a fundamental breach of contract and she must not have otherwise affirmed the contract, for example

by delaying her resignation and thereby evincing an intention to continue to be bound by the terms of the contract, see ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** and ***Bournemouth University v Buckland [2011] QB 323***. The term is not to be equated with a duty to act reasonably. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see ***Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420*** and ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***.

38 There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see ***Malik v BCCI SA (in liquidation) [1998] AC 20***.

39 Such a breach may be because of one act of conduct or a series of acts or incidents, some of them may be trivial, which cumulatively amount to a repudiatory breach, see ***Lewis v Motorworld Garages Ltd [1986] ICR 157***. If a series of acts, the last event must add something to the series in some way although, of itself, it may be reasonable, see ***Omilaju v London Borough of Waltham Forest [2004] ICR 157*** and ***Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1***.

40 If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

41 Under section 122(2) of the ERA, where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, it shall reduce or further reduce that amount accordingly.

42 By Section 123(1) of the ERA, the amount of the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award, if the Tribunal concludes that the complainant would or might have been dismissed had the procedures been fair[1].

43 Under Section 123(6) of the ERA, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding.

[1] Polkey v A E Dayton Services Ltd [1988] ICR 142.

Analysis and Conclusions

44 A number of the allegations depend upon the word of the claimant as against that of Ms Ward, although in a few instances they involve the word of the claimant alone, without contradiction; for example in respect of the acts of Ms Davies. The disputed discussions are not followed by any email or paper trail to assist on the reliability of the claimant's recollection, set out many months later. That is not to say I found the claimant to be an unreliable witness; but inevitably when she looks back, like all of us, it is from her perspective of an unhappy series of events for which she has strong feelings about who was responsible. That is not the surest of foundations upon which to have to determine disputed allegations of short exchanges of words, expressed in the space of seconds or minutes, usually in fraught and emotionally charged circumstances.

45 The evidence of the claimant was contained in a schedule, in tabular form, which she had prepared following the first preliminary hearing. She had not complied with the order of Judge Schulman following the second hearing to prepare a separate witness statement. At that hearing the parties identified 27 paragraphs of the schedule of 117 events which were alleged breaches of the implied term of trust and confidence. However, some of these are not allegations against anyone, but a description of events and the claimant's feelings at the time, such as item 19. Other paragraphs appear to be directly relevant to the breach but were not identified as one of the breaches at the preliminary hearing, such as item 14. I do not consider the respondent is obliged to defend those.

46 I was concerned by the excessive redaction of a number of documents by the respondent. The claimant had not objected to this. Being unaccustomed to litigation, she did not appreciate the boundary between what was properly disclosable and what was not because of the confidentialities owed to others referred to in the documents. Whilst I fully recognise the need to have regard to that confidentiality, it is necessary to ensure the Tribunal is provided with documents which are not so heavily redacted there is a risk they may not be fully understood or worse misinterpreted. An example is the redaction of some of the investigation reports in which redaction has been made of allegations from the claimant's colleagues. These were plainly material evidence.

47 That said, I found the two investigation reports and the outcomes into the conduct of Ms Ward and the claimant of assistance. Both those processes involved the interviewing of the claimant, Ms Ward and others in the Department. The reports were reasoned decisions of managers who were independent of the Department. They reached clear and well thought through findings. In a number of respects, those investigators had more relevant information than I have about the complaints and the witnesses were giving accounts which were far closer in time to the events than at this hearing which is more than two years later. Whilst I am not bound to accept them, they are important documents because they touch upon many of the concerns raised

in this case. Although Ms Ward did not agree with the conclusion of the first report, in these proceedings the respondent accepted them.

48 I have not found it necessary to address each of the 27 allegations. When addressing what is a breach of the implied term, it is not necessary for the claimant to establish that all the allegations which she says played a part in her resignation were breaches of contract. It is sufficient if any which amounted to repudiatory breaches played a part in that dismissal[2]. Of course I must bear in mind the question of affirmation, if the last event which contributes to the repudiation is some time before the resignation.

49 The manner in which the respondent excluded the claimants and the other complainants from the conclusions to the investigation was contrary to the word and spirit of the harassment and bullying policy and, I find, the disciplinary policy. In written submissions the representative of the respondent states that the disciplinary policy does not require the outcome of the complaints to be fed back.

50 Appendix C, the Terms of Reference to the Investigation Report, states that the investigation is to be conducted under the Trust's disciplinary policy. By paragraph 2.3 of the Disciplinary Policy, "*this procedure is not to be used for dealing with management of attendance, or performance improvement or* ***harassment and bullying issues*** *which must be dealt with in accordance with the appropriate policy/procedure*" [emphasis added]. It might be suggested, therefore, that the decision to use the Disciplinary Policy was itself a breach of that policy. That is not the case. These policies are written and designed to be complimentary. I am satisfied Ms Malin was mindful of that in her investigation report. She expressly referred to the Harassment and Bullying policy on several occasions and expressly addressed breaches of that policy in her report.

51 The purpose of the Harassment and Bullying policy is to ensure that all employees are able to work without harassment, bullying, discrimination or intimidation or fear of it. Under its provisions, after the investigation has been concluded, closure requires the reporting back of the findings to the complainants in writing and then in a meeting at which they have sight of the report, in strict confidence, by paragraph 6.4.6. Incidents which amount to harassment or bullying, in the opinion of the investigating officer, will be treated as misconduct and proceed to a disciplinary hearing. As to that, it states, "*If the Disciplinary Policy and Procedure is invoked the parties will be advised of this but not of the sanction which may or may not be imposed*". I reject the suggestion of the respondent that this negates paragraph 6.4.6. That would mean in the more serious cases, complainants will never know if their complaint has been upheld.

52 The use of the term "disciplinary investigation" in Ms Malin's report did not cloak the process retrospectively with confidentiality to exclude the complainants from access to the investigator's report. The complimentary

[2] Nottinghamshire County Council v Meikle [20045] IRLR 703.

nature of the policies can be seen from paragraph 6.4.9 of the Bullying and Harassment policy. It prospectively provides confidentiality in respect of the disciplinary sanction; but only the disciplinary sanction. It is of note that it does not even extend the confidentiality to the findings of the disciplinary panel; viz whether the opinion of the investigating officer has been upheld in the form of a finding of misconduct.

53 Mrs Griffin said she had been advised by a human resources advisor that there was limited information she could provide to the complainants because the concerns had proceeded down a disciplinary route. She read out an email of such advice which had not been disclosed. For the reasons I have set out, there is nothing in the policies of the respondent to require such limited sharing of the investigator's outcomes or the disciplinary panel's findings, save for the sanction. Nor is such extensive secrecy found to be warranted in the ACAS Code of Practice on Discipline and Grievance Procedures or, for that matter, the Information Commissioner's online guidance about the GDPR and FOIA. For good reason. For an employee to raise concerns about a manager's behaviour carries a risk of retribution from those in authority. To safeguard employees from bullying and harassment, not only do the investigations require fair and independent consideration, but the outcome must be fed back. Otherwise the suspicion will be that the complaint has not been taken seriously, or has been whitewashed, or that managers are closing ranks; or that the complaints have not been addressed at all. That will do nothing to harmonise good relations in the workforce and eliminate bad behaviour. Mrs Griffin said herself that if she had raised a serious complaint against her manager, she would expect to be told what had happened.

54 That is not to say such transparency does not present its own difficulties. For a manager who has been found to have breached the policy to return to manage her team is an enormous challenge. She will return with reduced authority and respect in the eyes of the complainants and may be vulnerable to further allegations some of which may be false. For that reason, consideration may have to be given to changing levels of reporting, at least between the complainants and the line manager found wanting. If that is not done, a significant input will be required from the next line manager to support the team and the manager who has been criticised.

55 The easier course may be to sweep matters aside, to say to the complainants it is best to move forward in the hope that lessons have been learned and with goodwill, bygones will be bygones; albeit the lessons only known to management. That is the best of interpretations which can be placed on the meeting of 7 February 2020. Even by that measure, I regard it as has having been very damaging to the confidence which the claimant could be expected to have in her employer. Her complaints were serious. She had struggled at work as a consequence and been off sick. The presentation of the PRF to her and her colleagues would imply they were at fault not their manager. The implication was, in the absence of any criticism of Ms Ward or Ms Davies, that the team members had fallen short and the very raising of the complaints may have breached the PRF.

56 I regarded the evidence of Mrs Mullarkey as informative. She said that she and her colleagues sat at one side of the room and Ms Ward, Ms Davies and Mrs Griffin at the other. They were on opposite sides of a table. Mrs Mullarkey and her colleagues were handed the Trust's core values. They were read out, bullet point by bullet point. She said the tone of the meeting was that they were guilty or responsible for what had happened and had to reflect on their behaviour. If individuals had failed to uphold the values, she believed they should have been informed individually. Not delivered to the whole group. She felt the way in which the managers spoke was patronising and offensive to those who had done nothing wrong and were already upholding the Trust's values. It was Ms Ward who had been criticised, unbeknown to them. I accepted that evidence and find that was a correct reflection of the meeting.

57 When the claimant raised further concerns, on 28 May 2020, Mrs Griffin replied quickly. Her initial response was appropriate. She proposed a meeting to consider matters in detail after Ms Ward had responded to the complaints.

58 That changed after advice was taken from Ms Lewis. The response in the email of 11 June 2020 was seen by the claimant as a rejection of her concerns and Mrs Griffin siding with Ms Ward. That was understandable. For all she knew, all her concerns from the previous year had come to nothing; worse than that, she and her colleagues had been told of the need to absorb and apply the PRF in their future dealings with others, an instruction which could only have come for the fact that they had raised complaints at all. Then Mrs Griffin wrote in censorious terms; of the claimant's tone and the seriousness of the allegations which had upset Ms Ward. Rather than progress them as she had said previously with a meeting, she now required the claimant to take advice and consider whether she wished to proceed. She said she should take any matters to human resources first, which is where the claimant had started. She was being sent in circles. The claimant regarded this letter as a serious rebuff. Objectively speaking, it was. It was a shot across her bows.

59 In contrast, the complaints of Ms Ward, which I find were a direct response, proceeded down a formal route. From the claimant's perspective, as of 11 June 2022, she was treated differently and unfairly. Her manager made a complaint, in response to hers and it led to disciplinary investigations, but the claimant's complaints appeared to go nowhere. That was not strictly the case because her original complaint had led to a disciplinary finding against Ms Ward. That was kept from the claimant. On what the claimant had been told, her interpretation was entirely reasonable, if not inevitable.

60 It is accepted that by this time the working relationship between the claimant and Ms Ward had broken down irretrievably. The respondent says, however, that this was not because of actions calculated or likely to destroy trust and confidence.

61 I disagree. The cloak of secrecy thrown over the initial complaints and the rebuff to the second, in conjunction with the way Ms Ward's were then

accepted and processed, cumulatively destroyed the claimant's trust in her employers on an objective assessment.

62 There was no reasonable and proper cause to deny the claimant the information of the outcome of her initial complaint, save for the actual disciplinary sanction to which it gave rise. There was no reasonable and proper cause to seek to deflect the claimant from raising further concerns in early June; particularly given the history and findings of the first enquiry which should have elevated the level of suspicion of Mrs Griffin and the human resources department that there may be something in what the claimant was saying. There was no reasonable and proper cause for the claimant to be faced with serious counter allegations at that moment in time, which arrived as a direct retaliation.

63 Mr Breen submits the claimant's last straw was her move from the OVO department on 11 June 2020. He says the claimant was pleased with this move as it freed her from a difficult working environment. Whilst that is true, the objection taken by the claimant to the move has to be seen in conjunction with the reaction to her complaints. Ms Ward raised counter allegations which, unlike hers, were taken seriously. This led to the claimant being moved from her post, not Ms Ward. I did not accept Ms Ward's evidence that she would have raised her own allegation of bullying and harassment against the claimant anyway. It was sent 4 days after she learned of the claimant's complaint against her. It is inconceivable that was a coincidence. The respondent was responsible for these events through the actions of Ms Ward, Mrs Griffin and the advice of the human resources department. There was a fundamental, or repudiatory, breach of contract.

64 The claimant resigned as a consequence. She expressed this in summary form in her resignation letter and more accurately in the claim form. She did not leave immediately and one of the reasons for the delay was to find alternative employment. That secondary reason does not detract from the effective cause of the resignation being the breach of the implied term.

65 Was the delay of nearly 8 weeks evidence of an intention to affirm the contract? By taking her weekly pay for a further seven weeks and continuing to work, did the claimant lose the right to resign and claim constructive dismissal?

66 In ***Bournemouth University v Buckland [2011] QB 323***, Jacob LJ said, at paragraph 54, "*Next, a word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation*", and at 56 "*Thirdly, the fact that it takes rather a lot*

to find affirmation on the facts in an employment contract is itself another good reason for refusing to recognise any doctrine of "cure" in that context. Once an employer has committed a repudiatory breach there will generally be some time for him to try to make amends, for tempers to cool and for the employee to make a rational decision as whether he or she should stay on".

67 The claimant had been in employment with the Trust for 7 years. She had been removed from the immediate chain of management which had led to the breakdown of trust and that had lifted the immediate stress. The intention was to protect the manager who said she had been bullied and harassed by the claimant. The move was temporary and the claimant was not to know she may not return, notwithstanding there had been a series of other transfers, temporary or permanent because of the pandemic.

68 There were fewer job opportunities on the market with many employees having been furloughed and so the route to alternative gainful employment was restricted. The claimant was only able to remain and work her notice because of the move, but she faced an uncertain future given the ongoing investigation. Taking all matters into account I am not satisfied the delay of 7 weeks could be taken to evince an intention to affirm the contract. The claimant could objectively be considered as considering her options for a few weeks before losing the right to resign for the repudiatory breach.

69 Mr Breen did not press the suggestion that if there was a constructive dismissal there was a potentially fair reason for it, that is for the reasons rise to the breach. It is difficult to envisage how that could arise in a constructive dismissal based on the implied term of trust and confidence. The dismissal was unfair.

Remedy

70 It is not just and equitable to extinguish or reduce the basic or compensatory awards because of conduct of the claimant. That is not to say I accepted everything she said. I did not regard her criticisms of her employer to refuse her request to work from home amounted to a breach, nor even contributed to it. Her request to protect her husband who had asthma was regarded with scepticism by her managers, given she had volunteered to work elsewhere in the hospital in PPE or at the entrance. The suggestion of the claimant that it was a question of minimising the exposure turned on some rather fine distinctions. The issue of working from home involved difficulties with equipment such as phones and a credit card reader, albeit temporarily out of action. I was not satisfied the very limited time extended to others to work from home established unfair and anomalous treatment of the claimant to the effect she was deliberately penalised. That said, I remained puzzled by Mrs Griffin's email to Ms Ward not to send the risk assessment she had colour coded to anyone but rather to hold it back to use in the event of a challenge. I can see why the claimant invites me to draw an inference from this, but I did not consider that was appropriate taking account of all the other circumstances which prevailed.

71 It would not be fair to reduce compensation just because the claimant did not establish every item as a breach. The disciplinary investigation rejected all Ms Ward's allegations of bullying and harassment save for one. With respect to that, it concerned the claimant's hostile demeanour to Ms Ward in the meeting of 7 February 2020. Criticisms I have made about that event and the OVO's being told that matters were now closed puts that finding in a very different perspective. I do not adopt it.

72 In respect of the findings of Ms Lake which went outside the remit of bullying and harassment, of micro challenges to Ms Ward, that too would require revising in the context of my findings which Ms Lake did not have. I accept the claimant may have presented as a challenging team member, but her actions must be evaluated against the background of a slow corrosion of trust over many months for which her managers were to blame. Managers are responsible for setting appropriate parameters in the working relationship. They have the authority to take corrective action by performance management or disciplinary action in the last resort. This requires addressing as and when issues arise. In this case Ms Ward sent a bullying and harassment complaint with diverse and diffuse allegations. They included complaints of the claimant's conduct to two patients or their families. There is no evidence that any investigation was carried out and Ms Ward confirmed there was no feedback to the claimant of the outcome. These are examples of management issues I would have expected to be addressed at the time they arose, not swept into a complaint about the claimant's manager. It is regrettable the advice of Ms Malin was not followed, it appears because the human resources department advised Mrs Griffin in February 2020 that they did not have the resource to provide an experienced and qualified organisational development professional to assist with the team. I do not regard there to be conduct for which it would be just and equitable to reduce the basic or compensatory award.

73 The evidence of the claimant's losses had to be provided at the request of the Tribunal. The materials in the bundle were insufficient to support the losses claimed. In the event the pay slips and P60 which were provided evidenced a much lower shortfall than had been claimed.

74 I was satisfied the claimant reasonably mitigated her loss. She took a suitable job which was slightly less well paid and eventually eliminated the ongoing losses.

75 That was a differential loss of earnings of £157.04 per month for 24 months, being £3,768.96. I calculated that on the differential between gross pay reflected in the P60 in current employment and the 5 months from April 2019 to August 2019 when the claimant was working for the respondent undertaking full shifts and not on sick leave. The gross pay has been used to ignore the effect of the fact the claimant ceased making pension contributions in her new employment. As the claimant's tax code remained the same, the differentials should be broadly similar were the computation of either gross or net pay.

76 To that I add a sum for loss of statutory rights of £500. That gives a compensatory award of £4,268.96.

77 The basic award is £5,111. That is £538 (being the maximum allowable weekly pay) x 9.5. The multiplier reflects continuous employment of 8 years, 5 of which were below the age of 41 and 3 of which were over 41.

Employment Judge D N Jones

Date: 22 December 2022

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