



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mrs. Joanne Rogers**

v

**Walsall Healthcare NHS Trust**

**Heard at: Birmingham**

**On: 16,17,18,19 and 20 January 2023**

**Before:**

**Employment Judge Wedderspoon**

**Representation:**

**Claimant:**

**In Person**

**Respondents:**

**Walsall Healthcare NHS Trust**

### JUDGMENT

1. The claimant's claim of constructive unfair dismissal is not well founded and is dismissed.

### WRITTEN REASONS

1. An oral judgment was delivered in this matter on 20 January 2023. By email dated 3 February 2023 the claimant requested written reasons. These are the written reasons.
2. By claim form dated 1 April 2021 the claimant brought a claim of constructive unfair dismissal.

#### List of issues

3. At the commencement of the hearing the parties agreed the list of issues as follows :
  - (1) Was the claimant dismissed;
  - (2) Did the respondent
    - (a) Fail to provide adequate support to the claimant to discharge her role;
    - (b) Fail to act upon health and safety concerns raised by the claimant.
  - (3) Did that breach the implied term of trust and confidence ? The Tribunal will decide :
    - (a) whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
    - (b) whether it had reasonable and proper cause for doing so.

(4) Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation;

(5) Did the claimant affirm the contract namely by serving 4.5 months' notice? The Tribunal will need to decide whether this showed the claimant chose to keep the contract alive after the breach.

4. The respondent did not seek to argue any admissible reason for the dismissal.

#### The hearing

5. The Tribunal was provided with an electronic bundle of 603 pages and a witness bundle of 118 pages. At the Tribunal's request, the respondent's grievance policy was added to the bundle. In cross examination, the claimant did not ask the respondent any questions about this policy. The respondent also added to the bundle the government guidance of social distancing produced in July 2020.
6. The claimant had three other witness statements but notified the Tribunal that two of the witnesses namely Jenny Brown and Tina Allen were presently off sick from work and would be unable to attend to give evidence. The Tribunal informed the claimant that she could submit their statements as written representations but the weight to be attached to them would be minimal because they had not attended the Tribunal and not been cross examined.
7. The hearing was timetabled. The Tribunal heard from the claimant and her witness Amanda Digennaro, Clinical Site practitioner. The respondent called Ned Hobbs, Chief Operating Officer and Ms. Dixon, Interim Matron Patient Flow.
8. On day 3 the respondent objected to a line of questioning which the claimant had asked Ms. Dixon about failing to provide another clinical site practitioner; the respondent did not understand this to be the claimant's case. The claimant had previously asked Mr. Hobbs questions about it. The claimant referred the Tribunal to two paragraphs in her witness statement (paragraphs 157 and 164) which she contended raised the lack of a clinical on-site practitioner as a failure to provide her with support. The Tribunal determined that the respondent's objection was rejected and the parties could deal with the issue in submissions.

#### Facts

9. The claimant was employed by the respondent from July 1986 until 6 June 2022. The claimant resigned in writing on 18 January 2021 and gave four and half months' notice. Her last day was 6 June 2021.
10. The claimant's case before the Tribunal was that from autumn 2020 the respondent failed to give her sufficient support to do her role and failed to take care of her health and safety. The claimant's relied upon the following

which she alleged was a lack of support namely (a) failure to provide an additional clinical site person after 10pm; (b) failure to provide administrative support (c) failed to provide her with study leave (d) failed to provide her with an appraisal. Her health and safety concerns were (a) lack of risk assessment concerning the claimant (b) failed to take adequate steps to keep the office safe namely failed to tape the floor to divide walkways; failed to limit the number of individuals in the office and failed to provide screens.

### Facts

11. The claimant commenced her employment at Walsall Manor hospital initially as a registered general nurse. For the last 20 years the claimant worked as a clinical night manager (clinical site practitioner). For her 35 years of working for the NHS the claimant had an unblemished work record and had not been involved in any work disputes.
12. Walsall Manor Hospital is an acute general hospital that serves a population of around 270,000 across Walsall and surrounding areas. The hospital has 550 acute beds and provides a wide range of services including a 24 hour accident and emergency department.
13. The claimant's role as a clinical site practitioner provided operational support across the hospital; to be lead nurse across the acute hospital site, support clinical staff, manager patient flow through the Accident and Emergency department by finding suitable beds for patients. The job description within the bundle (p.175-8) describes the claimant's role as having "overall responsibility under the direction of the on-call director for managing the two hospitals at night. The claimant's role required her to take the lead in all issues relating to bed management and staff deployment in all areas other than Theatres and Maternity. On 1 May 2012 the claimant's contract was varied so that her hours were reduced to 28 hours due to a flexible working request (page 187). The claimant agreed to work night shifts on her own from 10 p.m.
14. The claimant's contract of employment (page 179-185) required the claimant to provide 3 months' notice to terminate her employment as a band 7 employee. Pursuant to clause 17 there was no requirement to maintain qualification and do training and there was no express contractual right to be paid study days per year (see page 181).
15. The contract also referred to the Trust's Grievance and Disputes Procedure whereby employees in the first instance should apply to their line manager. It also referred to the whistleblowing policy/procedure to raise concerns about malpractice at work. The claimant was aware of these processes.
16. The claimant worked 12.5 night shifts from 7pm to 7.30a.m. working alone from 10pm on weekdays and from 7.30pm on weekends. The claimant had support from a co-ordinator until 10 p.m. and worked without a co-ordinator on duty for weekends for many years. The claimant had access to the out of

hours on call manager and the on call director. In reality this was by telephone so that after about 10 p.m. the claimant was working alone and was required to make rapid and important decisions.

17. The claimant's role was high pressured and encompassed the roles of four separate people overnight namely on-site manager, duty matron, capacity manager and operations centre clerk. The role was more difficult during the flu season and during the covid 19 pandemic due to the increased admission of patients. There are differences between the claimant's role at night and her day equivalent; no elective work or outpatient surgeries take place at night.
18. The claimant's last appraisal took place in March 2018 (page 195). There was no evidence that the failure to appraise the claimant directly affected the health and safety of the claimant or provided insufficient support in that she was inhibited in performing her role effectively. The claimant was an experienced and competent professional.
19. Further, the claimant's registration with the nursing council meant she had to undertake study which is not mandatory. The Trust's study leave policy (page 405) emphasised the importance of professional development. There is no evidence that the claimant's registration was threatened and in fact the Nursing and Midwifery Council extended the time, by 6 months as a result of the pandemic, for nursing professionals to obtain further evidence for their professional registration.
20. Although the claimant and her colleagues were informed that they would not be able to take study leave for 6 months by reason of the removal of Ms. Dixon for 6 months to the seconded position this went on for some 2 years. Although this is unsatisfactory, the tribunal finds that the context of COVID must be considered. The Trust's resources had to be prioritised; and during this period, study could not be prioritised.
21. Until March 2019, the claimant's clinical site management team consisted of 4 clinical site practitioners and 3 clinical night managers, totaling 6 whole time equivalent staff. This allowed for 24 hours 7 day a week cover staff holidays and annual leave. From April 2019 Nicola Dixon a full-time member of staff was removed from the team to act up as interim matron for patient flow on a 6 months' secondment. She was not replaced. This did have some impact on the claimant and her colleagues because they were informed they would not be permitted to take study leave for an initial period of 6 months. As this situation continued the claimant did not ask for study leave because there was a lack of capacity to provide cover if she was to take such time out. The NMC understood the difficulties of the COVID pandemic on nurses conducting study and a further 6 months grace was granted to nurses to obtain evidence of study for the three year validation. There is no evidence that the claimant's nursing registration was ever under threat by a failure to carry out study leave. Further the removal of Ms. Dixon meant that managing annual leave and sick leave was more difficult. The claimant

remained a sole clinical site practitioner on twilight; there was no change to this usual situation.

22. On 23 January 2020, Ms. Dixon did ask the claimant and others whether they would be interested in attending a patient flow conference on 14 May 2020 in Manchester. The claimant stated at this stage that she did not mind others going as she was likely to retire in a couple of years (page 202).
23. From March 2020 the NHS was under considerable strain. COVID 19 was an exceptional event. The Trust had one of the highest proportional over-occupancies of all critical care units nationally. The claimant and her colleagues had never seen such a situation during their lifetime and the demands on the NHS were unprecedented. There were three waves at the time namely from March 2020; from September/October 2020 and from later December 2020. A number of changes had to be made to usual working practices to accommodate the demand for the services of the NHS. This meant normal processes such as study leave were placed on the back burner as clinical staff were retrained and redeployed for emergency treatment.
24. Emergency measures were brought into the claimant's team. It was identified in about March 2020 that a twilight member of staff should assist the claimant and this was put into place for a number of weeks. Furthermore, the clinical practitioner's team administrator working in a band 3 capacity coordinator role working hours were extended until 10pm. Also, the working hours of the hospital's duty matron were extended to 9pm providing further support to the clinical site practitioner and the hospital coordinator.
25. In the context of concern for staff's health and well-being the Trust also implemented a number of initiatives to support them including respite for staff particularly during shifts; direct access to support without requiring a GP referral; on site psychological support; provided information about support services to staff and the communicated a daily dose newsletter to provide information about changes to protocols.
26. On 11 March 2020 social distancing at site safety meetings was introduced (page 66) so that staff who attend meetings were to be kept to a minimum numbers; staff were to wear appropriate PPE and keep a safe distance from others and operation actions centre clerical staff were to leave meetings if more than 6 people were in the room.
27. In whatsapp messaging on 24 March 2020 the claimant raised the practice of social distancing in the office. She also enquired whether meetings were still in the office and stating "*it may sound harsh but we ought to have a sign on the door saying no authorised entry*" and she raised there was "*very little need for people to come into the office*". Ms. Dixon noted the comments but did not reply via whatsapp about these issues. The claimant did not further pursue this and did not escalate it. The claimant did not raise this again until November 2020.

28. On 1 April 2020 page 387 the claimant messaged her manager *"It is virtually impossible at the minute the first half of the night especially I'm usually all happy's Larry on my own if its ok but you just cannot get your head together to even know whats going on till gone midnight. Its impossible on your own at the minute.."* Further at page 388 the claimant messages *"Mondays are also horrendous but it is what it is..I just wanted to voice the difficulties."* Ms. Dixon responded *"Happy for you to have a polite moan and voice the difficulties when ever you need to."* The claimant messages *"I feel if clerical and band 3 support limited at minute because of vacancies which of course its going to be it would be helpful 7.30 till 9pm s it is at the moment 7 till 9."* The next day the claimant emailed *"was horrendous why they staffed it with..To be honest last night was worse than the weekend I could have easily walked out at around midnight I don't feel like that very often."* Ms. Dixon the claimant's line manager took the claimant's comments as a moan about the job and the claimant did not correct her to indicate that this was a staff or patient safety issue.
29. Ms. Dixon carried out a risk assessment on 7 July 2020 (page 207). She identified the risk of a higher number of staff present during site meetings and ways to reduce the numbers attending and ensure all staff wear masks at meetings. The claimant raised in her evidence the fact that the office did not have screens or taped walkways on the floor. Miss. Dixon felt these were impractical and that although no precise measurements were taken of the room that the IPC were satisfied with the steps she had taken in accordance with her risk assessment. There was no documentary evidence to support this but the Tribunal accepts that reasonable steps were taken and the claimant did not escalate any further concerns about this.
30. A number of standard operational procedures (SOPs) were introduced; some of which were written by Ms. Dixon. Ms. Dixon stated that she had included these in a folder in the room but she did not alert the claimant to the existence of these. It was not until the claimant received the trial bundle that she was aware of 18 out of 20 of the SOP processes.
31. In September 2020 the Winter Plan was approved at the Trust Management level. The Winter plan was to cover the period 1 November 2020 to 31 March 2021. The Plan did not introduce a further clinical night practitioner to assist the claimant. However, the Tribunal finds that the steps introduced did have some indirect benefit to the claimant in that it placed the service in the best possible position during the day for the claimant to conduct her twilight work. The measures included :-
- (a) increased medical cover thereby contributing to the freeing up of beds and facilitating flow through the hospital;
  - (b) extending the opening hours of ambulatory emergency care unit so to strengthen the same day emergency care and reducing the need for admissions;
  - (c) Extending the frail elderly service including extending week day hours of the service and providing additional medical and nursing cover over the weekend;

- (d) Additional consultant and middle grade doctor shifts in ED particularly during evenings, overnight and weekends which contributed to the improved decision making earlier and safer discharges and improved patient flow;
- (e) A dedicated transfer team was set up to facilitate transfers out of the emergency department wards;
- (f) The extension of the emergency department progress chaser roles to relieve burdens on clinical staff in chasing up test results to improve decision making and discharge;
- (g) Additional winter ward capacity of 34 beds in medicine enabling greater number of admissions;
- (h) The introduction of dedicated nursing flow manager in surgery to improve patient flow;
- (i) Additional therapy staff rostered over weekends and the festive period to improve patient flow;
- (j) Additional staff allocated to the hospital discharge team to support the discharge of patients with complex needs;
- (k) Community nurses working within the admission areas of manor hospital to support patients to access community care pathways and reduce unnecessary admissions to hospital;
- (l) Extended hours of the rapid response team to reduce levels of hospital admissions;
- (m) Additional evening and weekend session of CT scans and ultra sounds to contribute to patient care making more efficient decision making and discharge of patients
- (n) A dedicated pharmacy discharge team to ensure that discharges were not held up by blockages in Pharmacy;
- (o) Extended hours for the discharge lounge in December and January to release ward needs.

32. Ms. Dixon did raise with Mr. Hobbs that the budget for the clinical site practitioner team was insufficient to ensure cover was available for all episodes of annual leave, study leave and other forms of leave. It was not raised in the context of their being an immediate patient or staff safety issue. This ordinarily would have been something Mr. Hobbs would have addressed as part of the budget setting process for the financial year commencing 1 April 2020 but due to the pandemic meant that usual budget planning processes were suspended.
33. On 17 October 2020 the claimant asked her manager whether there was any cover for Mel Flynn Sunday, Monday or Tuesday and Ms. Dixon replied "no Jo Sorry". The claimant replied if it was not to "get any better it will be horrendous it was a horrendous last Monday and that was with Mel". Again the claimant did not escalate her concerns further or suggest there was a patient or staff safety issue.
34. On 18 November 2020 (page 264) Ms. Dixon messaged the team to state that they had an agreement to double up every weekend throughout December and January. A sheet will be available for availability. The

claimant enquired what the doubling hours would be and stated that *“we really could do with twilights as its too much for one from as early as 7.30”*. Ms. Dixon did not respond to this message.

35. On 15 and 24 November 2020 at pages 260 and 273 the claimant submitted night site/patient flow reports the claimant raised difficulties during her night shift. These reports go to directors. The Tribunal finds although these highlighted difficulties on the shift they did not explicitly raise patient and staff safety issues nor were they the appropriate avenue to do so.
36. On 23 November 2020 the claimant emailed her manager Miss. Dixon (page 269) about her risk assessment and stated *“I do think its still a worry how many people attend some of the bed meetings in such a small office as ours even when clerks go out. I know I do not attend the meeting myself but I do have to work alongside people who do.”* The claimant’s risk assessment at page 270 revealed a health condition and was determined to be an amber risk. The claimant also noted on the risk assessment that there were no screens in the office and there were large meetings in a small space during the day.
37. By email dated 23 November 2020 Miss. Dixon emailed the claimant about her risk assessment and stated *“we have reduced the number that attend the meetings to the minimum we need and were are redoing the risk assessment on the room again”*. She stated that she would complete the rest of the risk assessment and then *“discuss it with you”* but she did not have any further discussions with the claimant about this. By this point the government had relaxed some social distancing rules. It had been announced on 23 June 2020 that with effect on 4 July 2020 where it was not possible to keep 2 metres apart individuals should keep 1 metre plus apart.
38. The claimant took sickness absence from December 2020 due to COVID which she had contracted from her daughter at home. No individual in the claimant’s team day or night had contract COVID at work.
39. On 7 January 2021 the claimant contacted Amanda Di Gennaro, her colleague and asked how the hospital was. Amanda told the claimant that the hospital was busy; that no twilights had been covered. Amanda informed the claimant about her shifts. The claimant became tearful. The claimant determined that there was no change to her working environment and determined she would resign her employment.
40. On 15 January 2021 the claimant messaged her manager to inform her that she would be off until 25 January. She further stated that she would be retiring on 6 June and would send her resignation letter next week. Miss. Dixon replied that she knew the claimant was looking at going but did not realise it was so soon.
41. The claimant sent an email to her manager Nicky Dixon on 18 January 2021 at 16.52 stating *“I hereby give my notice of resignation as I will be taking early retirement. I wish my last working day to be Sunday 6 June 2021.”* The claimant also sent a resignation letter to Ned Hobbs on the same date at



23.17 stating *“I have attached a letter regarding my resignation it is separate to the standard resignation letter I have submitted to Nicky today. Sadly it sets out reasons why I feel I have no option but take early retirement if possible could this remain confidential as far as possible in relation to my lone manager and team members.”*. In the claimant’s letter she stated *“I feel I can no longer work in my current environment. Since last winter the pressure of being the only person covering both onsite manager and patient flow have been exceptional to the point threat supporting the ward and monitoring quality and safety has been impossible alongside patient flow. This should be equally as important and as a nurse responsible for others leavers me feeling vulnerable and unable to do my job. Myself and other night managers and some members of the team who cover nights have expressed difficulties in having no support overnight numerous times to our line manager. I have also had conversations with more than one of the on call managers team who have stated they have escalated the unsafe situation of night duty and the workload. Myself and other team members of the team have regularly escalated the difficulties in our night reports to no avail. The final straw for me was this winter when like other areas have had there was no additional winter pressure funding for extra staff for the night shift.”* The claimant also stated *“alongside the pressures our office is also leaving myself and others at risk regards social distancing and covid 10 health and safety procedures despite escalation. The numbers attending meetings traffic through the office and lack of screening is a continuous risk.*

42. The Tribunal did not find the claimant’s letters to her manager and Mr. Hobbs as inconsistent. The claimant had explained she lacked confidence in her manager to keep matters private and this is an adequate explanation as to why she did not divulge to her manager the detailed reasons behind her resignation revealed to Mr. Hobbs.
43. The claimant was aware of the grievance procedure available to her. She did not make lodge a formal grievance about any concerns until her detailed resignation letter on 18 January 2021. The claimant described herself as a traditional nurse and she did not consider that it was appropriate to raise concerns directly with the chief operating officer.
44. There are a number of ways to raise concerns in the trust including via a grievance procedure and whistleblowing procedure. The respondent also publicised the Freedom to Speak Up guardians for those wishing to raise anonymous concerns. Human Resources was available to the claimant. The claimant was also a member of a trade union. The claimant did not access any of these avenues for redress including her trade union representative because she said she was concerned about issues of confidentiality and the negative view people may have about her for complaining.
45. By failing to instigate any of these processes or informing her manager directly she was raising a grievance, the respondent reasonably concluded that the claimant was raising concerns about improvements as opposed to issues of imminent patient or staff safety requiring immediate action.

46. The claimant followed her resignation letter up with an email dated 1 February 2021 stating that "*I consider myself working my notice period under protest.*" The claimant wrote this to the respondent being made aware she might be accused of affirming a breach of contract by providing long notice.
47. The claimant gave 4.5 months' notice because the NHS Pensions department asked for 4 months' notice to terminate employment (page 384). Furthermore, the claimant had prebooked some annual leave (about one year before) in advance for June 2021.
48. The Tribunal accepted the claimant's evidence that she was concerned about giving the pension agency sufficient notice of her resignation and she was also concerned about the effect of her departure on her colleagues and the service. The Tribunal accept these concerns were genuine. The claimant was a conscientious employee.
49. Mr. Ned Hobbs acknowledged the claimant's letter of resignation letter on 22 January at page 283-284. He acknowledged the claimant's experience and skill set. He noted the claimant's concerns and stated he would reflect on these for the next plan. The Tribunal did not conclude from Mr. Hobbs response that he did not take the claimant's concerns lightly. There was no indication in the claimant's letter that she wished to meet with him or seek a resolution of these issues.
50. On 21 January 2021 the claimant contacted ACAS. The respondent suggested that it should meet the claimant. Mr. Hobbs met with the claimant on 1 March 2021 and 26 March 2021 with her trade union representative. By letter dated 4 April 2021 (page 306) Mr. Hobbs stated that the claimant's concerns had not been raised via the trust's grievance and disputes procedure. In his letter Mr. Hobbs made the distinction between identifying something that can be improved and formally escalating a matter of significant concern particularly if related to patient or staff safety. He noted that the claimant had not formally escalated this matter to be a significant concern to her line manager or to him. He offered to consider looking for another role but the claimant did not want to explore this. Further by letter dated 15 April 2019 Mr. Hobbs informed the claimant by email that he had been informed about interactions in the operations room which could be more professional but not classified this as a breach of confidential trust. The claimant provided a detailed response to Mr. Hobbs letter on 25 April 2021 at page 317 including drawing his attention to some comments she had made to her by line manager in messages along with two night reports which set out difficulties of the shifts.
51. Following her resignation (Page 296) the claimant contacted the freedom to speak up guardian.
52. The claimant wrote to Ned Hobbs on 19 March 2021 about a breach of confidentiality; she had heard that 5 members of staff were aware that she

had met with Mr. Hobbs and the fact is being shared in an unfavourable manner. On 4 May 2021 Mr. Hobbs emailed Sabi about her allegations that she had heard colleagues gossiping but did not consider it was a breach of confidentiality. She was requested to provide further details to Mr. Hobbs but she did not do so. Amanda Digennnarao also had concerns about confidentiality in the workplace but these were unspecified in the witness statement.

#### The Law

53. Section 95 (1) (c) of the Employment Rights Act 1996 (“ERA”) relevantly provides *“For the purposes of this Part an employee is dismissed by his employer if (and only if)-the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”*.
54. An employee seeking to establish that she has been constructively dismissed must prove :- (1)that the employer fundamentally breached the contract of employment; and (2)that she resigned in response to the breach (see **Western Excavating (ECC) Limited v Sharp (1978) IRLR 27**).
55. It is an implied term of the contract of employment that the employer will not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee; **Malik v BCCI plc (1997) IRLR 462; Baldwin v Brighton & Hove CC (2007) IRLR 232**.
56. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT in **Pearce v Receptek (2013) All ER (D) 364** at paragraphs 12/13  
*“It has always to be borne in mind that such a breach (of the implied term) is necessarily repudiatory and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious”*. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal not in an employment context, in the case of **Eminence Property Developments Limited v Heaney (2010) EWCA Civ 1168** *“..the legal test is simply stated..it is whether looking at all the circumstances objectively that is from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention toe abandon and altogether refuse to perform the contract’*. That case has been followed since in **Cooper v Oates (2010) EWCA Civ 1346** but is not just a test of commercial application. In the case of **Tullet Prebon Plc v BGC Brokers LP (2011) EWCA Civ 131** Aikens LJ took the same approach and adopted the expression *‘Abandon and altogether refuse to perform the contract. In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that since it is repudiatory it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract’*.
57. It is not enough to show merely that the that the employer has behaved unreasonably although “reasonableness is one of the tools in the

employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach." (see **Buckland v Bournemouth University Higher Education Corporation (2010) EWCA Civ 121**).

58. Where a fundamental breach of contract has played a part in the decision to resign the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning; **Wright v North Ayrshire Council (2014) IRLR 4 (paragraph 16)**.
59. Where a Claimant relies upon a final straw to resign the final act may not be blameworthy or unreasonable but it must contribute something to the breach even if relatively insignificant **Omilaju v Waltham Forest London Borough Council (2005) EWCA Civ 1493**. Further, there cannot be a series of last straws; once the contract is affirmed earlier repudiatory breaches cannot be revived by a subsequent "last straw" and following affirmation it takes a subsequent repudiatory breach to entitle the employee.
60. Pursuant to the case of **Cockram v Air Products (2014) IRLR 672** it was held that affirmation can take place after notice of resignation has been given. The claimant in Cockram gave long notice of 7 months when contractually he was required to give 3 months. Mrs. Justice Simler held

*"..I am satisfied that the case of affirmation whether pre or post resignation is a concept capable of being considered under section 95(1)(c) of the ERA. The nature and outcome of that consideration depends on all the circumstances of the case including where appropriate, the length of notice given by the innocent party (always recognising that notice is expressly permitted by the subsection) in the face of an actual or threatened fundamental breach of contract and the reasons for giving such notice. On this basis the employment judge was entitled to construe section 95 (1)(c) as he did and no error of law had been established. Having correctly interpreted that provision the employment judge was also entitled to conclude that the claimant affirmed the contract on the facts of this case. Having found as he did that the claimant gave seven months notice (when his contract required only three months notice) solely for his own financial reasons and rejected the claimant's evidence to the contrary, the judge was entitled to conclude that the claimant had affirmed the contract of employment by providing services and receiving substantial remuneration in accordance with the contract for a period of seven months following the giving of notice."*

#### Submissions

61. The respondent provided a detailed written submission and referred to the cases of **Western Excavating (ECC) Limited v Sharp (1978) ICR 221; Malik v Bank of Credit and Commerce International AS (1997) IRLR 462; Baldwin v Brighton and Hove City Council (2007) IRLR 232; Buckland v Bournemouth University (2010) IRLR 455; Omilaju v Waltham Forest LBC (2005) ICR 481 and Cockram v Air Products (2014) 672**. The respondent also made oral submissions. The respondent

submitted that even if a breach could be established the claimant had affirmed her contract by providing an excess period of some 4.5 months notice which she financially benefited from by not detrimentally reducing her pension. In any event there was no breach of the implied term of trust and confidence. The claimant can not show there was an intentional conduct by the respondent to destroy the relationship such as bullying. Further objectively the respondent's conduct was not likely to destroy confidence as the respondent was not on proper notice of the claimant's concerns through the claimant's failure to adequately escalate her concerns. The claimant failed to raise any formal issues prior to resigning.

62. The respondent submitted that the claimant chose to resign to take early retirement after the stresses suffered by all staff in dealing with the COVID 19 pandemic. The respondent submitted objectively viewing the respondent's conduct there were no acts or omissions that were capable of breaching the term of trust and confidence. The respondent relied upon the fact that Amanda Digennaro who performed the same role as the claimant did not contend that there was a failure to provide support such as to support a breach of trust and confidence or a failure to deal with health and safety. The Tribunal must take into account the context of the time of the exceptional time of COVID 19 and the effects on the NHS.
63. The claimant provided a written submission and supplemented this with oral submissions. The claimant submitted it was her case that the respondent's conduct was likely to destroy trust and confidence. The claimant referred to page 384 of the bundle which states that employees are recommended to agree a retirement date at least 4 months before the claimant's intended retirement date to allow the pension application to be processed. The claimant stated that her annual leave booked for June 2021 had been booked a year before. She did wait until this date to terminate her employment because of the difficulties and pressures on her colleagues leaving at an earlier time. She submitted that if she had retired a few weeks before it would have made very little actuarial difference to the amount of her pension. She also disputed the evidence of Ms. Dixon that the IPC had accepted the layout of the office as there was no documentary trail in the bundle. The claimant sent her detailed resignation letter to Mr. Hobbs because she was concerned about confidentiality. The claimant referred to the night reports she submitted to directors which highlighted there were insufficient staff; it was extremely difficult to manage due to their only being one member of staff. The claimant raised her concerns via whatsapp messaging which was used as a formal means of raising concerns. The claimant relied upon her messages to Ms. Dixon prior to the winter period that more budget was required or staff would be dropping like flies and could have walked out. Amanda had referred to confidentiality issues. The claimant does not believe if she had raised concerns that Mr. Hobbs would have done anything about them. She put in full reasons in her resignation letter and Mr. Hobbs did not arrange to meet with her to sort them out.

#### Conclusions

64. The Tribunal found the claimant to be credible witness. The claimant was a conscientious professional evidenced by her concern not to apply for her

own study leave in case this would impact on other co-workers and the service she was providing to patients.

65. The claimant along with a number of health professionals working in the NHS was subject to extreme stress during the COVID pandemic. The Tribunal finds that the claimant did perceive that there were health and safety concerns at work and that she had inadequate support to do her role. However, the claimant did not articulate her concerns in a manner so to suggest they were imminent threats to her health and safety or an imminent threat to patient safety.
66. Further the claimant failed to escalate her concerns in accordance with the processes available and known to her including the grievance procedure. The claimant did not even contact her trade union representative until after her resignation.
67. The Tribunal accepts that the claimant was concerned about the lack of confidentiality. The claimant lacked confidence in her own line manager to keep matters confidential. However, by the very nature of the claimant's concerns she needed to escalate them in the appropriate way. She did not do so. The issues she was concerned about potentially impacted on others and herself. Concern about lack of confidentiality cannot be an adequate explanation for failing to use the usual and appropriate avenues to raise such concerns.
68. In the Tribunal's determination the use of a works whatsapp messaging forum was inadequate for the respondent to process that the claimant's concerns were putting her or patients at risk. Furthermore, the content of a night report raising matters was insufficient to formalise the serious issues the claimant perceived them to be.
69. Miss. Dixon on her own admission did discuss with colleagues in the office that changes were to be made after the claimant complained. The Tribunal was not satisfied there was any requirement for Ms. Dixon to discuss the concerns specifically raised by the claimant to Ned Hobbs or identify that it was the claimant raised them; it gave the impression that Ms. Dixon was unnecessarily revealing information.
70. However, the claimant was overly concerned with the confidentiality about raising concerns and how others might negatively perceive her which meant she failed to use the appropriate channels to raise concerns. The claimant did not adequately escalate her concerns to the point that Ned Hobbs did not understand any complaints raised had an impact on either staff or patient safety.
71. The burden rests upon the claimant to establish that the respondent was in serious breach of contract, namely a breach of the implied term of trust and confidence. The claimant contends it was the manner the respondent

conducted itself that destroyed trust and confidence. The Tribunal determines that the claimant has failed to establish such a breach.

72. The Tribunal accepts that the claimant was short-staffed on the night shift and under extreme pressure in the Autumn of 2020. This was the second wave of the COVID pandemic. However, the claimant did not formalise her concerns or ever suggest in a direct manner that her health or patients health was at risk. By the informal manner the claimant chose to raise her concerns the respondent reasonably could conclude they were suggestions for improvement as opposed to requiring immediate attention due to health and safety risks to patients or staff. This was not a case where an employee instigated a formal process and the respondent did nothing. The claimant did not access the number of avenues open to her and known to her to voice these issues. Where her manager stated on a whatsapp group that she was *“Happy for you to have a polite moan and voice the difficulties whenever you need to.”*, the claimant did not correct her manager to suggest anything different or more serious to patient or staff safety.
73. The Tribunal has some sympathy for the claimant in that she was mindful of a hierarchal structure in her organisation and that she was uncomfortable going above the head of her manager to Mr. Hobbs to complain. Furthermore, that the claimant felt uncomfortable as being seen as a “complainer” which could be perceived negatively. However, if the claimant wanted her complaints to be taken seriously she needed to initiate a formal process. Regrettably the claimant failed to utilize her trade union representative until after she has resigned.
74. The Tribunal determines that the employer did not conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (see **Malik v Bank of Credit and Commerce International SA (1997) IRLR 462**).
75. The context of the COVID pandemic must be considered in relation to the granting of study leave and completion of appraisals. The work of the NHS was unprecedented. The pandemic meant that the NHS and its employees were under significant pressure. There was no evidence to suggest that the absence of study leave or a recent appraisal placed the claimant at risk or that she could not undertake her role. The Tribunal has already found the claimant to be a competent professional.
76. The Tribunal accepts that the claimant knowing that she was returning to the workplace under similar circumstances following her conversation with her colleague on 7 January 2021 determined to leave her employment. This was sufficient to add to other matters she subjectively believed were breaches of contract to amount to a last straw; “the something more”. However, the legal test to establish a repudiatory breach of the implied term of trust and confidence is not a subjective one. Objectively, the Tribunal finds there was no repudiatory breach. An employer cannot be criticised for failing to act where complaints are not articulated through a proper and known process or where they are not articulated in such a manner to raise issues of patient

and staff safety. The respondent reasonably concluded that the issues raised by the claimant were issues suggesting improvement as opposed to staff or patient safety issues.

77. The Tribunal does find that the claimant left as a result of her perception that there had been a breach of contract. The claimant had intended to retire early but her perception of how the respondent behaved determined that she would retire earlier than previously planned.
78. In conclusion, the claimant has not established that the respondent acted in a manner without reasonable and proper cause, so to conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. On this basis the claim for constructive unfair dismissal fails.
79. The respondent has raised an interesting point as to long notice and affirmation. The case of **Cockram** permits the Tribunal to find long notice may amount to affirmation. The argument has been run and so the Tribunal determines on the facts of this case had the claimant established a repudiatory breach, the Tribunal would not have found affirmation here. The Tribunal found the claimant to be a caring health professional concerned as to patient care and her colleagues. This significantly impacted on her decision to provide long notice. Her email dated 1 February 2021 further clarified that she was working under protest following being made aware that she could be perceived to have affirmed the contract. However the Tribunal does not consider that this email was written in bad faith. The claimant did not want to leave the service or her colleagues in a manner which might impact on them negatively so she chose to give a generous period of notice. On the particular facts of this case the Tribunal could not have found that the claimant affirmed the contract.

**Employment Judge Wedderspoon  
9 February 2023**