



EMPLOYMENT TRIBUNALS

Claimant: D Ramjuttun

Respondent: Greater Manchester Mental Health NHS Foundation Trust

Heard at: Manchester

On: 12-15 June 2023

Before: Employment Judge Serr

Representation

Claimant: Mr Adam Ohringer (Counsel)

Respondent: Ms Rosie Kight (Counsel)

JUDGMENT having been sent to the parties on 27 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form presented on 29 July 2022 the Claimant brings a claim for unfair dismissal pursuant to s.95 (1) (c) and s.98 ERA 1996 and wrongful dismissal. He says that the Respondent's failure to properly address an assault he suffered from a service user on 9 May 2021 and the manner in which it conducted a disciplinary and grievance investigation arising out of incidents involving service user "ST" on 5 and 10 May 2021 constituted a repudiatory breach of contract entitling him to resign and treat himself as dismissed. He says that such a dismissal was unfair. The Respondent denies that it has breached the contract of employment. The Claimant was not dismissed. A further claim for unlawful deduction of wages was dismissed on withdrawal.

The Issues

2. In lieu of a previous Preliminary Hearing (PH) in the case, at the outset of the claim the Tribunal sought to identify the issues and in particular the matters said to individually or cumulatively constitute a breach of contract. Following discussion with the representatives these were identified as follows:

Was the Claimant constructively dismissed?

The Claimant complains of constructive dismissal, effective 27.04.22. The Tribunal will have to determine the following issues:

1. Did any or all of the following occur?
 - a. The Claimant was assaulted by a service user on 09.05.21 whose high-risk status had not been correctly recorded:
 - i. The Claimant was not sent to Occupational Health (OH) until this was requested by the Claimant, the OH recommendations were not followed and the Claimant was not provided with support.
 - ii. No investigation was conducted into the recording error which resulted in the Claimant being assaulted until August 2021.
 - iii. The Claimant was not informed of remedial steps being taken in response to this error until October 2021.
 - b. An investigation was conducted into the Claimant's interactions with a different service user on 05.05.21 and 10.05.21:
 - i. The initial fact-finding exercise took an inordinate amount of time and was not completed until 09.07.21.
 - ii. The Respondent failed to retrieve CCTV evidence.
 - iii. A decision was then made to commence a formal investigation without justification as the evidence already showed that no serious misconduct had been committed by the Claimant. This included the Respondent failing to take into consideration

the Claimant's PARIS notes from 05.05.21 which set out his actions and permissions received for them.

- iv. Despite requests from the Claimant, the Respondent did not suspend him from work during the course of the investigation
 - v. Despite requests from the Claimant, he was not provided with the material collected or created in the original fact-finding exercise.
 - vi. The CCTV evidence was still not retrieved during the formal investigation.
 - vii. The investigation took an inordinate amount of time and was only completed and sent to the Claimant on 14.02.22. The Claimant was exonerated of any substantial allegations of misconduct.
 - viii. The Respondent failed to put in place any process for the Claimant to return to work after a nine-month long investigation which had caused him to be off sick during that period.
 - ix. The Claimant submitted a grievance into the handling of the investigation and other matters on 12.07.21 which was escalated to a formal grievance on 15.10.21. The Respondent had still not completed its investigation into the grievance by the time the Claimant terminated his employment on 27.03.22.
2. Did the Respondent through its acts and omissions set out in paragraph 1 commit a repudiatory breach of any of the following implied terms in the Claimant's contract of employment?
- a. That the employer will not without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee;
 - b. That an employer will conduct a disciplinary process fairly and without undue delay;

- c. That an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have.
3. If so, did the breach play a material part in the Claimant's decision to resign?
4. If so, did the Claimant affirm the contract following the alleged repudiatory breach and before resigning?

The Procedure

3. Both parties were ably represented by Counsel, Mr Ohringer (for the Claimant) and Ms Kight. The Tribunal read witness statements and heard oral evidence from the Claimant and three witnesses for the Respondent being Astrid Rawlison Service Manager at the time, Declan Meehan Operational Manager and Adam Morris Service Manager.
4. The Tribunal had a file of documents running to over 500 pages. It considered expressly only those documents it was taken to by the parties. In the end only a relatively small selection of the hearing documents was considered by the Tribunal. A helpful agreed chronology was also produced by the parties on request of the Tribunal. The Tribunal indicated that the issue of liability and remedy would be split with remedy being addressed, if necessary, on another date.

The Facts

5. The Claimant is a senior mental health practitioner. He was employed with the Respondent from according to the ET1 18 April 2000 and according to his witness statement November 1996 until his resignation with effect from 27 April 2022. He worked 19.5hrs over two days per week. He was separately the proprietor of a care home which was his main source of income.
6. He describes having an immaculate track record having not previously been involved in any disciplinary matters with the Respondent prior to the events giving rise to this claim.

5 May 2021

7. What occurred on 5 May 2021 can be taken from the investigation report of Ms Sutton dated 28 January 2022. The Claimant was working on the 5th May 2021 and had been the allocated gatekeeper for Central Home-based Treatment Team (the gatekeeper is a triage role). A service user ST had attended Accident and Emergency at Manchester Royal Infirmary in crisis.

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The decision by the Mental Health Liaison Team was to admit this individual. The process for this is that the Home-based Treatment Team (HBT) will triage all decisions to admit seeing if there is a less restrictive option. Due to this the Senior Practitioner from mental health liaison Michael Bourne contacted the Senior Practitioner in Home based Treatment Bolah Soboyejo to make the referral.

8. At this point a PARIS number (PARIS is the Respondents computerised patient records system) was taken and given to the Claimant to research and then attend to do a gatekeeping assessment. Once the Claimant went into the electronic notes, he realised that he knew the service user who was a family friend and so then alerted the Senior Practitioner on shift with him Mr Soboyejo and they had a discussion. It was agreed that the Claimant went over and asked the Senior Practitioner if the service user would see him. The answer was no from the service user and the Claimant returned to the HBT office in the Rawnsley Building.
9. On 6 May 2021 Andrew Buckley the acting Team Manager was informed by Mr Soboyejo about the incident on 5 May 2021. Mr Buckley indicated he thought this was inappropriate and that the claimant should not have gone to A&E at all. Mr Buckley decided to have a conversation with the Claimant about this when he returned to duties.

9 May 2021

10. What occurred on 9 May is recorded in a serious incident briefing form completed after the event in August 2021. The Claimant attended patient AM's property to deliver medication whilst AM was under the care of HBT. The Claimant entered the property and when sorting out AM's medication AM threw a glass of water/juice over the Claimant's head. The Claimant got up to leave but before he left the property AM threw a second glass of water/juice over the Claimant. At this point the Claimant left the property.

10 May 2021

11. 10 May was not a working day for the Claimant (he was next due in on 12 May 2021). He attended patient ST who was now on Mulberry Ward.
12. On the same day Mr Buckley received an email from a Nicola Williams a nurse on the Mulberry Ward expressing concerns about the Claimant's actions in visiting the Mulberry Ward on that day. She also completed a datix form on that date. The form stated as follows:

Unidentified person arrived on the ward with medics and stated he was from HBTT and was here to see patient ST, reported he was a friend and supporting him. Author was not aware of this and upon finding patient and person in activity room approached the person and asked what capacity he was visiting the ward and patient. He reported to staff nurse NW he was from HBTT, asked if he was completing the outstanding assessment and he confirmed he was. The room was required for another patient and therefore

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I asked patient ST and HBTT worker to leave the activity room and placed them in the ward office to continue with the assessment due to the unavailability of other appropriate space on the ward and he agreed. Patient and person were checked on several occasions and upon entering it appeared he was assessing the patient due to the conversation that was taking place.

Staff on shift later advised staff nurse NW the person was visiting the ward as a friend and he worked for HBT, therefore they allowed him to adhere to the visit.

Staff NW entered the office and queried with the person the purpose of the visit, he again reiterated that he worked for HBTT. When asked about his relationship to the patient he disclosed he was a friend, then stated "but your staff let me come onto the ward". Visit was terminated immediately and discussed with person, "Dan" the visit was not appropriate and reiterated the rules for covid-19 at present.

Immediate Action Taken:

Person was asked for his details and he advised his name was Dan, discussed how it was not appropriate to be on the ward and as a professional he should be aware of the covid-19 rules and regulations. He did not provide a surname.

Further information gathered from the patient in terms of his name and relationship to patient, states he is a family friend and only confirmed his first name, "Dan".

Discussed concerns with manager HP and acted on advice.

Reviewed signing in sheet at reception and person had not signed in. Discussed with reception and she reports she would not allow another person onto the wards without prior approval, assume working person has pass access to gain entry within park house. Email sent to managers of HBTT to try to identify the individual for further discussions with line manager.

Discussed with staff on shift to ensure all persons entering the ward are monitored and to establish a reason for the visit. Reiterated to staff to ensure security on the ward for staff and peers.

13. On 11 May 2021 Mr Buckley wrote to Mr Meehan Operations Manager, by email discussing the communications he had had with Nurse Soboyejo and Nurse Williams. The email expressed concerns on behalf of Mr Buckley about the Claimant's actions and stated that he thought the matter needed further investigation and that he wished for a meeting with Mr Meehan.
14. On 12 May 2021 the Claimant wrote to Mr Buckley with the subject 'sick today'. The email stated that he had just called in and spoken with Olivia and that she would pass a message on to Mr Buckley who was not available. He said he wasn't feeling well after the incident on Sunday for which he had emailed Mr Buckley. If you need to speak with me then call by all means but I don't really want to talk about it any longer I will not be in this

week. I will get back to you next Tuesday regarding next week. The incident on Sunday refers to the assault by the patient in respect of the water being thrown. The Tribunal did not see any email referred to by the Claimant said to have been sent to Mr Buckley in regard to this matter.

15. The Claimant completed a fit note indicating that he was unable to work due to work-related stress. The Claimant in fact remained continuously off sick until his ultimate resignation.
16. Mr Meehan discussed the matter with Miss Katie Robb HR Manager. It was determined that an initial enquiry whose purpose was to gather the facts should be initiated under the respondent disciplinary policy. The policy at para 4.7 states that if sufficient facts are available and the matter is straightforward the Line Manager in consultation with an HR Adviser will decide whether or not a full formal investigation may be necessary. It may be that a simple discussion with the employee is all that is required. However if the Manager decides to take formal action then an investigation must be commissioned.
17. Mr Buckley was charged with undertaking the fact-finding investigation by Mr Meehan. Statements were obtained on 14, 18 and 21 May from a Mr Adejeji who was on duty on 10 May at Mulberry Ward and had interactions with the Claimant and Miss Holly Maguire Support Worker also on duty on Mulberry ward and Miss Nicola Williams. The statements of Adejeji and Williams are identical. No explanation was given to the Tribunal in respect of why this was the case.
18. Other information including an IT audit trail for the PARIS records accessed by the Claimant was also sought and received on 15 May. This showed the patient records were kept open for a number of hours by the Claimant after having been first accessed.
19. On 2 June 2021 Mr Buckley raised a series of questions to the Claimant in respect of his relationship with patient ST and the reasons underpinning his actions on 5 and 10 May 2021 which were answered by the Claimant.
20. On 3 June Katie Robb acknowledged the answers provided by the Claimant and asked Mr Meehan and Mr Buckley to review the evidence and come to a decision on whether there was misconduct or poor practice.
21. On 4 and 7 June an email exchange took place between the Mr Meehan and Astrid Sarsfield then Service Manager for the mental health team. Mr Meehan thought the visit to the ward was done with goodwill and to support the family. The conduct on the ward was open to interpretation. There were questions as to why the Claimant didn't arrange the visit in advance complying with Covid requirements and the accessing of the records and

attempting to do a gatekeeper assessment of a family friend was inappropriate.

22. Ms Sarsfield took a more serious view of the Claimant's actions. She stated *I agree with all your thoughts, but i do query the misconduct as he attempted to visit a patient on the ward that was not a work/ professional contact by means of deceit and i find that conduct of one of our professional, experienced staff very concerning.*

23. On 8 June the Claimant emailed Mr Buckley submitting a fit note for three weeks and stating his version of events and seeking an update on the investigation. He stated:

I did not access PARIS except when I was on the GK role which I had discussed with Bola who was on the shift. Since that day I have not accessed his notes.

I did go on Mulberry ward as per request from ST , who was struggling on the ward because of various issues.

I did not access my ID card to gain access into the building to see ST. When, I went on the ward, I asked to speak with the person in charge via a support worker/student.

I explained to the person in charge that I did work for the HBT and I was not on duty and understood that visiting was only planned visits over weekend but asked for a favour while I was at North Manchester General.

I also explained that he was a friend, and I was only there to support him as per his request as he was struggling.

The person in charge agreed and said it was no problem and asked for the support worker/student to escort me to ST.

I was moved several times due to lack of space which was ok with me and ST

The staff member who actually had an issue with me being there was very rude and literally escorted me out of the building when I told her I was not there officially. She did not give me a chance to explain that I did ask permission from the person in charge, and it was agreed for me to see ST.

24. The email was forwarded to Mr Meehan who replied on the same date stating that he understood the Claimant had been referred for an Occupational Health (OH) assessment by Mr Buckley, that the Trust had to undertake a fact-finding investigation and he would be informed of the outcome as soon as possible.

25. On 8 June Mr Buckley confirmed to the Claimant he had in fact referred him to OH. While it is not evident from the documents Mr Meehan stated in evidence and the Tribunal accept that further discussions between himself and others took place in respect of the decision whether to initiate a

disciplinary investigation with a final decision being taken on 30 June to proceed.

26. On 8 July 2021 an OH report was received in respect of the Claimant. The OH physician recorded a number of stressors including the perception of an absence of a suitable risk assessment prior to the water throwing on 9 May, caseload, lack of communication following his absence and an agreed return to work plan. The opinion was that the Claimant would be fit to return to work following a period of planned leave due to end 22 August and would require a stress risk assessment on his return. The occupational health report was not provided to the Claimant at this time.

27. On 9 July 2021 the Claimant was notified by Mr Meehan about the disciplinary investigation by phone and in writing. Terms of reference were set out (wrongly dated 6 July). Mr Meehan was to be the Case Manager for the investigation. The Investigator was to be a Ms Elizabeth Sutton, Quality Improvement lead nurse. The allegations were set out as follows:

1. On the 5 May 2021, following a referral for a Gatekeeping assessment at MRI A & E to Central HBTT, you accessed the PARIS records of the service user who is known to you and your family outside of work and who you describe as a family friend.

2. You then attended A & E, MRI to Gatekeep the service user but the service user declined for you to assess him

3. You visited the family friend on Mulberry Ward, Park House, NMGH on the 10 May 2021. It alleged that you 1) did not arrange the visit to the ward in advance and during covid visiting restrictions 2) you claimed you were on Home Based Treatment team duties as part of your visit 3) you refused to give staff your name on being asked.

28. It was indicated who would be interviewed. This was said to be Mr Soboyejo, Nicola Williams, and Mr Adejeii but this was to be reviewed by Miss Sutton. The letter also stated:

I have asked Elizabeth to complete their investigation report by 10th August 2021. If they need further time they will request this from me and I will update you. Once the report is complete, I will review it and arrange to meet with you to provide you with the outcome of the investigation. One possible outcome is that the matter could proceed to a Disciplinary Hearing.

29. On 12 July 2021 the Claimant raised a grievance. The grievance is headed grievance against the Trust of bullying and harassment. It is lengthy running to some seven pages and contains a number of different allegations many of which are not relied on in his claim to the Tribunal. The Claimant indicated that since being notified of the decision to further investigate the allegations against his conduct at work he was feeling very unwell with lack of sleep, lack of support and an increased level of anxiety. The Claimant within the

grievance requested a number of different items of information including the OH report, the fact-finding findings and work related to it, a number of documents related to the assault at work and he sought a further referral to occupational health. He also for the first-time mentioned checking CCTV on the Mulberry Ward for the day in question. By this point the CCTV was not available having not been retained beyond a 30-day period and in any event did not have audio.

30. A second referral to occupational health was made on 13 July 2021.
31. Mr Meehan on the same date responded to the Claimant's letter of grievance acknowledging it and indicating that there was a lot of information and detail to go through from the grievance document and that he would try to go through it the following day. He hoped to get a response to the Claimant by week commencing 26 July.
32. The Claimant chased for the information requested in the grievance which had still not been provided by 21 July 2021. Within the same email he also sought a copy of the occupational health report which had not been forwarded to him.
33. The Claimant's trade union representative Mr White chased Mr Meehan on 2 August for a response.
34. Mr Meehan responded on 4 August apologising for the delay in response. He stated that he had told the Claimant and repeated that he had had some time unexpectedly off over the last two weeks but that he was back in work now full-time in a position to address specific concerns. He was undertaking the informal stage of section 4.3 of the grievance policy where we would aim to resolve the issues raised and provide a response as quickly as possible. Elizabeth Sutton was in receipt of the initial fact-finding notes in respect of the disciplinary and could share that with the Claimant before she meets with him.
35. On 10 August 2021 the Claimant sent another letter of grievance. The attached email stated that none of the timeframes which was stated by yourself have been adhered to. The grievance itself complains amongst other things that the information requested on 12 July is yet to be received.
36. On 11 August the Claimant was invited to attend a grievance meeting to take place on 20 August 2021.
37. The Claimant wrote to Mr Meehan on 13 August 2021 stating that he would need the information he originally requested in his grievances before that meeting and asking when they were to be made available to him. Mr Meehan replied on the same day stating "yes you will receive all the information you have requested before the meeting and I will get what is remaining sent to you as soon as I can".

38. A second occupational health report was also received dated 13 August 2021. That report stated that the Claimant had not returned to work following his absence attributed to stress. He cites this as being due to allegations made against him and subsequent investigation proceedings. The Claimant stated that he had not been supported following the assault or during the disciplinary process. The management advice was that undue delay in dealing with stressors can result in an exacerbation of symptoms. The advice was to conclude matters with normal care concern and sensitivity and in a timely manner by scheduling a meeting. Return to work is likely at the end of this process.
39. On 18 August 2021 the Claimant wrote to Mr Meehan stating that he is still awaiting the requested information which he had still not received. As he had not received the information he would not be able to attend the grievance meeting on 20 August. He had not received the previous occupational health report of 13 August either.
40. In the meantime it appears that Mrs Sutton's disciplinary investigation was proceeding. Mrs Sutton interviewed Bola Soboyejo on 5 August and the Claimant himself on 27 August 2021. By this point of course the 10 August deadline set by Mr Meehan in his terms of reference letter had passed seemingly without any explanation to the Claimant or authorised extension.
41. Attempts were made by Mr Meehan and the Claimant and his trade union representative to obtain an alternative date for the grievance meeting. The union representative was off between 20 August and 6 September 2021 on annual leave. Further attempts were made to find a date in September and a significant amount of correspondence passed between the parties. The Claimant indicated on 23 September that in advance of a meeting a few days later he had not been provided with a single piece of information which had been requested prior to the grievance meeting.
42. On 12 October 2021 Mr Meehan provided a copy of his written response to the grievance. The response of Mr Meehan is relatively lengthy but includes extensive information in respect of steps taken by the Trust following the assault on 9 May. A local service review had identified a number of failures leading to the assault including the fact that AM should have been visited in pairs and PARIS notes for the service user should have been reviewed and risks passed onto the Claimant. The grievance decision indicates what immediate actions were taken and additional actions following the local review. A datix form was also completed albeit some time after the incident.
43. On 15 October the Claimant and Mr Meehan met under the informal grievance procedure. The Claimant indicated that he wished the matter to be escalated to a formal grievance under the Respondent's policy. Ms Ana Sanderson, Service Manager was allocated to hear the stage I formal grievance.
44. On 1 November 2021 a further occupational health report was received in respect of the Claimant who was still off sick and still regularly submitting fit

notes indicating workplace stress. The report states that the Claimant was feeling frustrated and indicated additional concerns and stress regarding financial difficulties. He stated that he cannot return to the workplace until the issue has been resolved and perceives a lack of communication regarding the ongoing investigation. The report concluded that general medical evidence is that undue delay in dealing with stressors can result in an exacerbation of symptoms and so our advice is to conclude matters with normal care concern and sensitivity and promptly by scheduling a meeting.

45. At some point in early November Mr Meehan was replaced as the Case Manager for the disciplinary investigation with Miss Rawlinson. The Claimant was not written to by the Respondent to communicate this change. It appears that the change was driven by the concern that it was no longer appropriate for Mr Meehan to be the Case Manager given his involvement in the grievance. Ms Rawlinson was not provided with 1 November 2021 OH report.
46. Mrs Sutton remained the investigator. She had interviewed Holly Maguire on 21 September 2021. Other than that, it was unclear what if any steps she had taken to progress the disciplinary process. The Tribunal has seen no evidence of the Claimant being written to over this period to explain why the disciplinary process was seemingly so protracted, or what steps had been taken to advance it. No extensions to any deadlines appear to have been sought or communicated to the Claimant.
47. The Respondent's disciplinary policy at paragraph 4.7 states that it is expected that an investigation will take no longer than eight weeks to complete. Any extension to this must be agreed by the Case Manager and the employee informed in writing and a refreshed investigation outline completed and agreed. The Investigating Officer must inform the Case Manager of any difficulties faced during the investigation which may prevent timescales being met. The Case Manager will work with human resources to remove any organisational barriers that may be causing delays. Any investigation going beyond 12 weeks whether the employee has been temporarily removed from duties or not will be referred to the Associate Director of Operations and Associate Director of HR and OD for review.
48. No discussions are documented between Ms Sutton and Mr Meehan regarding difficulties causing delays, extensions do not appear to have been sought by the Case Manager, the employee was not kept informed at all and following the investigation going beyond 12 weeks (around about October 2021) the matter was not referred to the Associate Director of Operations and Associate Director of HR for review.
49. On 26 November 2021 Mrs Sutton interviewed Michael Bourne. The Tribunal was told in oral evidence that the reason for this delay was seemingly intransigence on the part of Mr Bourne requiring Mr Meehan to step in to expedite the interview. It was not explained why the Respondent did not simply use its managerial powers to require Mr Bourne to attend earlier than late November.

50. On 23 December 2021 the Claimant sent an email to a number of persons at the Trust as he said he didn't know who to address the email to. The email was about an apparent shortfall in pay. The email clearly expresses an exacerbation on the part of the Claimant in respect of the disciplinary process stating that he is at breaking point.
51. Mrs Sutton completed her investigation report on 28 January 2022. The conclusion was that the matter was not sufficiently serious to warrant formal discipline reaction and maybe resolved with training/coaching/counselling rather than by recourse to the formal disciplinary procedure.
52. Following this report Mrs Rawlinson in her witness statement states that the Claimant contacted her to meet up in person (the policy in fact requires such a meeting with a written outcome of the investigation 5 days later) and she responded by agreeing however he did not respond further to arrange a suitable date so to minimise any further delay in the process it was agreed to deliver the outcome solely in writing. By letter dated 14 February 2022 Mrs Rawlinson found the allegation one, wrongly accessing the records, was not upheld. Allegation two, attending A&E to gatekeeper the service user, was not considered serious enough to warrant formal action and instead it was asked that this be picked up directly with the Claimant in management supervision. In respect of allegation three the visit to the Mulberry Ward on 10 May while the visit was not appropriate in the light of covid restrictions it was not considered serious enough to warrant formal action and was to be picked up in management supervision.
53. The formal grievance hearing took place for the Claimant on the 25 February 2022 with a further meeting on 3 March 2022. Mrs Sanderson was replaced by Mr Morris due to sickness absence on the part of Mrs Sanderson. Mr Morris was effectively parachuted in the day before the grievance hearing was due to take place. It was unclear to the Tribunal why the grievance meeting had not been previously scheduled prior to 25 February 2022 given that the formal grievance process was essentially begun following the informal meeting on 15 October 2021. Mr Morris' evidence was simply that there had been some delays in arranging a suitable time for all parties to attend.
54. The grievance outcome was delayed on a number of occasions. On 10 March Mr Morris stated it would be produced the next day. On 11 March a serious incident involving the death of a service user caused a delay. It was indicated by Mr Morris that it would be hopefully produced by close of business Monday. That date wasn't met and there were further communications with Mr Morris and the Claimant and his TU rep on 15 March. The matter was chased by the TU rep and on 24 March it was said by Mr Morris it would be produced on the Tuesday 29 March.
55. The grievance decision was not produced on 29 March. On 30 March the Claimant resigned by email. The email is fairly lengthy and contains a

number of allegations no longer relied on by the Claimant in his claim to the Tribunal. It does state:

I raised a grievance in July 2021 and after 8 months, I am yet to receive an outcome of my grievance. I understood that Adam was late when he called weeks ago, but now, this is just completely unacceptable and disrespectful beyond belief.

I really cannot cope with this level of anxiety and frustration associated with the Trust. I have been waiting for outcomes for my queries and concerns for nearly a year.

All I wanted was for the Trust to show respect towards me and investigate my concerns which were of a very serious nature. I now understand that the Trust has no interest in resolving my concerns.

56. On 31 March 2022 the grievance outcome was sent by Mr Morris. The grievance was upheld in part. The conclusion notably stated:

The period of fact finding and investigation has clearly been a too long process that has as a result impacted on the wellbeing of a long standing member of staff who has many years of experience of working within the mental health services in Manchester. There are lessons to be learned which were acknowledged during the grievance process and have also been referenced above in the findings in each area. Processes whereby a staff member has experienced assault in work or are subject to investigation processes can be, and clearly in this case, have been very stressful for the staff member involved and can lead to distress. It is extremely important therefore that these processes are completed in a timely manner, communication must be upheld throughout by all parties and the support for the staff member involved must be sought at the earliest point. This support should be available throughout the process and regularly reviewed. This is a lesson that should be considered by the local management during this process. Additionally, I include myself in this lesson learned. The delays in providing this outcome to Dan has evidently caused more distress for which I apologise personally. I would like to take this time again to express that this was not due to any other reason than the extreme pressures experienced recently – however this does not take away the distress caused for which I apologise. I will personally discuss this with my line manager for reflection to see if there are any ways in which I could have ensured a more timely response to this hearing.

57. As indicated a Claim was presented on 29 July 2022.

The Law

58. The Employment Rights Act (ERA) does not use the term constructive dismissal. S. 95 deals with circumstances in which an employee is dismissed. S.95 (1) (c) ERA states

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(c) 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.

59. The classic statement of what must be established in a constructive dismissal is still contained in *Western Excavation (ECC) Ltd v Sharp* [1978] IRLR 27 that is a Claimant must prove: (1) that the employer acted in breach of his contract of employment; (2) that the breach of contract was sufficiently serious to justify resignation or that the breach was the last in a series of events which taken as a whole are sufficiently serious to justify resignation; (3) that he resigned as a direct result of the employer's breach and not for some other reason; and (4) that the Claimant did not waive the breach or affirm the contract.

60. While the test is not reasonableness but one of contract there is a term implied into every contract of employment "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

61. In *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35 the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. The last straw must have at least contributed to the decision to resign in the light of the preceding course of conduct, it need not in itself be fundamental enough to be repudiatory.

62. The repudiatory breach must play a part in the decision to resign. It does not need to be the sole or principal reason.

63. That which is alleged to be the last straw must have at least contributed to the decision to resign in the light of the preceding course of conduct, it need not in itself be fundamental enough to be repudiatory. If the employee, faced with earlier repudiatory conduct by the employer, has *not* left the employment or has in some other way arguably affirmed those breaches, then if some *subsequent* employer misconduct occurs, he or she can argue that that misconduct can *then* be a last straw justifying leaving:

64. In *Kaur v Leeds Teaching Hospitals NHS Trust* (2018) EWCA Civ. 978 in the Court of Appeal Underhill LJ stated a Tribunal must ask the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation)
- (5) Did the employee resign in response (or partly in response) to that breach?

Conclusions

65. The Tribunal turns to the alleged breaches said to individually or cumulatively amount to a breach of the implied term of trust and confidence.

66. a i-iii the assault on the Claimant on 9 May 2021. The Claimant did not initially request an OH report. He was referred to OH on 8 June 2021 by Mr Buckley. The manner and timing of this referral was appropriate. Within his grievance response dated 12 October 2021 Mr Meehan indicated the outcome of the local review in respect of service user AM including the failings identified the immediate actions taken and the additional actions taken. While there was some delay in completing this review until August 2021 the Tribunal does not find in context that the period was unreasonable given the complexity of the issue involved. While there was a delay in notifying the Claimant of the steps taken following the local review which was not done until October Mr Meehan had made efforts to secure an earlier date for a grievance meeting which was delayed in part due to lack of availability on the Claimant's side as well as extensive requests for information and submission of a further grievance document.

67. b i the fact finding exercise began on or around 12 May 2021. It was essentially concluded by 2 June 2021 but then further time was required for the Respondent to determine whether the matter should proceed to a disciplinary process. This was finally concluded on 30 June with the Claimant notified of the TOR on 9 July. While the Tribunal accepts that the policy indicates a target of 7 days for the fact finding process this will always depend on all the circumstances. The Tribunal is not of the view that in this case the fact finding and decision to move to a formal disciplinary was an unreasonable period of time.

68. ii and iv the Respondent did not retrieve the CCTV. This was not asked for by the Claimant until it was too late to retrieve it. The Respondent could be perhaps legitimately criticised for not on its volition obtaining this evidence. Even if Mr Barclay or Meehan was unaware of its existence on the ward they had the benefit of HR advisors. However, in the Tribunals view it would be of limited evidential value given the main issue was what he had said to staff, and it had no audio so it would not necessarily have obtained as a matter of course. The Tribunal does not find this contributed to any breach of the implied term.
69. iii the decision to commence a formal investigation was based on the witness statements from staff, a datix report, email complaints and the PARIS access logs. While the fact that 2 of the statements are identical is troubling and should have been identified by the Respondent, the evidence in totality did raise proper and legitimate concerns in respect of the Claimant's conduct and as to whether he acted inappropriately in respect of professional boundaries, Information Governance etc. the Respondent cannot be criticised for commencing a formal investigation.
70. iv while suspension is often referred to as a neutral measure its detrimental effect on employees is well known. The Claimant's submission that his employer has breached his contract by not suspending him is a novel one and does not stand up to scrutiny in this case. The allegations taken at their highest did not amount to gross misconduct and none of the other factors listed in the disciplinary policy at appendix 1 were present in supporting such a decision. The Claimant remained on full contractual sick pay. While it may have been financially advantageous to be suspended given his role as owner of the care home (although it is not entirely clear why he was precluded from running his own business during this period) this in the Tribunal's view is not a consideration for the Respondent.
71. v while Mr Meehan arguably did provide an indication that the Claimant would be provided with the fact-finding material (although it may be said he was only saying Mrs Sutton would provide it) he was unwise to do so. The disciplinary policy does not provide for an employee to receive such material until it seems the decision has been taken to progress to a full disciplinary which never occurred in this case- (see para 4.7 of the disciplinary policy). If the Claimant would not be provided with the statements during the disciplinary process, then he was unlikely to be given them via a grievance running in parallel. His Trade Union would have been likely to have advised him of this.
72. vii/ix the Tribunal then turns to what it considers the most significant issue in the case, that of delay of the investigation and grievance.
73. The disciplinary As stated the policy suggests a target of 8 weeks to completion with any investigation going beyond 12 weeks (whether accompanied by suspension or not) being referred to the Associate Director or Operations and HR for overview. The terms of reference letter sent out

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on 6 July 2021 gave an intended completion date of 10 August 2021 for the Sutton investigation albeit there would presumably be some additional time for the Case Manager to come to a final conclusion. The Case Manager's decision was not communicated until 14 February 2022, 6 months after the intended completion date and 9 months after the incident giving rise to the disciplinary inquiry. On behalf of the Respondent Ms Kight urged me to consider the context. This was 2021. The effects of the Covid 19 pandemic were heavily impacting on the Respondent as a health care provider for mental health services. Demand for its services due to the effects of lockdown etc. had increased while its ability to meet that demand had reduced due to sickness absence from those staff isolating. Staff were incredibly busy, there were multiple demands on the time of those involved in the disciplinary and grievance investigation. While delay in completing the disciplinary investigation was regrettable it was excusable.

74. For his part Mr Ohringer submitted that the Tribunal should take no heed of any suggested impact of Covid on the Respondent's resources. He submitted that the Respondent has an absolute duty to provide a fair and appropriate disciplinary and grievance procedure. Just as an impecunious employer cannot plead poverty to defend a failure to pay wages so a busy, stretched employer cannot state they were unable to meet their obligations to provide an efficient effective disciplinary procedure. He further or alternatively submits that the evidence of the impact of the pandemic on this employer's ability to adhere to a reasonable time frame is weak, lacks specificity and has arisen late in the day.

75. The Tribunal accepts that it can and must consider the full factual context when determining whether the manner in which the disciplinary and grievance procedures were conducted constituted a breach of the implied term. The analogy with wages is not apt. The requirement to pay wages is a fundamental non-negotiable term of any employment contract. Whether a fair disciplinary and grievance procedure has been conducted however is far more nuanced depending on complexity, resources, cooperation of parties etc. The Tribunal reminds itself that the implied term requires the employer not to conduct itself in a manner likely to destroy trust and confidence without reasonable and proper cause.

76. Was the manner in which the disciplinary procedure conducted and in particular the delay in providing an outcome in this case a breach of the implied term of trust and confidence? While this issue was not entirely straightforward the Tribunal finds on balance that it was, for the following reasons:

76.1 The Claimant was a very long serving employee with 26 years of service.

76.2 He was an experienced and clearly highly valued member of staff and had never previously been subject to any disciplinary sanction.

- 76.3 The Claimant faced a misconduct charge that if proved would no doubt cause reputational damage to him and his career.
- 76.4 The matters which gave rise to the disciplinary procedure were not complex. There were some but not many significant disputes of fact. There was no real technical evidence to consider other than perhaps the PARIS logs. The incidents were short in time, there were few witnesses and their evidence through interview ultimately is brief.
- 76.5 The Respondent was in possession of a number of OH reports which made clear that the Claimant was off work because of stress related to the disciplinary and grievance process and a return was likely to be predicated on a resolution to these procedures. It also had the fit notes and the emails from the Claimant indicating he was clearly struggling with the protracted process being detrimental to his mental health.
- 76.6 The Respondent singularly failed to keep the Claimant informed of progress. It seems to have given no explanation as to the delay and provided no amended time frames. It failed to expressly inform him even of a change of Case Manager.
- 76.7 The important procedural safeguards provided in the policy of the 8 week and 12 week review were not adhered to. Had it been it may have been an opportunity for senior management to appreciate that those assigned were struggling and to provide more resource or at least to inform the Claimant. The conclusion was that the matter could be dealt with by way of advice and guidance training and a reflective piece. The Claimant was not subject to any disciplinary sanction.
- 76.8 The findings of the Respondent's own grievance decision was highly critical of the process the Claimant was subjected to.
77. The Tribunal has no doubt that the Respondent was under increased pressures due to a combination of the Covid 19 pandemic and the tragic self-inflicted death of 2 service users (albeit that one was in March 2022 after the grievance decision). This was not the only disciplinary process it was managing as an institution. However, there is a lack of specificity to this evidence which was largely given in oral evidence. It does not explain why for example it took nearly 5 months to conduct a short interview with Mr Bourne or 2 ½ months to interview Holly Macguire. It does not explain the failure to keep the Claimant informed or to refer the matter to the director of HR after 3 months. The Tribunal was told that Ms Sutton and the HR advisor got covid during the Xmas period. This explains some delay but the isolation period was usually only 10 days. Ms Rawlinson also said that Liz Sutton had 2 complex patients, she was doing flu fighters clinic, covid injections, and there was no manager of the ADHD clinic so she was doing this. Ms Sutton had the support of non-clinician HR resource. It is a fair criticism of this evidence generally by Mr Ohringer that it came late in the day, largely doesn't appear in witness statements and lacks specificity. Further the purpose of the policy is to allow the Case Manager and ultimately HR to monitor progress so that if an investigator or decision maker is struggling, assistance could be provided.

78. The Tribunal is all too aware that delay, sometimes very lengthy delay in disciplinary procedures is not uncommon in the NHS. Not every delay will entitle an employee to resign. However, the combination of factors identified in this case drives the Tribunal to the conclusion that it was a repudiatory breach of contract.
79. The Grievance Turning to the grievance procedure delays the Tribunal can deal with this more briefly. The Tribunal is not satisfied that there was significant culpable delay during the informal part of the process that is from 12 July 2021 until 15 October 2021. While it could and should have been resolved more quickly there were a number of factors including unavailability on the Claimant's part, the decision of the Claimant to submit a number of grievances raising a multiplicity of issues and a fairly extensive request for information.
80. So far as the period from October 2021 to late February 2022 when the first grievance meeting took place there was a significant and largely unexplained delay. Mr Morris was placed in a difficult position having come into the process late. The final outcome was given to the Claimant on 31 March 2022. In context the period of less than a month between meeting on 3 March and outcome is not unreasonable, particularly given the pressures on Mr Morris at the time. Accordingly, the Tribunal would not have found that the delay in the grievance process was of itself a repudiatory breach of contract. However, the overall delay while the Claimant was off sick and according to the OH evidence requiring a response to return to work and importantly the multiple dates provided for an outcome and not met were blameworthy and did contribute to the Respondent's repudiatory breach of contract.
81. viii Given its conclusions on the grievance and disciplinary procedure the Tribunal does not need to address ground viii- failing to put in place a return to work (RTW) process in any detail. A RTW procedure would most likely have been discussed once the Claimant had indicated an ability to return which most likely following OH advice would be a WRAP and/or stress risk assessment. This was all predicated on a resolution to the grievance which had not at date of resignation happened.
82. Having determined a breach of the implied term the next question for the Tribunal is whether the Claimant resigned in part because of it. The Tribunal is quite satisfied that the Claimant resigned i) in part because of the way the disciplinary process was handled including delay and lack of effective communication and ii) because of delays in the grievance including a further promised date for delivery that was not met. So much is clear in the resignation letter and the correspondence leading up to it.
83. Finally, although not expressly raised by the parties in oral submissions the Tribunal considered the issue of affirmation or waiver which is referred to in the grounds of resistance.

84. The decision in respect of the disciplinary process was finally communicated on 14 February 2022. The Claimant resigned on 31 March 2022 some 6 weeks later. He was off sick with work related stress during this period. In the view of the Tribunal such a period would not be sufficient to constitute a waiver of that breach. In any event the Claimant's resignation followed the failure of Mr Morris to deliver the promised grievance decision. This was a last straw in the omilaju sense that was in part causative of the resignation.
85. The Claimant was accordingly dismissed pursuant to s.95 ERA. As no fair reason for dismissal has been established by the Respondent that dismissal is unfair pursuant to s.98 ERA.

Wrongful Dismissal

86. As the Respondent was in repudiatory breach of contract which was accepted by the Claimant it necessarily follows that the dismissal must be wrongful.

Employment Judge **Serr**
Date: 5 July 2023

REASONS SENT TO THE PARTIES ON
Date: 11 July 2023

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FOR THE TRIBUNAL OFFICE