



EMPLOYMENT TRIBUNALS

Claimant: Ms Stephanie Riste

Respondent: Surrey and Sussex Healthcare
NHS Trust

Heard at: London South

On: 27, 28, 29, 30 and 31
March 2023

Before: Employment Judge Rahman
(sitting alone)

REPRESENTATION:

Claimant: In person **Respondent:** Mr Shellum (counsel)

Written Reasons

Introduction

1. By a claim form presented on 1 April 2021 the Claimant complained of unfair dismissal in relation to her resignation from her role as a medical secretary on 11 December 2020.

2. She also made an earlier claim – by claim form 4 November 2020 – for age discrimination and harassment relating to disability. However on 18 March 2022 the claims of age discrimination (direct and harassment) were struck out as being out of time.

3. A final hearing was listed on 27-31 March 2023 – originally for 3 days but later extended to 5 days.

4. The claim that remains is one of constructive unfair dismissal.

5. At the outset of this hearing the Claimant applied to amend her claim to include breach of contract – with no further particulars given. That application was

refused for reasons given at the time – it was a late application but crucially did not add anything to the existing claim which, if successful, would have to establish a breach of contract.

6. The Claimant maintained that she was forced to resign prematurely following time off with ‘work-related stress’ owing to:

- a. A heavy and imbalanced workload and a total lack of support from management and from the Trust which resulted in an irretrievable breakdown of the relationship.
- b. Despite requests for deployment this was denied.
- c. Her complaints were investigated in a totally unprofessional manner with total disregard of her evidence

7. The Claimant’s case is that these matters all cumulatively amounted to a breach by the Respondent of the implied term of trust and confidence.

8. By a response form dated 18 May 2021 the Respondent resisted the complaint. The case of the Respondent is that it denies there has been a dismissal as the Claimant alleges or at all. It further denies that there has been any breach of the Claimant’s contract of employment including any repudiatory breach of contract on its part in the manner alleged. Alternatively, the Respondent contends that any breach of contract was not sufficiently fundamental to justify the Claimant resigning. If the Tribunal disagrees the Respondent argues the Claimant subsequently waived any such breach and/or affirmed her employment contract by her subsequent actions.

Issues

9. The issues to be determined by the Tribunal are as follows:

- (1) Could the Claimant show that her resignation should be construed as a dismissal because the Respondent breached her contract in a fundamental way and the breach was a reason for her resignation?
- (2) If so, was that dismissal fair or unfair under section 98 Employment Rights Act 1996
- (3) If the dismissal was unfair, what is the appropriate remedy?

Evidence

10. I heard evidence from the Claimant and on behalf of the Respondent Katharine Horner, Elvish Veeramootoo and Mary Parsonage. Each witness had prepared a witness statement that I had seen in advance of the hearing.

11. In addition the Claimant had filed witness statements from Felicity Hook and Alexandra Stewart – who were not available to give evidence at this hearing. I was not taken to these statements at any time by the Claimant and in the absence of their evidence being tested, it is clear any weight the Tribunal could place on these statements was limited.

12. Moreover the Respondent filed a witness statement from Alison James who was present and able to give evidence. However the Claimant confirmed she had no questions for Ms James and did not require her to give evidence.

13. The Respondent had prepared the main bundle which ran across 3 lever arch files and 1136 pages. In addition there was a 4 page PDF document (from Firstcare) that was admitted in evidence by the Respondent (with no objection from the Claimant) and the bundle of witness statements comprising 94 pages.

14. A Schedule of Loss filed by the Claimant is contained within the main bundle, but no parties have addressed the Tribunal with regards to remedy, it being agreed this will be dealt with after the decision on liability, if required.

15. In terms of the progress of the hearing the Claimant gave evidence part of Day 1 and Day 2, the Respondent's witnesses gave evidence on Day 2 and 3, submissions were delivered on Day 4 and an ex tempore judgment was delivered on Day 5.

16. The hearing was initially listed as an 'in-person' hearing but on the first day the Claimant asked for the hearing to be converted to a CVP hearing as she struggled to get to the Tribunal with the bundles. The Tribunal had some sympathy with this – as the papers spanned 4 files. Although the Tribunal explored whether bundles could be delivered to the Claimant's home (the Respondent confirmed they could), the Claimant explained she would prefer to have one set of bundles as they were marked up with her personal notes. The Respondent did not oppose the hearing being remote. On that basis and once the Claimant confirmed she had a stable internet connection to attend remotely, the Tribunal permitted the hearing to continue, from the afternoon of Day 1, as a remote hearing by CVP.

17. There were some technical difficulties – mainly when the Claimant's connection dropped or the quality of her picture on her video was unclear. At this point the Tribunal offered again the option of reverting to an "in-person" hearing – which the Claimant declined. The hearing therefore continued by video and it progressed – at the point when the Respondent's witnesses gave evidence – on the basis where the Claimant largely kept her camera off but audio on, which improved the quality of her connection as she was heard clearly. The Tribunal Judge's connection also disconnected on occasion – however each time there was an interruption the Tribunal ensured there was a recap of any evidence missed so there was no prejudice to any party.

18. Given the Claimant was a litigant in person extra time and flexibility was allowed – including a liberal allowance when there was cross-examination of the

Respondent's witnesses, save that the Tribunal prevented some questions that were not relevant to the List of Issues. The Claimant was still allowed significant time to put to the Respondent's witnesses any factual disputes.

Relevant Legal Framework

19. A claim for unfair dismissal is successful if the Claimant establishes her resignation should be construed as a dismissal as the Respondent breached her contract in a fundamental way and that breach was the reason for her resignation.

20. The relevant legal framework which is summarised below.

Constructive Dismissal

21. The law regarding constructive dismissal is set out at section 95(1)(c) of the Employment Rights Act 1996.

22. The Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 listed five questions that it should be sufficient to ask in order to determine whether an employee has been constructively dismissed:

- a. 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?
- b. Has he or she affirmed the contract since that act?
- c. If not, was that act (or omission) by itself a repudiatory breach of contract?
- d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation.)
- e. Did the employee resign in response (or partly in response) to that breach?

Repudiatory breach

23. A repudiatory breach is a significant breach going to the root of the contract (*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221).

24. A term of mutual trust and confidence is implied into all employment contracts (*Malik v BCCI SA (in liq)* [1998] AC 20, [1997] ICR 606). The parties to a contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust that

should exist between employer and employee. Every breach of the implied term of trust and confidence is a repudiatory breach of contract (*Morrow v Safeway Stores* [2002] IRLR 9, *Ahmed v Amnesty International* [2009] ICR 1450).

25. The test for determining whether the employer has acted in breach of this term is a severe one. The conduct must be such as to destroy or seriously damage the relationship and there must have been no reasonable and proper cause for the conduct (*Gogay v Hertfordshire County Council* [2000] IRLR 703, CA, paragraphs 53-55). Both limbs of this test are important: conduct which destroys trust and confidence is not in breach of contract if there is a reasonable cause (*Hilton v Shiner Ltd Building Merchants* [2001] IRLR 727).

26. In a case based on a breach of the implied term of mutual trust and confidence, it is not necessary for a tribunal to make a factual finding as to the employer's actual (subjective) intention with regards to the contract, but simply a finding as to whether, objectively, the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence (see Tolley's Employment Handbook 32nd Ed., 54.7, page 1348).

27. It is not enough to show 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*": *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, [2010] IRLR 445.

28. Even if the employer's act which was the proximate cause of the employee's resignation was not by itself a fundamental breach of contract, the employee may be able to rely upon the employer's course of conduct considered as a whole in establishing that she was constructively dismissed (Tolley's, 54.7, page 1349). The '*last straw*' must contribute, however slightly, to the breach of trust and confidence (*Omilaju v Waltham Forest London Borough Council* [2004] EWCA Civ 1493).

Employee left because of the breach

29. The correct question for the Tribunal to determine is whether a repudiatory breach has played a part in the employee's resignation (*Wright v North Ayrshire Council* [2014] ICR 77).

30. In *United First Partners Research v Carreras* [2018] EWCA Civ 323, the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.

Employee has not waived the breach (affirmed the contract)

31. The general principles of the law of contract apply to the question of whether the employee has affirmed their contract of employment (*WE Cox Toner (International) Ltd v Crook* [1981] ICR 823, [1981] IRLR 443).

32. The EAT gave an overview of these general principles in *Crook* at pages 828 to 829:

“Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: Allen v. Robles [1969] 1 WLR 1193 . Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract...”

33. The wronged party has an unfettered choice whether to accept the repudiatory breach or not and all the defaulting party can do is to invite affirmation of the contract by making amends (Tolley’s, 54.7, page 1349).

Fairness

34. A constructive dismissal is not necessarily unfair (*Savoia v Chiltern Herb Farms Ltd* [1982] IRLR 166, *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121).

35. In *Buckland*, the Court of Appeal clarified the correct approach for determining whether a constructive dismissal was fair (in particular, sub-paragraphs (c) and (d)):

- a. In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applies;
- b. If acceptance of that breach entitled the employee to leave, he/she has been constructively dismissed;
- c. It is open to the employer to show that such dismissal was for a potentially fair reason;
- d. If so, it will be for the Tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

Reason for dismissal

36. Where the dismissal in question is constructive, the reason for dismissal is determined by asking why the employer behaved in a way that gave rise to the fundamental breach of contract. That is determined by analysis of the employer’s reasons for so acting, not the employee’s perception (*Wyeth v Salisbury NHS Foundation Trust* (UKEAT/0061/15/JOJ) (12 June 2015, unreported)).

Was the dismissal reasonable in all the circumstances?

37. The question of whether or not a dismissal was fair has to be determined in accordance with s.98(4) of the ERA, which requires a consideration of all the circumstances, including the size and administrative resources of the employer (s.98(4)(a)). The question of fairness also has to be determined “*in accordance with equity and the substantial merits of the case*” (s.98(4)(b)), although current case law indicates that this is not an additional test.

38. In order to determine liability, the Tribunal should apply the test laid down in *British Home Stores Limited v Burchell* [1978] IRLR 379 and ask the following questions:

- a. What was the reason for the Claimant’s dismissal?
- b. Did the Respondent believe the Claimant was guilty of the alleged misconduct?
- c. Did the Respondent have reasonable grounds for believing the Claimant was guilty of that misconduct?
- d. At the time the Respondent held that belief, had it carried out as much investigation as was reasonable?
- e. Did dismissal fall within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted?

39. Although the EAT in *Burchell* said it was for the employer to establish that the test was satisfied, it has subsequently been clarified that the burden is neither on the employer or the employee, but is “neutral” (*Boys and Girls Welfare Society v McDonald* [1996] IRLR 129 EAT).

40. Case law has established that the Tribunal must decide whether the employer’s decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439). For the purposes of this test, it is irrelevant whether or not the tribunal would have dismissed the employee if it had been in the employer’s shoes: the tribunal must not “substitute its view” for that of the employer (*Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 827).

Relevant Findings of Fact

41. The Respondent is an NHS Trust responsible for East Surrey Hospital.

42. The Claimant was employed by the Respondent as a medical secretary from 1 April 2009 and transferred to the Oncology Breast/Gynae department in December 2011. She received a permanent contract in January 2013. She came under the Cancer Division on 1 June 2016 and remained an employee of the Respondent until her resignation on 11 December 2020. With the notice period included, her actual last day as an employee was 8 January 2021.

43. From December 2016 the Claimant was line managed by Mary Parsonage. Elvish Veeramootoo was the Service Manager in the Oncology Department that Ms Parsonage reported to.

44. There are long detailed chronologies that have been prepared by the parties in this case which the Tribunal has carefully considered. This is a case where the factual background is not straightforward. A summary of the important facts is set out below. The summary is regrettably more comprehensive than is usual but this case is one where the factual matrix has been far from straightforward.

45. On 20 August 2016 the Claimant emailed Mr Veeramootoo essentially citing a heavy workload and this led to the commissioning of the first workload review by the Respondent in October 2016.

46. The review was undertaken by Ms Bailey and the tables at pages 1130 and 1131 summarise the findings of that review. It does appear from an analysis of that review and the Tribunal finds, that the share of the workload was imbalanced between members of the team – but that review does not show that the Claimant's workload was heavier than that of her colleagues. By way of example the most recent of the figures in the table - for September 2016 and August 2016 (bearing in mind two of her colleagues workshare) under baseline transcription and print/file volumes - are less than the figures of some of her colleagues.

47. The Claimant's case was she was working for four consultants at the time. Ms Parsonage's recollection was that that was for a short period and the work involved for each consultant varied. Ms Parsonage also gave evidence that she considered the workloads of Ms Paice and the Claimant were very similar. They both had a very busy 'breast' clinic.

48. In February 2017 the Claimant emailed Mr Veeramootoo (subject line of email being 'stress') and suggested workload pressures. Within minutes Mr Veeramootoo replied by email suggesting he and Ms Parsonage take over booking of clinics.

49. The Claimant was absent 2 days from work in April citing a migraine caused by stress. This followed some email traffic where the Claimant referenced her concerns about her heavy workload.

50. In April 2017 Mr Veeramootoo referred the Claimant to Occupational Health. The Claimant declined to attend.

51. Following the Claimant's return to work in April 2017 Ms Parsonage emailed the Claimant with offers of support – including asking another secretary (Ms Paice) to help the Claimant out.

52. Moreover in April 2017 a 'bank' or temporary worker was also brought in to assist the oncology medical secretaries with administrative tasks three mornings a week for 1 year.

53. In June 2017 Ms Bailey undertook a second workload review. This focussed on outpatient activity for the oncology consultants.

54. In April 2018 Mr Veeramootoo scheduled a meeting with the Claimant to look at workload overall – but she did not attend.

55. In July 2018, May 2019, June 2019, August 2019, September 2019, October 2019, January 2020, March 2020, April 2020 the Claimant continued to raise concerns about her workload and stress.

56. A 'workload meeting' took place on 30 August 2019 between the Claimant, Ms Parsonage and Mr Veeramootoo.

57. In September 2019 Ms Parsonage made enquiries and secured the services of volunteers to help the team of oncology secretaries.

58. A third workload review was undertaken by Ms Bailey to address the period January – December 2019. An analysis of the tables at pages 971-2 shows there were no inequalities with workload as each secretary within oncology services had an equal workload and all have equal numbers of patients per hour on average in a month.

59. On 6 April 2020 at the Claimant's request Ms Parsonage emailed another medical secretary (Ms Paice) and asked Ms Paice to assist the Claimant. Ms Paice agreed.

60. On 20 April 2020 a difficult telephone conversation took place between the Claimant and Mr Veeramootoo. The Claimant accepts she was emotional – Mr Veeramootoo describes her as being '*quite argumentative and rude*'. There is a dispute as to what was said during that call. For the purposes of this claim it is not necessary for the Tribunal to determine the detail of the call; however it is clear that emotions were running so high that the Claimant (as she admits) put the phone down on Mr Veeramootoo. He considered that the Claimant had not behaved appropriately during this call but did not refer the matter further as his primary concern was the Claimant's welfare and as he recognised, quite fairly in the Tribunal's view, that the start of the pandemic was an unprecedented and turbulent time for all in the department.

61. On 21 April 2020 the Claimant then commenced a period of sickness for stress. The initial report to the Respondent's absence reporting service (FirstCare) on 21 April 2020 was not said to be work-related – yet on 26 April 2020 the second report from FirstCare indicates it had been changed to 'work-related'.

62. Following this Mr Veeramootoo made a further referral to Occupational Health.

63. On 14 May 2020 the Claimant raised a formal grievance against Mr Veeramootoo which was considered by Alison James. The letter, at page 440-441, sets out that the Claimant considers she has been subjected to unreasonable treatment, through discrimination and generally being treated with total disregard and disrespect. Complaints are made as to Mr Veeramootoo's lack of communication and '*clear dismissal*'.

64. In May 2020 the Claimant was invited to complete a stress identification tool – this was declined by the Claimant until the grievance had been investigated.

65. In June 2020 the Claimant asked for and received a copy of the Occupational Health referral form.

66. On 7 July 2020 the first grievance (hereafter Grievance 1) was partly upheld on the basis it was accepted there had been poor communication between Mr Veeramootoo and the Claimant.

67. A week later the Claimant appealed the outcome of Grievance 1.

68. A week after, on 22 July 2020, the Claimant filed her second Grievance (hereafter Grievance 2).

69. On 10 August 2020 Katherine Horner was appointed to investigate Grievance 2.

70. On 28 August 2020 the outcome of the appeal of Grievance 1 was that the original outcome was upheld.

71. On 7 September 2020 the Claimant was informed the report of the investigation of Grievance 2 would likely be available in October 2020. The outcome meeting took place on 5 October 2020.

72. Between October – December 2020 redeployment was discussed. The Respondent agreed to placing the Claimant on the redeployment register but they state that the Claimant was told at all times she would have to apply and interview for any roles even if on register.

73. On 11 December 2020 the Claimant resigned.

Submissions

74. At the conclusion of the evidence each party provided comprehensive written submissions and then made supplementary oral submissions.

75. The Tribunal will not rehearse those lengthy arguments set out therein (all of which have been very carefully considered) but will summarise some of the main points below.

76. The Claimant claims the Respondent failed to uphold her complaint of 22 July 2020 and sets out the factual background as set out already in her oral evidence. She argues she was led to believe she was on a redeployment register, She criticises the manner in which the Occupational Health referral was carried out. She says she was not made aware of any complaints against her. She argues the implied term of trust and confidence was completely lost.

77. The Respondent reminds the Tribunal the Claimant resigned on 11 December 2020 as she said she was not being updated regarding redeployment nor had she had any contact from that team. Neither failure to update the Claimant nor to contact the Claimant are pleaded breaches of contract (with reference to the List of Issues (pages 127-131) and the Claimant's ET1 At page 49. Therefore the respondent submits her claim must fail. For completeness the Respondent further argues the Respondent has not demonstrated the Respondent committed a fundamental repudiatory breach of contract, individually or cumulatively, for which she was entitled to resign. Moreover it is argued the Claimant's conduct namely her delay, affirmed a number of the putative individual breaches.

Conclusions

78. The Tribunal has carefully considered the evidence in this case, both written and oral. In relation to witness evidence, the views and additional findings of the Tribunal are contained below, in the body of the Conclusions. The fact that I have not specifically referred to an argument or factual dispute does not mean I have not considered the same. Given the sheer volume of papers before the Tribunal – which at over 1100 pages is far in excess of a standard Unfair Dismissal case - I have focussed on the most significant matters relevant to the issues I have to determine. In this context I have had specific regard to the agreed List of Issues that is at page 127 of the bundle.

79. The Tribunal has to decide is whether the Claimant's resignation should be construed as a dismissal.

80. The definition of a dismissal for these purposes is found in section 95(1)(c) of the Employment Rights Act 1996 which is where an employee terminates the contract in circumstances where he is entitled to terminate it because of a fundamental breach of contract by the employer.

81. I therefore first have to consider whether there were breaches of contract as set out in paragraph 2 of the List of Issues. I will deal with each in turn.

82. Before I consider the same I have regard to the Respondent's submission that the claim of the Claimant must fail as she indicated she resigned as she was

not updated regarding redeployment nor had any contact from redeployment – yet those failures are not pleaded breaches of the contract in the List of Issues.

83. I consider that submission relies on too narrow an interpretation of her case and note that she is a litigant in person who has conducted her case without legal or lay assistance. I consider the correct way for the Tribunal to approach her case is to consider her evidence as a whole and to consider the asserted breaches as set out in the List of Issues. I will therefore consider whether the Claimant has demonstrated the Respondent has committed a fundamental repudiatory breach of contract, individually or cumulatively, for which she was entitled to resign.

2.1 Failing to uphold the Claimant's complaint dated 22 July 2020

84. The Respondent is correct to state in its submissions that an employee does not have a contractual right to have his or her complaint upheld. This is not sufficient to demonstrate a breach of contract.

2.2 Handling the Claimant's complaint in a totally unprofessional manner by:

2.2.1 disregarding the Claimant's evidence whilst taking all of the Claimant's managers falsifications on word without proper investigation.

85. The Tribunal heard evidence from Ms Horner who undertook the investigation of the Claimant's complaint. It is the view of the Tribunal that the handling of the complaint was both thorough and professional. The Tribunal notes Ms Horner has experience of investigating complaints and prior to her involvement with the Claimant's case, Ms Horner had no knowledge of the Claimant or any matters concerning the Claimant and her employment with the Respondent. The Tribunal is satisfied from what has been read and heard that Ms Horner was impartial and objective during her investigation.

86. Ms Horner gave an explanation in evidence as to the reasons why there was a delay once she was appointed before her report in October – with a breakdown of the steps she took and the reasons for some delay between the steps. It is clear she approached the investigation with the intention to be fair to both sides, asking for an account from both Mr Veeramootoo and the Claimant and any delay, as occurred during the undertaking of the investigation was, in the Tribunal's view, reasonable in the circumstances. It was also in the context of a global pandemic which the Tribunal bears in mind. The Tribunal accepts the evidence of Ms Horner that she emailed the Claimant during the investigation and kept her updated of the proposed timeline.

87. The Tribunal does not find that Ms Horner 'disregarded the Claimant's evidence whilst taking all of the Claimant's managers falsifications on word without

proper investigation' as asserted by the Claimant. The Claimant was fully involved in the process and listened to. The Claimant had an investigatory meeting with Ms Horner on 1 September 2020 and the Claimant was reminded of her right to be accompanied, which she declined. At that meeting the Claimant had an opportunity to talk through events that led to the allegations and the Claimant talked through the allegations in detail. The Tribunal notes Ms Horner specifically decided to speak to the Claimant first before Mr Veeramootoo, given she was the complainant and in order to test the allegations. The Claimant thereafter sent more documents to Ms Horner after the meeting and these documents were reviewed and taken into account by Ms Horner when reaching a decision.

88. Accordingly it is the view of the Tribunal's view a proper investigation was undertaken. The Tribunal forms no view on whether there were falsifications by the manager as asserted. What is clear is that the Claimant's views were not disregarded and a proper professional investigation was undertaken by Ms Horner. The fact that Ms Horner relied on emails from the Claimant's colleagues – who were not interviewed nor statements obtained – does not undermine the professionalism of the investigation; it is the Tribunal's view Ms Horner attempted to obtain a wider canvas of evidence in order to investigate the complaint properly. The Tribunal also notes that a number of the findings made by Ms Horner in fact supported the Claimant – e.g. that the Claimant had not changed the reason for her absence and that Mr Veeramootoo had not provided a copy of the referral form to the Claimant and should have done.

2.2.2 failing to carry out the investigation in a professional and unbiased manner

89. The Tribunal does not find the Claimant has demonstrated this for the reasons set out above.

90. In addition the Tribunal notes the Claimant considered the investigation biased as there were areas '*she didn't look into*' – namely the lack of reference to the Occupational Health response form. In this context the Tribunal notes and accepts the evidence of Ms Horner who indicated she had considered the document and it was included as an appendix and she did not specifically refer to it as the referral was more relevant rather than the response. The Tribunal considers this a reasonable approach and does not consider the lack of reference to the response form as evidencing the investigation was undertaken in a biased way.

2.2.3 the investigation team failing to provide the Claimant with documentary evidence to show how their decision was reached

91. The Tribunal considers that the report provided to the Claimant – a comprehensive analysis of the investigation and detailed conclusions – even with redactions to maintain confidentiality – is sufficient documentary evidence to show how the decision was reached. The Tribunal was told the Respondent's policy was not to share appendices – and it is difficult to see how that would prejudice the

Claimant when the main report was comprehensive. It provided the Claimant with sufficient information to understand the basis of the decision reached.

2.2.4 failing to correct the outcome report at the Claimant's request which contained many errors.

92. The Claimant sought a number of amendments to the outcome report by email dated 14 October 2020. There were some obvious errors in the report – such as the wrong spelling of her surname and the incorrect surname given for Ms Parsonage that should have been corrected; however other proposed amendments appear to be a statement or furtherance of the Claimant's case. The Respondent refused to make any amendments, apparently on advice of their HR team. The Tribunal considers the obvious errors probably should have been corrected – however the failure to do so does not, in the Tribunal's view, amount to a breach of contract.

2.3 Claimant's requests for redeployment being denied

2.4 Leading the Claimant to believe that she was on the redeployment register

2.5 C being required to apply for any jobs that may be advertised and go through the normal interview process

('The Redeployment Issues')

93. The Claimant told the Tribunal her understanding of redeployment and being on the redeployment register meant she would be allocated to another role without the need to apply or interview. The Tribunal considers it is not reasonable for her to have formed that view as the Tribunal finds, accepting the evidence of the Respondent's witnesses, that she was informed she would be required to apply for jobs in the usual way and the redeployment process involved being sent out vacancies. The Tribunal accepts the evidence of Ms Parsonage who explained she had set this out to the Claimant as had Ms Rodriguez-Couso Gomez. It is clear (and accepted by the Claimant) that the Claimant was placed on the relevant redeployment register and that her requests for redeployment were not being denied; rather Ms Parsonage was trying to actively help her by printing off vacancies and trying to provide these to the Claimant. The redeployment process was ongoing at the time of the Claimant's resignation. The matters under this head are therefore not, in the Tribunal's view, either individually or together, a breach of contract.

2.6 The manner in which the Occupational Health referral was carried out

2.6.1 Referring the Claimant to Occupational Health when the reason for the Claimant's absence was work related stress caused by management failures

94. The Claimant confirmed under cross-examination that her criticism of the Occupational Health referral was that it was '*premature*'. It appears to the Tribunal

on the basis of her evidence that she does not actively pursue the allegation under this head, Even if she had it is difficult to see how this is a breach of an implied term – a referral is clearly a supportive measure. For the avoidance of doubt the Tribunal does not consider this is a breach of the implied term.

2.6.2 Referring the Claimant to Occupational Health when she had only been absent from work for 4 working days which was contrary to the Respondent's policy

95. The Claimant asserts that the Occupational Health referral was sent prematurely and not within the guidelines of the Respondent's Organisation-Wide Policy for the Management of Stress. The Tribunal does not accept this was a premature referral or contrary to that Policy's guidelines. It is clear that the Claimant's absences meant she qualified to meet one of the 'triggers' for a referral in line with the Respondent's Managing Attendance Policy. Once Mr Veeramootoo was notified of this on 5 May 2020 he made the referral to Occupational Health the following day. He was clearly following the Trust's policy in this regard.

2.6.3 Referencing the Claimant's age in the Occupational Health referral form

96. There is a factual dispute as to whether the Claimant referred to being 70 in her conversation with Mr Veeramootoo on 20 April 2020. The Tribunal prefers the account provided by Mr Veeramootoo for the following reasons –

- a. He struck the Tribunal as being an honest straightforward witness. He was measured in his tone and veered away from criticising the Claimant even when the Tribunal pressed him on his account of the Claimant being rude as set out in his written evidence. It was not in dispute that she was stressed and put the phone down on Mr Veeramootoo on that occasion – yet to his credit he considered the wider context of the pressure on staff during the pandemic and he did not pursue the matter further even though he considered the Claimant's behaviour was inappropriate. He told the Tribunal he sensed she was very stressed and upset.
- b. He was consistent in his accounts about the conversation in his written and oral evidence.
- c. His account was detailed, specific and had the ring of truth. He explained she raised the issue of her age, he then asked how old she was and she said over 70 and then that to him led him to think about the government guidance in respect to shielding. He therefore provides credible detail and context in his account.

97. In the Tribunal's view the Claimant's account is less likely to be reliable given she was stressed and emotional at the time of the call and this may have affected her recollection of the conversation.

98. On this basis it is not unreasonable for Mr Veeramootoo to have referred to the Claimant's age in the circumstances where the Claimant herself referred to her age in the call to Mr Veeramootoo. There is therefore no breach in this respect.

2.6.4 Acting contrary to the Trust's policy by failing to discuss and agree the contents of the Occupational Health referral document

2.6.5 Failing to send a copy of the Occupational Health referral to the Claimant at the time

99. It is accepted these were omissions. The Tribunal is not satisfied such omissions meets the threshold to amount to a breach of the implied term as:

- a. The context is significant – firstly this was within the wider context of the unprecedented pandemic when NHS Trusts were under significant pressure and the failure to provide details / content of the referral by a senior manager organising clinics in oncology is understandable.
- b. Moreover the previous Occupational Health referral had not been provided to the Claimant and no issue had been raised at that time. If it had Mr Veeramootoo is likely to have been aware of the need to be more transparent.
- c. Mr Veeramootoo discussed the fact of the referral but not the contents with the Claimant. Therefore although it would have been preferable he had discussed the contents it is unlikely to be a surprise to the Claimant that it related to matters raised in the telephone call of 20 April 2020.

2.6.6 The Service Manager completing the OH referral rather than the line manager of the Claimant

100. The Tribunal does not consider this is a breach. The referral needs to be completed by a manager according to the Respondent's policy – the designation is not relevant.

2.6.7 Suggesting in the referral form that the Claimant's work related stress was caused by her age rather than by management failings

101. Mr Veeramootoo was not suggesting the Claimant's work related stress was caused by her age – the reference to age followed on from the Claimant raising this in the telephone call of 20 April 2020. The Tribunal accepts the evidence of Mr Veeramootoo that he was seeking advice – therefore he used the word 'unsure'. The Respondent argues and the Tribunal agrees that in the circumstances Mr Veeramootoo couched his language in exceptionally neutral terms.

2.6.8 Falsifying and fabricating the following information on the form

102. The Tribunal has carefully considered the rival evidence on this issue and has come to the clear conclusion that the Claimant has not established that Mr Veeramootoo deliberately falsified and fabricated information in the OH referral. Taking each head of complaint -

2.6.8.1 That R advised C to shield

98. As set out above Mr Veeramootoo's account of the telephone conversation of 20 April 2020 is preferred. Therefore there was no fabrication.

2.6.8.2 That C changed the reason for her absence with FirstCare

103. Mr Veeramootoo confirmed in evidence that the basis for his view that the Claimant had changed the reason for her absence with FirstCare was because the original FirstCare report logged on 21 April 2020 showed that the absence was not work related "Work related: No", whereas the updated FirstCare report on 26 April 2020 shows that the absence was work related "Work related: Yes". On this basis the Respondent's belief was reasonable.

2.6.8.3 That no additional clinics have been assigned to C since 5 years ago

104. This formed no part of any challenge during the evidence at the hearing before the Tribunal save it is noted that the Claimant accepted that the change of Dr Stewart's clinics from fortnightly to weekly occurred in September 2015. It is not demonstrated that this is a fabrication.

2.6.8.4 That C appeared to experience regular bouts of migraine and/or anxiety

105. It is not clear how it is asserted this is a fabrication in circumstances where (a) the Claimant had previously been referred to Occupational Health for a migraine-related absence (pages 1114-5) and (b) Mr Veeramootoo gave evidence that Ms Parsonage had informed him on more than one occasion that the Claimant had left work early due to having a migraine.

2.6.8.5 That C was a member of the pension scheme

106. Mr Veeramootoo gave evidence that he ticked a box in this respect rather than 'free-typed' that the Claimant was a member of the pension scheme. The Tribunal is not satisfied that this was a deliberate falsification on the evidence it has heard.

2.6.8.6 That the referral form had been discussed with C before submission

107. Looking at the form (page 412) the reference is to the referral being discussed not the content of the referral form. Mr Veeramootoo's evidence, which the Tribunal accepts, is that the fact of the referral was discussed with the Claimant but not the content. The Claimant has therefore not established there has been falsification of the form in this regard.

108. For all the reasons set out above the Tribunal considers Mr Veeramootoo had reasonable and proper cause for making the Occupational Health referral in the manner he did.

2.6.7 Displaying a lack of professional management and total disregard and disrespect for the Claimant's wellbeing over a long period of time.

109. This is not borne out by the evidence. The Tribunal has before it emails from Mr Veeramootoo – promptly replying to the Claimant when she raises concerns about her workload, acting on this by commissioning workload reviews, offering solutions with Ms Parsonage such as the provision of 'bank workers' or volunteers to lessen the workload, Ms Parsonage undertaking regular checks – all of which show that the management has been not only professional but focussed on achieving support for the Claimant.

Did that breach the implied term of trust and confidence ?

110. The Tribunal has carefully considered all the matters above. It has come to the clear conclusion that the Respondent has not behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent. The Tribunal was particularly impressed with the evidence of both Ms Parsonage and Mr Veeramootoo who appeared to work hard to address the difficulties the Claimant raised at various intervals from 2016. The Tribunal is satisfied each responded promptly and in an appropriate manner to her concerns and worked hard, in difficult circumstances – given the global pandemic – to support her.

111. Given the Tribunal's conclusion there is no need to go further with the list of issues to consider whether any breach was fundamental or to look at the issues of resigning in response to any breach or affirmation and so on.

112. Taking into consideration all of the above the Tribunal therefore does not find that there has been one act, or a course of conduct, on the Respondent's part, that amounted to a breach of the implied term of trust and confidence.

113. Accordingly the Tribunal is not satisfied that there has been any breach of the express or implied terms of the Claimant's employment contract by the Respondent. The Claimant has therefore not established she was dismissed.

114. On this basis the Tribunal rejects the Claimant's claim for unfair dismissal.

115. The Tribunal has further considered whether to make the findings the Respondent sought within its written submissions. The Tribunal does not consider it is necessary to make such findings as part of the determination of the issues in this case and accordingly declines to do so.

EMPLOYMENT JUDGE RAHMAN
30 March 2023

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