



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Mrs Emma Tang

v The Queen Elizabeth Hospital King's  
Lynn NHS Foundation Trust

**Heard at:** Norwich

**On:** 1, 2 and 3 August 2023

**Before:** Employment Judge Postle

## Appearances

**For the Claimants:** In person

**For the Respondent:** Mr T Shepherd, Counsel

## JUDGMENT

The Claimant was not constructively unfairly dismissed.

## REASONS

1. The Claimant's claim is one of constructive dismissal and the specific issues advanced by the Claimant are set out at pages 46 – 47 of the Hearing Bundle, which were set out at the Case Management Hearing in September 2022 by Employment Judge Tynan.
2. The Claimant's resignation was made on 16 August 2021 and she worked her notice throughout to 17 November 2021. It is therefore correct that any matters arising after the date she resigned in August 2021 cannot support any claim of a fundamental breach of the implied term of trust and confidence.
3. The Respondents deny the claims in their entirety.
4. In this Tribunal we heard evidence from the Claimant through a prepared Witness Statement. For the Respondents we heard evidence from Ms Karen Beckett, an HR Business Partner, and Ms Nicola Berns, the former Divisional Director of Clinical Support Services, who retired in July 2022. They also were giving their evidence through prepared Witness Statements.

5. The Tribunal also had the benefit of a Bundle of documents consisting of 392 pages.

### **The Facts**

6. The facts of this case show the Claimant was employed by the Respondent from 5 November 2018 as an Associate Chief Pharmacist Clinical Lead, until her employment was terminated by the Claimant by reason of her resignation on 16 August 2021, which the Claimant worked out her notice until 17 November 2021 (apart from a period of illness during that notice period).
7. The Claimant's role was graded as a Band 8C which is clearly a very senior role in the Respondent's Trust, effectively that was second to that of the Chief Pharmacist Ms Berns who interestingly had previously occupied the Claimant's position. Those working at Band 8C would generally have significant previous experience, assuming a high level of management responsibility and leadership for their Team, with a high degree of autonomy to reflect that role and position attracting a salary of £81,000 per annum.
8. The Claimant was clearly made aware of the requirements of the role at the interview stage and prior to taking up the role would have been aware of its importance and standing within the Trust. Just prior to taking up the role with the Trust, the Claimant made a flexible working request application. Indeed, the week before starting in the role (pages 98 – 99) Ms Berns accommodated the Claimant in that request and it was duly approved.
9. The Claimant's role was approximately fifty per cent clinical and fifty per cent managerial. At the appointment stage the Claimant would have Line Managed approximately 20 Pharmacists Bands 6a to 8a (pages 100 – 101). The Claimant was responsible for the Clinical Service Delivery Performance and Line Management of the Pharmacists. The role required the Claimant to manage also the Pharmacy Education and Training Programme for Junior Band 6 Pharmacists and undertake Milestone Review meetings during their induction period with all of the Junior Pharmacists. The Claimant's role is set out in the Job Description at pages 156 – 161 of the Hearing Bundle. All of which the Claimant was fully aware of from the Job Description.
10. Ms Berns clearly had regular one to one meetings with the Claimant and indeed, all her direct line Reports in both the Pharmacy and the Division clearly were offering support and guidance, in effect an open forum to raise any issues. This was an opportunity to update Ms Berns with progress on matters within the respective departments and indeed, raise any concerns that the Claimant had about her position, role or matters within her department.

11. In addition to one to one meetings, Ms Berns conducted Probationary Milestone Reviews with the Claimant, notably the first on 2 January 2019 and a subsequent one on 12 March 2019 and a First Appraisal on 30 April 2019, again in accordance with the Trust Policies. It is clear, all of these meetings and the one to ones were an opportunity or forum for the Claimant to assess how she was managing in her role and in particular to raise any issues of concern and further for any support or training she required in the role. In the Claimant's First Appraisal it was noted by the Claimant,

*"Nicola [Berns] has been very supportive in helping me settle into my current role"*

12. The Claimant did note a few challenges in her first few months, in part due to staffing issues and also an Opioid Project which apparently took the Claimant one day a week for a short period of time. The Claimant, however, makes no mention at all in her one to one appraisals of excessive responsibilities. The Appraisal Form asks what support an individual requires going forward to help their health and wellbeing and the Claimant completed this,

*"No support needed in health and wellbeing" – page 108*

13. On 28 April 2020, there was a Second Appraisal. Again, the Claimant did not refer to excessive extra responsibilities. She did mention there were staffing challenges with some Pharmacists leaving and that she was often working outside her contractual hours. Though the Claimant nevertheless stated she did not require any adjustments or changes to her working arrangements to support her health and wellbeing. She stated she would be grateful sometimes for support in developing a strategy to achieve a better work life balance. Time management techniques were discussed with Ms Berns in order to help her achieve a better work life balance.
14. Ms Berns accepted that there had been staff issues during Covid, there clearly was a lack of movement of staff during Covid and steps were being taken by the Trust to address this issue and it was anticipated when recruitment of a full complement of Pharmacists arrived this would ease the pressure on the Claimant and indeed, no doubt on all the Pharmacists in the department.
15. In terms of the impact of the Covid Pandemic on the Claimant's role, the Claimant's role was fifty per cent clinical and fifty per cent managerial. Further, the Claimant had chosen to work on the Ward Pharmacy within her Clinical Specialism at the outset of her employment and indeed in line with her job description the Claimant did not become a Ward Pharmacist during Covid.

16. It was clear that after six to twelve months that the Claimant was not performing as expected in her role, particularly her ability to effectively manage and lead the Pharmacy Clinical Team. Ms Berns recommended various courses on Clinical Skills and Management Leadership which the Claimant did attend.
17. On 9 March 2021, Ms Berns held a Return to Work meeting following a period of sick absence and which was certified as 'work related stress'. At this meeting a discussion did take place about booking annual leave, as the Claimant had suggested she had been restricted in booking her annual leave.
18. Ms Berns explained it would be helpful to liaise with her Team about leave as previously the Claimant's leave had caused others, in particular Ms Berns to re-book annual leave. For reasons unclear, the Claimant became agitated at this discussion and the meeting was terminated and re-convened on 17 March 2021 with Ms Beckett HR Business Partner in attendance. Again, the issue was raised by the Claimant that she felt that she was being restricted in booking annual leave, which was at odds with the reality of the situation as the Claimant's leave request had always been approved. What the Claimant was being asked to do was in effect check with colleagues before booking annual leave, so as not to clash.
19. At this meeting it was also agreed to carry out a Risk Assessment of the Claimant. The Claimant's role had been created in 2014, it was not a new role, Ms Berns previously worked in the role and therefore was well placed to understand the requirements and demands of that role. Ms Berns had accepted the Pharmacy was understaffed in 2020, but by early 2021 additional Pharmacist posts had been approved and enabled the Claimant's Line Reporting to reduce to 30. The Respondents had recruited five Senior Pharmacists at Band 8A and B, to whom the Claimant would delegate activities. We see that at page 101. The Risk Assessment was completed by 7 April 2021 (page 142), the Claimant having identified work related stresses and a number of actions were agreed to mitigate those issues, which the Claimant identified. These were to be completed or actioned by 31 May 2021.
20. The Claimant having complained at having not enough time to complete her role, produced in a document (page 255) the various jobs she did. Ms Berns made annotated comments on that document as she was well placed to understand the role having previously performed it. There were a relatively small number of fixed commitments that could be removed and it was agreed to remove one meeting that was recurring and review the job lists. Further training for the Claimant was to be provided and Ms Berns also provided further guidance on time management.
21. A further meeting took place on 21 May 2021; a record of that is at page 143. The Claimant agreed at that meeting that all actions had been completed in respect of the Risk Assessment and in going forward and included the requested training the Claimant received was raised and at

that meeting the Claimant did not raise any further concerns about her job or performing it.

22. Subsequently, it was still apparent that the Claimant was struggling in her role. The Claimant was failing to set targets, create direction for the Team and provide leadership. Ms Berns became sufficiently concerned about the Claimant's ability to perform the role and Ms Berns created her own Aide Memoir of the Claimant's shortcomings (page 256 – 257) and was going to be effectively monitoring. Ms Berns considered at one stage putting the Claimant into Performance Management, but after discussions with her Line Management decided the best way was to continue with the more constructive approach at that stage by mentoring and coaching the Claimant in one to ones, together with assisting with Leadership and Management Responsibilities in the hope of building on the Claimant's capabilities.
23. The Claimant has not at any stage throughout Appraisals or one to one meetings suggested that Ms Berns was in any way unsupportive or belittling of her in some way.
24. There then was some further issues of the Claimant's management of the Pharmacy over the implementation of the Electronic Prescribing and Medicine Administration, in or about April / May 2021, over which Ms Berns had cause to speak with the Claimant. A meeting took place on 5 May 2021 and the Claimant was asked to reflect on how she managed that day and the implementation and the lack of support for Pharmacists on the roll out (page 144). There was clearly no consequences for the Claimant, it was best described as a coaching exercise.
25. On 21 May 2021, at very short notice of three days, the Claimant again made an application for flexible working. That request was actually to begin on 24 May 2021 and to last for nine weeks and again, this was accommodated and approved by Ms Berns.
26. There was then a major issue over the Claimant's handling of a Senior Pharmacist at a meeting which led to that Pharmacist going off on long term sick. Originally that Pharmacist wanted to lodge a formal Grievance against the Claimant, but Ms Berns and Ms Beckett had persuaded that Pharmacist not to proceed along that route on the basis that a Grievance often has negative consequences not only for the person whom the Grievance is against, but also the person taking out the Grievance and is often not helpful in the round. Therefore that Pharmacist said that provided the Trust dealt with the Claimant in some way, she would refrain from pursuing her Grievance.
27. In the meantime the Claimant made a further request for flexible working in July 2021 and again that was granted by Ms Berns.
28. There was a further Appraisal on 28 July 2023 (page 149 – 150). Again the Claimant does not refer to excessive extra responsibilities and

responding to a question about wellbeing at work and what could be done, as there being,

*“no special requirement at work and that an ongoing supply discussion on workload management may be useful.”*

29. On 12 August 2021, there was a meeting between the Claimant and Ms Berns at which was discussed the issue of the Claimant’s handling of the Senior Pharmacist and how that Pharmacist originally wanted to take out a Grievance against the Claimant. It was explained to the Claimant that it was felt that that was not in the Claimant’s interests and that the best way to deal with the matter was an informal stage of the capability process enabling the Claimant an opportunity to demonstrate her capabilities against set criteria. It was agreed that as Ms Berns was about to go on holiday, on her return together they would sit down and agree objectives drawn from the Job Description.
30. On 16 August 2021, the Claimant resigns by letter (page 178) and there is no mention in that letter of in any way of Ms Berns being unsupportive or belittling the Claimant.

### **The Law**

31. The Law in this matter is contained in s.95(1)(c) of the Employment Rights Act 1996 and that states that,

95. Circumstances in which an employee is dismissed

- (1) For the purposes of this Part an employee is dismissed by his employer if-
  - (a) ...
  - (b) ...
  - (c) the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer’s conduct.

32. This form of dismissal is commonly referred to as constructive dismissal.
33. As Lord Denning put it in Western Excavating (ECC) Limited v Sharp [1978] ICR 221,

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he or she terminates the contract by reason of the employer’s conduct. He or she is constructively dismissed.”*

34. Therefore, in order to claim constructive dismissal the burden is on the Claimant, the employee must establish that there was a fundamental breach of the contract on the part of the employer. The employer's breach caused the employee to resign and the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.
35. In this case the Claimant relies upon the breach of the implied term of trust and confidence and I repeat - it must be a significant breach going to the root of the contract, you must be able to show that the Respondents behaved in the manner that was likely to destroy or seriously damage the relationship between the employer and the employee.

### **Conclusions**

36. It is fair to say that much of the Claimant's case as advanced by her at the Case Management Hearing in September last year, has not been put to the Respondents witnesses. Events occurring after resignation, i.e. 16 August 2021, cannot form part of the reason for the resignation.
37. It is clear in this case that the Claimant's position and the Job Description was a very senior role; it was a Band 8C and the Job Description has a high degree of management responsibilities as well as Clinical, split fifty, fifty.
38. It is expected that such a position will carry a large workload. It is accepted that in 2020, because of the Respondent's geographical location that it may have been difficult to recruit Pharmacists. It is also noted that in the early part of 2020, we were subject to Covid and there was not a lot of transfer of employment between any organisations during that period.
39. Nevertheless, it was difficult to fill vacancies at the Respondent's Trust, but it is clear by early 2021 vacancies and recruitment had been addressed, vacant posts had been filled and by that stage the Claimant had fewer Direct Line Reports and we see that in the Organisational Charts originally at 100 in November 2018 and then 101 in 2021.
40. It is also clear, the Claimant's role did not change to a predominantly Ward role. It is clear that the Claimant had in any event elected to work in ICU Clinical Wards and we see that at paragraph 65 of the Witness Statement. It is clear the Claimant had been well supported by Ms Berns throughout her employment. It is clear Ms Berns is a very supportive Manager. It is clear that there were regular one to one meetings and it is clear they were open forums, there were no agendas, there were effectively no rules, anything could be discussed and canvassed at those meetings. Indeed, it is noted also that the Claimant and Ms Berns rooms were adjacent, so it is not as if Ms Berns was in some way distant from within the Respondent's organisation to the Claimant. It is clear Ms Berns is an open person,

approachable and was indeed supportive throughout. That is confirmed by the one to ones and the Appraisals.

41. It is also clear from Ms Berns' evidence that she did not want to lose the Claimant, indeed she felt with the Succession Policy within the Trust, the Claimant might be a natural successor to Ms Berns' position.
42. There is evidence, as I have said, of regular Milestone Meetings during the probationary period and the Appraisal Meetings. There is no evidence to support the assertion the Claimant was in any way being set up by Ms Berns, or anybody else, to fail. Far from it. Every effort was made by Ms Berns to support the Claimant through mentoring, coaching, offering further training when there was training within the Respondent's organisation or external training. Indeed, even in the Claimant's last Appraisal in July 2021, she said she did not need support, those were her own words.
43. By that stage various training courses had been provided, both internal and external. Ms Berns' approach to the Claimant's flexible working applications, every one she made including one before she even started employment, was accommodated and granted. There were no problems with the Claimant's leave requests, they were granted. The only issue with them was advice to speak to her colleagues before trying to book leave.
44. The Risk Assessment and Review in April 2021 of the Claimant's job list, clearly, again this confirms supporting and looking to see how best they could help the Claimant to achieve her objectives and the job requirements of the Job Description.
45. There was a follow up meeting, a review of the job tasks. The Claimant agreed at that stage that all actions that had been planned had been taken up and there were no further concerns raised.
46. There were some issues with the Claimant, as we know. In particular, the implementation of EPMA and the lack of support on the day and also the Claimant's management and handling of the Senior Pharmacist. All of those were dealt with in a supportive manner and not exposing the Claimant to a Grievance is clearly supportive. Grievances taken out against individuals are never helpful in career progressions.
47. Finally, the resignation letter (page 178) is not indicative of an organisation or Ms Berns' either belittling or not supporting the Claimant.
48. Even the Claimant at one stage in her own admission and cross examination, stated,

*"with hindsight my decision to resign may have been unwise"*

I note that she resiled from that subsequently, but that was clearly her first thoughts at that stage.



49. To conclude, there is simply no evidence that either the Respondents or Ms Berns were unsupportive, exposing the Claimant to excessive workloads or belittling the Claimant. They were extremely supportive.
50. Therefore, there is no evidence to support that the Respondents were in some way in fundamental breach of the implied term of trust and confidence, entitling the Claimant to resign.
51. Therefore, the Claimant's claim of constructive dismissal does not succeed.

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Employment Judge Postle

Date: 4 October 2023.....

Sent to the parties on: .10 October 2023

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For the Tribunal Office.