Case Number:- 3314672/2020;
3311659/2020.

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
(1) Mr Clive Rennie; and (2) Miss Ann-Louise Schofield	**v**	NHS Norfolk and Waveney Integrated Care Board

Heard at: Norwich

On: 4, 5, 6, 7, 8 and 11 September 2023
20, 21 and 22 November 2023

In Chambers Discussion: 22 November 2023 (in part)
4 and 5 December 2023

Before: Employment Judge Postle

Members: Ms S Blunden and Ms J Costley

Appearances
For both Claimants: Mr Ashley, Counsel
For the Respondent: Miss Whiteley, Solicitor, Higher Rights Advocate, (on 4,5,6,7,8,11 September 2023); and Mr Moriarty, Counsel (only for 20, 21, 22 November 2023)

RESERVED JUDGMENT

1. The Respondent's Application that the Tribunal recuse itself was not well founded.

2. The Respondents having already conceded liability prior to the Hearing in the case of Miss Schofield's claim for unfair dismissal.

3. The First Claimant's claim for constructive dismissal succeeds.

4. The First Claimant's claim for the protected characteristic of age is not well founded.

5. The First Claimant's claim for unlawful deduction of wages was withdrawn during the course of this Hearing.

REASONS

1. As already noted above, in respect of Miss Schofield, the Respondents prior to this Hearing conceded liability on her claim for unfair dismissal. A Remedy Hearing has been listed for 2 and 3 May 2024. That Hearing will also deal with Mr Rennie's Remedy claim.

2. Mr Rennie had claims for: age discrimination, both direct and indirect, a claim for constructive dismissal and a claim for unlawful deduction of wages; the claim for unlawful deduction of wages was withdrawn during the course of this Hearing.

3. In this Tribunal we heard evidence from both Claimants through prepared Witness Statements.

4. For the Respondents we heard evidence from: Mr Webster, Direct of Strategic Commissioning; Mr Stavrinou, Head of HR Business Partners NHS Arden and Gem Support Unit providing HR Services to the Respondent; and Mr Burgess, Locality Director for the North Norfolk and Norwich and South Norfolk giving their evidence through prepared Witness Statements.

5. The Tribunal had an original Bundle of 695 pages and a Remedy Bundle.

6. Subsequently during the course of this Hearing, additional documents were produced by the Claimant consisting of 199 documents.

7. A further Bundle produced by the Claimants' Counsel following the Order during the course of these proceedings for specific disclosure of 153 pages.

8. Also from the Claimants' Counsel, there was a short Bundle consisting of an Opening Note, the Claimants' Chronology, List of Issues, the Claimants' Witness Statements, the ACAS Code of Practice and additional pages for insertion into the Bundle.

9. A further Bundle was produced on the fifth day of the Hearing, again following an Order for specific disclosure, produced by the Respondent and consisting of the Draft Investigation Report prepared by Mr Stavrinou. Previously Mr Stavrinou and the Respondent's Advisors had maintained no such draft existed.

10. The Tribunal also had the benefit of Mr Moriarty, Counsel for the Respondents, written closing submissions.

The Issues

11. The issues in this case in relation to Mr Rennie's claim for constructive dismissal, he relies on the breach of the implied term of trust and confidence. In particular paragraphs 14 – 20 of the Particulars of Claim which are read in context of paragraphs 1 – 13 which the Claimant says amount to a repudiatory breach of the Claimant's contract.

12. The Claimant, Mr Rennie, relies upon the matters complained of in paragraph 20 of the Particulars of Claim as the last straw.

13. In relation to the claim for direct age discrimination, it is advanced on the basis that the Claimant was treated less favourably than a hypothetical comparator in relation to the alleged decision to renege on the Respondent's (Mr Webster's) commitment to make the Claimant redundant.

14. In relation to the indirect age discrimination claim, the PCP relied upon was selecting for redundancy those who were materially easier to make redundant, i.e. younger persons. The Respondents relying upon the justification defence of it being a proper and responsible management of public money as its legitimate aim.

Background to the Respondent's Application for Recusal

Monday 4 September 2023 – Day 1

15. The first day of the Hearing was largely a reading day. There was a housekeeping exercise with the parties appearing before the Tribunal on the first day. There was some discussion about the issues as set out by the Claimant's Counsel. The Tribunal made it clear at the end of the day it was for the Tribunal to decide whether the allegations set out in the Particulars of Claim truly represented a breach. The Respondents disagreed and suggested there should not be reference to paragraphs in the Particulars of Claim. The Tribunal were satisfied they understood the matters to be determined in relation to the Claimant's claim for constructive dismissal. The matter proceeded with a discussion about the Law on constructive dismissal and the Judge made it clear ultimately this was a matter for submissions.

16. There was then discussion about the Claimant's Application for Specific Disclosure made by Counsel for the Claimant, in which they had been asking for drafts of key documents in relation to the Grievance Reports and Investigatory Statements, etc. They said that these drafts were important to the issues. In addition they were asking for drafts covering documents in relation to Mr Webster and Miss Yellon's evidence in relation to Mr Rennie's Grievance.

17. Solicitor Advocate for the Respondent indicated that a thorough search had been carried out and no such documents exist. Miss Whiteley went on to say that she was assured that two searches had been carried out and they were unable to find any draft investigation and Grievance Reports and that all documents in the Respondent's possession had been disclosed.

18. This was notwithstanding the fact that the author of the Grievance Investigation was sitting at the back of the Tribunal throughout and would have known ultimately if such drafts existed, as were eventually disclosed following the Order for specific disclosure. Much to the surprise of the Tribunal given Mr Stavrinou was the author of these Reports and had been sitting in the Tribunal throughout these exchanges.

19. Counsel for the Claimant then said that some further documents had been sent to him last Friday, password protected which he could not open. They then asked the Tribunal to request that the Respondents provide the appropriate password.

20. The Claimant also advanced the argument that it seemed odd that the Respondents were saying they do not have a draft of Mr Stavrinou's Investigatory Report into the Grievance. The second point, Counsel for the Claimant made is that he has some difficulties with the Bundle. He was provided with an electronic Bundle some time ago which was impossible to open. Apparently vast quantities of text have been replaced with machine code and various documents have been redacted. Counsel has asked for those documents to be sent without redaction. The response Counsel received was that they were corrupted documents. Counsel for the Claimant then went on to say that he had been offered a hard copy of the Bundle by the Respondent, it was not forthcoming. On 3 August 2023 Counsel for the Claimant chased for this and again on 14 August 2023. The Bundle was still not forthcoming and ultimately Employment Judge Quill Ordered that the Bundle should be sent to Counsel for the Claimant as a hard copy. Apparently the Respondents, in breach of this Order, no such hard copy was received and Counsel received yet another electronic Bundle.

21. Employment Judge Postle questioned why the password had not been sent and Miss Whiteley's response was that she cannot send documents without a password. The Judge Ordered that the password be sent and expressed concern by the failure to send a hard copy of the Bundle particularly given the Order made by Employment Judge Quill.

22. Miss Whiteley indicated that a Final Bundle had been sent in June 2022. There was then some discussion that the Bundle had been substantially changed since June 2022, this being the reason why the Claimant's Counsel had asked for the most recent up to date Bundle. The Judge made the point that it seems the Claimant's Counsel has chased for the Bundle, it was not forthcoming and that is not the way to conduct litigation.

The Judge asked for it to be possible that a hard copy be provided to Counsel for the Claimant by 4pm today.

23. The issue of draft documents was then returned to and the Judge enquired whether those documents had been destroyed. Miss Whiteley's response was,

> *"Drafts do not exist. There are no draft documents in relation to the Grievance Report or the Investigatory Statements to do with Mr Stavrinou and the Grievance decision."*

24. Employment Judge Postle enquired whether they were all produced without a draft and the response from Miss Whiteley was,

> *"There were no drafts."*

25. The Judge requested that all drafts and the notes of the Grievance be sent to Counsel for the Claimant by 4pm today, together with any covering documents. The Judge reminded the Respondents there was a continuing obligation to disclose documents.

26. Miss Whiteley's response on behalf of the Respondent was that the Respondents buy HR Services from Arden and Gem and they act as an Agency. Apparently they were requested from Arden and Gem and that any such documents that were in their possession, i.e. Arden and Gem, have been disclosed.

27. The Tribunal then adjourned and continued reading for the rest of the day.

<u>Tuesday 5 September 2023</u> – Day 2

28. Mr Ashley, Counsel for the Claimant wishes to make an Application. He handed in an email of 5 September 2023, timed at 0756, which was an Application for 'third party disclosure'. Mr Ashley went on to say that from the documents he has been provided, one of them was created on 7 May 2020. The second PDF was created on 4 September 2020, an annotated Report. The version disclosed was not annotated and in any event, this was provided to the Claimant following a Subject Access Request. Mr Ashley was not a party to this, suggesting that there were draft documents which were possibly in relation to the Grievance Investigation by Mr Stavrinou (Mr Stavrinou remains in the back of the Tribunal).

29. Miss Whiteley went on to tell the Tribunal that her client has assured her they have carried out a full and detailed search which includes all relevant documents from Arden and Gem, the HR provider to the Respondents. She suggests that the Disclosure Application is not in accordance with the overriding objective, as well as being disproportionate, as they have confirmed they do not have any further documents. The person who wrote the Report will be giving evidence on this (that person remains sitting in

the back of the Tribunal). Miss Whiteley went on to say there was no justifiable reason for the delay by the Claimant's Representative in making the Application. If it is so important, she said, it should have been requested earlier.

30. Mr Ashley, for the Claimant, said the Application was made some 14 days ago. Applications often arise late and the case is looked at in forensic detail during final preparations for trial. He went on to say, two Officers of the Court told the Tribunal there were no draft documents and Mr Ashley is inviting them to explore this. If they have nothing to hide they should not fear the Order for 'third party disclosure' being made.

31. A further point arose again from Mr Ashley that he still cannot open the Bundle and the documents he asked for to be made available. Apparently there was also a member of the Press who was trying to access documents and was unable to open them and they, of course, were entitled to have access to them. Miss Whiteley indicated that Bundles are being sent to the Press this morning and that they have had IT issues at the Respondent's Solicitors yesterday. Employment Judge Postle reminded Miss Whiteley that all documents should be made available in the interests of open justice.

32. Mr Ashley went on to advise the Tribunal that as the result of further disclosure yesterday, there were some aspects of the case which he is not able to get into in the allotted time. He stated he could consider applying for a postponement, but his clients have waited for these proceedings for a long time, although he is still wrestling with accessing the documents provided. Mr Ashley went on to say that by tomorrow morning he will produce an additional Bundle of documents and Mr Rennie will start to give his evidence today. Mr Ashley did not think there would be a need for Mr Rennie to be cross examined on these additional documents.

33. Miss Whiteley was concerned it would not be fair cross examining Mr Rennie without knowledge of what these documents were as they were not in the Bundle and have not yet been admitted into evidence. She indicated she was not running this case and had not been involved prior to the List of Issues being produced, as such if Mr Ashley was going to introduce this additional Bundle she could not cross examine without seeing the Bundle.

34. The Judge indicated the best way forward, using the time, was to start hearing Mr Rennie's evidence and then have a break for a few hours to take instructions on the additional documents. The Judge obviously cannot comment on the size of the Bundle, we will have to consider that tomorrow. Mr Ashley indicated he could get the additional documents to Miss Whiteley by lunchtime today. In those circumstances the Judge indicated that we will not start the evidence until Miss Whiteley has had the Bundle so that she is not prejudiced.

35. There was then some discussion between the parties' Representatives following Mr Ashley's submission that the Respondent's pleaded case was in direct conflict with Mr Webster's Statement. In other words, the Respondents were pleading to say one thing and the evidence says something entirely contrary. Mr Ashley submitted that the Respondents have two options: run the pleaded case, or apply to amend their Response so it reflects the reality other than fantasy.

36. Miss Whiteley indicated she had no notice of these submissions and requested ten minutes to take instructions. The Judge adjourned the case for 30 minutes and ultimately 45 minutes was granted

37. On return, Miss Whiteley's submission was that no amendment was required, that the claims from Miss Schofield are irrelevant and therefore there are no grounds for amendment. Though it was unclear from the outset which facts have been relied upon by the Claimant, the primary issue appears to be the reference to slotting in. The legal defence is as pleaded in respect of the constructive dismissal stand. In those circumstances there is no requirement to amend the Respondent's case.

38. At 1130, seemingly documents had not been further disclosed, the subject matter of Mr Ashley's Application for specific disclosure. It was the unanimous view of the Tribunal, having regard to putting the parties on an equal footing and the overriding objective, is that the Tribunal were going to make an Order under Rule 31 as set out in Mr Ashley's email of 5 September 2023. Arden and Gem to search for the documents as requested by 4pm this afternoon. The Judge then read out the email from the Claimant's Counsel with the exact wording of the Order for disclosure.

39. The Judge made comment that the Respondent's pleadings appear to be odd that the pleaded case does appear different to the witness evidence of Mr Webster and the Tribunal were surprised they were not making an Application to Amend. That is a matter for the Respondents. It was agreed the matter would be put back until tomorrow morning.

40. Counsel for the Claimant told the Tribunal his view was that the third party Order should be delivered to the statutory Officer of Arden and Gem, not the middle Manager.

41. The Judge made the point the Order was made at 1145, the Order is live from now and would use best endeavours to obtain the written Order. In Norwich we have difficulties as there are no persons available to type such an Order which would be produced at Watford.

42. The Tribunal then adjourned at 1145 to recommence at 10am tomorrow in the hope that matters in relation to the third party disclosure had been addressed and dealt with.

Wednesday 6 September 2023 – Day 3

43. There was a delayed start at the parties' request. Upon resuming the Hearing this morning Miss Whiteley advised Arden and Gem had refused to accept the oral third party Order and wanted a paper Order. The Judge reminded the parties that an Oral Order takes effect immediately it is made. The Judge questioned whether any progress had been made in the interim period as there were concerns that with the time that had already elapsed, the case might not finish in the allocated time which would be unfortunate as it would go part heard into the next year. Although, part heard Hearings do take priority.

44. Mr Ashley wanted to address the Tribunal further with background to the Order for specific disclosure. His email at 1524 yesterday which purported to advise that the Order had been communicated to a statutory Officer of Arden and Gem and then the Respondent's response to the Tribunal was that nothing could be done. They appeared not to be complying with the official Order. Mr Ashley wanted to know why they were not able to comply and were in his view, *"thumbing their noses"* at the Tribunal. Mr Ashley further submitted that Capsticks were also Solicitors for Arden and Gem. Mr Ashley went on, that an Order was made under various circumstances in which he has effectively accused two Officers of the Court and the Tribunal of misleading the Tribunal. That Order has now been breached.

45. Miss Whiteley said she needed to take instructions as she had no warning of this matter.

46. Mr Ashley's response was,

> *"I put on record that there was some gamesmanship here, the consequences of which would strengthen his invitation to the Tribunal to infer discrimination. There is non-compliance and asked the file go to the REJ and the DPP for disobedience relating to non-compliance with the Tribunal's Order."*

47. Mr Ashley also submitted the inevitable course in this case is that we will only finish hearing the evidence and there will be a Reserved Judgment. The Reasons will be available on the internet and he will be inviting the Tribunal to make Judgments on the conduct of Legal Officers and will invite his clients to make a complaint to the SRA.

48. Mr Ashley submitted that the conduct of the Respondents / Advisors was scandalous and was inviting the Tribunal to make a further Witness Order for relevant Officers of the third party to attend and explain their position to the Tribunal. The Tribunal again adjourned for 30 minutes.

49. The Judge then enquired whether the third party was going to comply with the Order. Miss Whiteley's response was,

> *"I cannot make representations as Capsticks are not acting for Arden and Gem."*

50. The Judge responded,

> *"Miss Whiteley, I just want to know, has anyone spoken to them? We are on the third day of this case and have so far got nowhere. It is unacceptable. Why are the Respondents prevaricating? Are they able or willing to co-operate? Otherwise we are going to get nowhere. I just needed someone to make a telephone call to the third parties. I assumed that is what you were doing in the adjournment."*

51. Miss Whiteley again repeats,

> *"Capsticks are not acting on behalf of Arden and Gem. We are not advising them. We cannot provide submissions."*

52. The Judge responded,

> *"I appreciate that, but your clients could put in a call to the people who provide their HR advice and ask them if they are going to comply with the Order."*

53. The Judge noting that Mr Stavrinou from Arden and Gem was sitting in the back of the Tribunal, as he has been throughout.

54. The Judge went on to say,

> *"It is as simple as that. Your clients could co-operate with the Tribunal having regard to the overriding objective. The Tribunal is going to stand down now for you to find out if the third party is going to comply with this Order. We will now take an early lunch and return at 1:30pm.*
>
> *If the case goes part heard, a provisional day for a re-list is in February. Justice will not be served. Your clients need to find out what is happening. The Tribunal fully understand Capsticks do not act for the third party, but there is no reason why your clients should not find out what is going on."*

55. The Judge expressed these views in robust terms in an effort to ascertain what, if anything, the HR Advisors to the Respondent were going to do about the Order made for third party disclosure.

56. The Tribunal resumed at 1:30pm. There was an issue with one of the Respondent's Representatives approaching a Member over lunchtime. The Judge made it clear that no one should attempt to approach the Tribunal's Members on the concourse at any stage and that is not

acceptable. If any witness attending has anything they wish to say, they should approach the Clerk.

57. Miss Whiteley went on to say that there were three emails received from Arden and Gem which indicated that even if the Order came through today, i.e. the written Order, it would not be dealt with for 48 hours as it has to be dealt with by a third party. It then has to be signed by their Managing Director who is currently on holiday. Clearly the implication was prevarication. The Judge questioned why the Managing Director had to sign off documents being disclosed if they are available. Miss Whiteley's response was,

> *"That is all Sarah Hirst has said as they are not a legal entity in their own right."*

58. The Judge was informed that the additional Bundle from the Claimant's Counsel has now been given to Miss Whiteley.

59. The Judge indicated the Respondent's position and enquiries over the third party disclosure issue was most unsatisfactory state of affairs. Three days of judicial time so far being largely wasted and it is clear the case is not going to conclude within the time. There was the question as to whether it was worth even starting. The Judge repeated if it goes part heard we could be looking at 2025 for a re-listing date. Counsel for the Claimant understood this and hoped that things could be re-organised, but does not want to go part heard as this would suit the Respondents and that would be an appalling travesty of justice. They are ready to start today.

60. Miss Whiteley questioned if disclosure supports the Claimant's case, if it is so necessary, how can the Claimant's Counsel say he is ready to proceed?

61. Mr Ashley's response was the simple answer,

> *"The Tribunal has taken things as far as they can. The Claimant is stuck between a rock and a hard place.*
>
> *The judge is concerned about going part heard. I am confident for an early date in the middle part of next year."*

62. Mr Ashley was keen to start and indicated that it appeared that the Respondent's HR providers are in some difficulty and he cannot see why this disclosure should take so long. It was not in the interests of justice to delay any further and that the Tribunal should go ahead and hear the case.

63. Miss Whiteley's response was,

> *"Subject Access to request the Bundle, there are a couple of names on the on-call rota which contains personal telephone numbers and they need to be redacted. That was agreed and we should start with Mr Rennie's evidence."*

64. The Tribunal then proceeded to hear cross examination in the afternoon.

Thursday 7 September 2023 – Day 4

65. There was a delay in the parties' Representatives coming into the Tribunal. The Representatives were called in at 10:13 to explain the delay. The Judge explained that the Hearing was on a tight schedule and needed to know what was happening.

66. Miss Whiteley stated,

> *"We are going to make an Application that the Tribunal recuse themselves from this Hearing."*

67. She then went on to say that the Application needed to be finalised and approved by her clients. A 20 minute adjournment was granted.

68. Whereupon a letter was subsequently produced / emailed, dated 7 September 2023, from an Alistair Kernohan of Capsticks whom had not been listed as an attender at this Hearing previously, setting out the Application. This was read by the Tribunal. The Tribunal asked Miss Whiteley if she wished to add anything further, whereupon her answer was,

> *"Nothing"*

69. In effect the Application was made by someone who had not been present at these proceedings.

70. To summarise the Application, it was that,

> "Employment Judge Postle has demonstrated the premature formation of a concluded view in the Claimant's favour without properly considering representations from the Respondent and before the Respondent has been able to put forward its evidence.
>
> …
>
> Employment Judge Postle's inappropriate conduct, tone and disparaging comments towards the Respondent and its representatives, has crossed the line between what is tolerable and what is impermissible, to the extent that his comments would give an appearance to the fair minded and informed observer that there is a real possibility that the Employment Judge will carry into his judgment the scorn and contempt his words and behaviour convey.

…

Employment Judge Postle has made unnecessary and inappropriate criticisms of the conduct of the Respondent and its representatives which he has expressed in absolute terms, which failed to leave open the possibility of him considering an explanation, despite not having heard or in some cases even invited evidence or submissions from the Respondent's representative.

…

Employment Judge Postle has allowed and facilitated inappropriate conduct of the proceedings by the Claimant's representative, allowing such conduct to go unchallenged despite representations made by the Respondent or even, on occasion, failing to allow the Respondent the proper opportunity to make representations.

…"

71. The Tribunal then asked Mr Ashley if he would like to respond. He in turn wanted time to consider the Application. He had only 10 minutes to consider it, however, he wanted half an hour.

72. On return at 11:45, Mr Ashley responded firstly in not accepting what had been said and noting these Applications arise very rarely.

73. Mr Ashley went on to say that he was an Officer of the Court and takes his responsibility seriously, his Practising Certificate and livelihood is important, indeed he stated it is more important than his clients. In responding to the Application without fear or failure he had this to say,

    73.1. Firstly is that the allegations of inappropriate conduct by the Judge be judged in context;

    73.2. Secondly, that it is important that we are astute enough to identify that any evidence that such an Application made can be used as a device for a party which finds itself in difficulties because of the quality of its case.

    73.3. Mr Ashley went on to say that he has been practising for 24 years and he had never seen such deplorable conduct on the part of the Respondent's Solicitors. He stated that rarely has he seen such a 'car crash' of a case presented before a Tribunal.

    73.4. Mr Ashley went on to say that at the outset, the Tribunal was told by a Solicitor Advocate that there was no drafts of the Investigatory Report and none had ever existed. This was echoed audibly by Miss Aslam, Solicitor. Mr Ashley said,

> *"Two Officers of the Court sat here and told the Tribunal that a 20 page perfectly polished Report had never been the subject of any drafting. This is absurd to the extreme and obvious to us all that it cannot be and no doubt Miss Whitely made the statement recklessly and off the cuff without any thought to what she was saying. It was, to my mind, utterly untruthful. Miss Whiteley and Miss Aslam knew, or at least had constructive knowledge that the statement was untrue. There is a whole trail of correspondence which shows these statements are untrue."*

73.5. The Tribunal was asked to turn to ND147, 'Reattachment of Investigatory Report' which suggests, as of 17 April 2023, it was a largely completed draft.

73.6. Mr Ashley pointed out that whilst their clients had been involved in providing documents for a 'Subject Access Request', they had not disclosed many of these documents and were therefore not complying with their duty of disclosure in legal proceedings.

73.7. In Mr Ashley's submission there is at this point, a whiff of sharp practice. There was a flagrant non-compliance of the Tribunal's Orders. He stated Employment Judge Quill made an Order for the Bundle to be sent to him and so it was a breach.

73.8. Furthermore, Mr Ashley never received a hard copy of the Bundle despite repeatedly requesting one.

73.9. Thirdly, that on Tuesday 5 September 2023 when responding to his attempt to disclose,

> *"Miss Whiteley became quite animated and tried to persuade you not to do so. Mr Stavrinou was going to give evidence, the author of the Report. The implication was that Mr Stavrinou was going to confer there was no draft. In his witness statement he goes from gathering statements to producing final Report. He makes no reference to drafting one, or passing it around to other involved parties. The Tribunal was therefore given the clear impression Mr Stavrinou would confirm under cross examination there was no draft Report."*

73.10. Mr Ashley submitted that things had gone from bad to worse as at every turn the Respondents and their Solicitors had shown a lack of co-operation and a wilful disregard of the overriding objectives of the Tribunal.

73.11. Mr Ashley asked the Tribunal to turn to the email of 7 September 2023 at 8:51. Reference is made to Miss Whiteley being more junior. Mr Ashley recognising that and has been tempted to take her to one side and ask her what she is doing as she is plainly breaching her duty. But he realises that of course he cannot do.

Mr Ashley therefore addresses it in appropriate language and advises her she should tell the Tribunal that she retracts the statement she made that there was never any draft Report. However, they still have not done so.

73.12. Mr Ashley submitted that in the context of the Application and the attack on the Judge, this is because the case is a train wreck. He submits this is a dishonest Respondent who is acting unlawfully and there appears to be sharp practices by two Solicitors. In fact Mr Ashley described it as total incompetence in the running of their case.

73.13. Mr Ashley says,

> *"I have seen the Judge becoming frustrated and as an Officer of the Court I can say honestly it is not that I have never seen such conduct before. Judges and Advocates must have broad shoulders."*

73.14. Mr Ashley accepts that Employment Judge Postle raised his voice yesterday as pure frustration as nothing was being done regarding the third party Order, no calls had been made by the Respondents to the third party.

74. Mr Ashley wanted it noted that the Tribunal / Judge did not grant Mr Ashley's Application for Witness Orders yesterday. Also, a Judge being frustrated and cross in a case is not extraordinary, it is quite normal.

75. Mr Ashley is concerned that this is a device by the Respondents to put the case off possibly until 2025, to delay and frustrate the process.

76. Mr Ashley submits there are draft versions of the Grievance Investigation Report and he can read they exist from analysis of the evidence.

77. Mr Ashley went on to say the point that Miss Whiteley makes about being far more junior, the Respondent's Solicitors employed her as the Representative in this case. Judge's do not have to behave differently to a younger advocate than to an older more experienced advocate. Mr Ashley concludes he finds it remarkable that they are suggesting they have lost confidence in the Tribunal when the fact is they are concerned about coming to the Tribunal to give evidence and in effect commit perjury rather than accepting the independence of the Tribunal.

78. The Judge asked if Miss Whiteley would like to respond. She said,

> *"I do not have anything further to say specifically in relation to the allegations regarding my professional conduct, which we are not in a position to understand what was being alleged and I need time to consider that and provide a response."*

79. The Tribunal then adjourned at 1:30pm to consider the Respondent's Application for Recusal.

80. The Tribunal, in reaching its unanimous decision that it should not recuse itself in these proceedings, reminded itself in reaching that decision we must consider whether the circumstances lead a fair minded and informed observer to conclude that there was a real possibility that the Tribunal was bias. This hypothetical observer would be appraised of all the relevant circumstances, including matters not necessarily known to the parties at the time of the Hearing, as well as the Employment Judge's and Members' explanations and more particularly what has been the background in the last few days..

81. The Tribunal also remind the parties that firm Case Management by the Judge / Tribunal should not be characterised as bias. Trained legal representatives are expected to take difficult conduct by the Tribunal in their stride. What the Tribunal have to consider is was that fair minded and / or informed observer sitting at the back of the Tribunal, did he / she conclude that the Tribunal showed actual bias or apparent bias?

82. What the Respondents appear to complain about and the Tribunal note it does not appear to be Miss Whiteley's Application, but from a party not even present in these proceedings, is the fact that the Tribunal / Judge chastised the Respondent's Representative over the lack of progress in what appeared to be the Respondent's third party's prevarication in complying with the Order for third party disclosure. When all the Judge was asking for, in no uncertain terms, is that acknowledging that the Respondent's Solicitors may well not be acting for the third party, but noting there was a representative from Arden and Gem sitting in the back of the Tribunal, Mr Stavrinou from the third party, why have the Respondent's Solicitors not taken it upon themselves with regard to the overriding objective to speak to Mr Stavrinou about the Order, or alternatively for the Respondent's Solicitors simply to make a phone call to the third party, or for their client to make a call to their own providers of HR Support Services? It is not beyond the wit of man and what the Tribunal are frustrated about was the lack of progress and compliance.

83. Looking at the above, could it possibly be said, looking at a key test namely public perception of the possibility of unconscious bias knowing the facts that have happened in the last couple of days. The answer must be no.

84. The Tribunal have asked themselves whether this Application is purely tactical and wanting a back door postponement. Is it a form of revenge because the Respondents / their HR Advisors, have had an Order made against them that might embarrass them?

85. In dealing with the specific allegation, the argument on day one over the Bundle was clearly a genuine argument and in fact the Claimant's Counsel

had not been provided with the password or the correct Bundle and had not been provided with a hard copy of the Bundle despite an Order being made by Employment Judge Quill.

86. There was some discussion about whether to proceed or not and in the interests of justice the Tribunal decided to proceed, as it would not have been fair on the Claimants to adjourn and equally on the Respondent's witnesses to delay matters further.

87. There was no disparaging comments towards the Respondent or its Representative, it was simply a case of asking, what is happening about the third party Order for disclosure, concerns about prevarication, delay and the frustration of the Tribunal that the Respondent / its Representative, were doing nothing to advance the process in getting disclosure from the third party. All that was needed was a call, whether it be by the Respondent's Solicitor, their client or Mr Stavrinou who sat in the back of the Tribunal and is employed by the third party, and the frustration by the Judge in this not happening. Equally, fully understanding as the Judge said on a number of occasions, he accepted that the Respondent's Solicitors did not act for the third party.

88. The Respondent's Representative, at every avenue that she requested adjournment, it was granted. There was never any question of that, she had time to take instruction. It is therefore not clear what is meant in the fourth allegation that,

> "Employment Judge Postle has allowed and facilitated inappropriate conduct of the proceedings by the Claimant's representative, allowing such conduct to go unchallenged despite representations made by the Respondent or even, on occasion, failing to allow the Respondent the proper opportunity to make representations."

89. The Tribunal / Judge cannot stop the Claimant's Representative having his say or comment about the process. It is his right.

90. The Tribunal were unanimously of the view that the fair minded observer, and indeed informed observer sitting at the back of the Tribunal would conclude that there is no bias by the Tribunal and no predetermination in their decision of the outcome. The desire of the Tribunal was to make progress, with frustration in the lack of progress and trying to get the matter moved forward without further delay.

91. The Tribunal was also surprised that the Application for a Recusal was made in a letter by someone who has not been in attendance to date and the Solicitor, Miss Whiteley, who was the Advocate, not making the Application herself. But of course that is a matter for the Respondents how they run their case.

92. It is important to note, subsequently it turned out, following the Respondent's third party Order for Disclosure, that there was indeed a draft Investigation Report prepared by Mr Stavrinou and with input from other people in that draft. Notwithstanding the Respondent's assertion no such draft Reports existed. Equally concerning was the that the author of the Report remained in the Tribunal throughout the Hearing and did not approach Capsticks or Miss Whiteley and come clean that such draft Reports did exist in any event.

93. That perhaps was what was behind the Respondent's Application for Recusal. Perhaps a cynical attempt to hi-jack the proceedings and delay further process.

94. At the conclusion of the Tribunal giving Judgment on Recusal, Miss Whiteley wished to address the Tribunal. She informed the Tribunal she was an Officer of the Court, it was her livelihood, she took her responsibilities seriously and would not knowingly mislead the Tribunal. She would like to correct the Tribunal Record in that it is clear that drafts of the documents did exist, although they were not in the possession of the Respondent. She was not clear what she said on the first day of the case other than that there were no drafts in the possession of the Respondents, further she works on instructions and only puts forward what she is instructed to do so and that she does not understand what Mr Ashley was referring to.

95. As Mr Rennie's cross examination had concluded the day before, the Tribunal then proceeded with Miss Schofield's evidence and cross examination. Thereafter, the Respondent's Mr Webster and Mr Stavrinou.

The Facts

96. Mr Rennie commenced his employment with the Respondent's predecessor organisation on 3 January 2000. In or around 2012 the Claimant was promoted to the position of Assistant Director Integrated Commissioning (Mental Health and Learning Disabilities), which he held until his employment ended by reason of resignation on 9 June 2020, with effect from 9 September 2020 (page 585).

97. Miss Schofield started work for South Norfolk Clinical Commissioning Group on 5 August 2013, a predecessor of the NHS Norfolk and Waveney Clinical Commissioning, in the position of Assistant Director of Commissioning (Band 8C). She was considered a high achiever, indeed a future leader of the CCG. She was ultimately appointed to the person of Head of Mental Health Transformation (Band 8D) with effect from August 2016.

98. On 30 July 2019, John Webster Director of Strategic Commissioning became Miss Schofield's Line Manager. During the hand over call from her previous Manager, John Webster, Miss Schofield was advised that the

CCG Chief Executive Officer Melanie Craig had requested that she liaise as a single point of contact within the CCG on mental health matters.

99. On 9 September 2019, consultation for the third part of the CCG restructuring exercise began. Within the new Mental Health Strategic Commissioning Team, there was to be one Band 8D role Head of Mental Health. The two staff identified as eligible for that role were to be ring fenced and were Miss Schofield and Mr Rennie.

100. Initially it was clear that Miss Schofield was expected to be the successful candidate in the Head of Mental Health role as against Mr Rennie. The reason being Miss Schofield was leading on the oversight of the Mental Health Transformation Programme and supporting the Programme Board Chair in this. In effect, Miss Schofield was already doing the job of Head of Mental Health and the job description for that role was largely the same as Miss Schofield's job description which she had provided to Mr Webster on 12 September 2019 the job title was simply amended.

101. Miss Schofield was also being trained by the CCG to commence on-call responsibilities for the Healthcare System. Whereas Mr Rennie was not asked to train on the on-call system. It is also clear, Miss Schofield had met with Miss Yellon, Assistant Director of Mental Health on 18 October 2019 and was informed she was expected to fill the Band 8D role and was going to assist Miss Schofield in progressing in her role within the Respondent's organisation. Furthermore, there were several conversations thereafter between Miss Yellon and Miss Schofield about what she would be doing when appointed to the Band 8D role (unchallenged evidence). Indeed, it was openly discussed between Miss Schofield and Mr Webster about his expectations of her being appointed to the Band 8D role in the future.

102. On 19 November 2019, Miss Schofield receiving the Re-Structuring Outcome letter advising her she had been ring fenced to the Band 8D role of Head of Mental Health (page 377). That letter came from Melanie Craig. At the same time the letter did not indicate Miss Schofield was in any way at risk of redundancy.

103. Following the Consultation Process beginning, Mr Rennie and Mr Webster were also having regular meetings, although oddly Mr Webster acknowledges throughout the whole process of consultation he took and kept no written notes of any such meetings, which the Tribunal found somewhat surprising.

104. There was a meeting in early September, possibly 10 September 2019, between Mr Rennie and Mr Webster, in which Mr Webster acknowledged the potential outcome that Mr Rennie wanted. That was voluntary redundancy (when cross examined on this Mr Webster did not deny) and maintaining there was a process to follow. Mr Webster acknowledging he had sympathy for what the Claimant wanted and it was also discussed that

Miss Schofield was an asset to the NHS and was the person for the leadership role in the Band 8D position. Mr Webster, concluding in that meeting that the situation was fluid and seemed to acknowledge and accept the desired outcome that Mr Rennie wished for was redundancy.

105. There was then a further meeting on 22 October 2019 at Lakeside between Mr Webster and Mr Rennie. Mr Webster started the meeting by asking Mr Rennie to be open and honest about his intentions for the future (again when cross examined Mr Webster admitted quite possibly he did ask this). Mr Rennie clearly emphasising his position being the desire to leave the organisation. Mr Rennie went on to comment in the meeting that Miss Schofield was now leading on Mental Health Commissioning and enjoying the role. He further stated in that meeting that Mr Rennie did not want to compete for the role as Miss Schofield had vast experience and he was already reporting to her. It was clear from Mr Webster's reaction and tone in the meeting that there was a settled intention on both parts that Mr Rennie was to leave the organisation as redundant. Indeed, Mr Webster went further in that meeting to suggest that was a successful outcome (the Tribunal repeats it is extraordinary that such meetings (if they were Consultation Meetings) were not Minuted, nor accompanied by anyone from the HR department).

106. What is also clear from Mr Webster's evidence, Melanie Craig's management style was described as authoritarian, she could be difficult and what she wanted she got. On one occasion she described Mr Webster as *"a fucking nightmare"* after a meeting.

107. It is also around this time, it is clear, Mr Rennie was imparting to Miss Schofield the discussions he was having with Mr Webster and his assurances of a successful outcome. Miss Schofield, likewise, was keeping Mr Rennie informed that she had parallel conversations with Mr Webster about the future and working with Joanna Yellon.

108. There was a further meeting on 28 October 2019 between Mr Webster and Mr Rennie, at which Mr Webster asked the Claimant,

> *"If I offered the job, would you take it?"*

Mr Rennie's response was,

> *"Definitely not."*

Mr Webster responded,

> *"I thought you would say that, you cannot blame me for trying."*

109. Mr Webster reiterated that he was fully supportive of Mr Rennie leaving the organisation with a successful outcome and Miss Schofield being

appointed to the Band 8D post. Mr Rennie left the meeting reassured that he was to be made redundant.

110. On 6 November 2019, Mr Rennie met with Miss Yellon, at which they discussed the future structure of the organisation. Mr Rennie repeated what he had discussed with Mr Webster about the successful outcome and redundancy. Mr Rennie was clear that Miss Yellon was appraised of the situation, namely the Claimant was to be made redundant. Miss Yellon understood the Claimant's position and how unhappy he was in the present organisation and she was supportive of his leaving the organisation. In fact, she actually asked the Claimant whether he would be prepared to undertake Consultancy work for the organisation after leaving, of which Mr Rennie confirmed he would be happy to help out.

111. Why would you ask Mr Rennie of his availability for Consultation work if there was no agreement that he was to leave the organisation?

112. On 22 November 2019, Mr Rennie received a letter dated 19 November 2019 which purported to ring fence both he and Miss Schofield in the Mental Health post (page 380). The job description being almost the same as Miss Schofield's position as Assistant Director of Mental Health Commissioning post.

113. On 22 November 2019, following the letter referred to above received by Mr Rennie, Mr Rennie texted Mr Webster,

> *"… I am grateful for brief chat about the HR process for me as I have form to be signed to say I wish to compete for the 8D Head of Mental Health role that I am ring fenced for. I do not know what to do with it reference to our discussions. Hope you have a good weekend, you are a good man to work with."*

114. The reason for that text was to seek guidance, given clearly the agreement that had been reached between Mr Rennie and Mr Webster regarding a redundancy.

115. The fact that Mr Webster did not reply in the first instance suggests an agreement being reached that was now being questioned above Mr Webster and that had put Mr Webster in an embarrassing position.

116. As Mr Rennie had received no response by 28 November 2019, he sent a further text (page 385) stating,

> *"John, I am having to complete the response to the letter from HR re: the 8D post, I am unsure how to complete it. Will complete positively on the basis that this is due process."*

117. Mr Webster eventually replied on 28 November 2019 (page 386),

> *"You must* "apply positively" *in order to get the outcome you are looking for. The rest you need to trust me! Jonathan does seem rather controlling. I've met him before when he joined the system. Maybe time to reacquaint. Keep me posted please. Catch up soon, John."*

118. The fact applied in parentheses suggests this was only to go through the motions given the agreement that had been reached between Mr Rennie and Mr Webster.

119. Mr Rennie responded,

> *"Many thanks John, will do and certainly trust you, will drop you a note about SMHP concerns as I could be wrong, but I bet I'm close to the truth"*

120. The Tribunal concludes, certainly the words *"trust you"* seems to be informing an agreement had been reached between Mr Webster and Mr Rennie over Mr Rennie's redundancy.

121. Then on 6 December 2019, Mr Rennie had cause to ring Mr Webster to seek his guidance over a clash of meetings, one of which was Out of Hours On Call Training. Mr Webster advised Mr Rennie that he did not need to attend that Training as it was not going to be relevant for the Claimant in the future. Again, the implication clearly being that Mr Rennie was leaving the organisation and thus reaffirming to Mr Rennie that there was still in place an agreement that he would be made redundant.

122. Some time after 12 December 2019, Mr Rennie met Mr Webster on the stairs at Lakeside and questioned whether the interviews were really necessary and his response was,

> *"We need to go through the process… it will be five minutes in and out"*

123. The Tribunal noted that Mr Rennie was unchallenged on this point.

124. The response from Mr Webster was,

> *"You have to trust me, it will be all right"*

125. This is a theme that runs through discussions between Mr Webster and Mr Rennie clearly suggesting that some form of agreement, namely redundancy, had been agreed.

126. On 9 January 2020, Mr Rennie and Miss Schofield were invited to interview for the Band 8D post to take place on 22 November 2020.

127. The interviews duly took place at which both were asked to make a presentation. Miss Schofield had not been well and was not feeling particularly well at the time having recently returned from a short absence. Apparently Miss Schofield noted before the interview, having already seen

through the glass doors, what appeared to be a lot of hasty / last minute comings and goings, with discussions taking place by the Panel for the interviews, with the result that her interview commenced 15 minutes late.

128. Her interview was conducted apparently in a rather hostile manner with Mr Webster asking most of the questions. Whereas when Mr Rennie was interviewed, in contrast the interview was conducted in a much more convivial and friendly manner. At the end of Mr Rennie's interview he was somewhat taken back after he told the Panel,

> *" My view and wishes as per previous conversations with John and Jo remains exactly the same"*

129. Mr Webster's response was,

> *"This is not what the EMT have agreed"*

130. Again, none of which was challenged by the Respondent's Solicitor Advocate. The Panel on the interview was Miss J Yellon, Mr Webster and Miss A Walpole from HR. The scoring for each candidate appeared to have been carried out some time after the interviews and collective scoring rather than individual scoring seems to have been conducted, rather than marking each candidate at the time being the normal process. Thereafter discussing between the panel, which suggested the Interview Panel process was somewhat of a sham.

131. Following the interviews, indeed the same evening, for reasons best known to Mr Webster, he contacts the Chief Executive, (we see a text at page 677 – Melanie Craig being the Chief Executive) to advise the outcome of the interviews, namely that HR advice should be that if Mr Rennie does not take up the position then Miss Schofield would have to be slotted in. The context of that text is surprising,

> *"Sorry it's late. The MH interviews feedback has taken a bit of sorting. I am meeting Clive tomorrow at 1.30 (face to face). Advise from Stevie is if Clive does not want the job and resigns / retires then Ann would have to be slotted in. I would then have to put her on short term objectives and manage her out if necessary……."*

132. Melanie Craig's response oddly suggesting she was already in the know,

> *"Don't understand how AL* [reference to Miss Schofield] *can slot in if she is not above line which the Panel say she wasn't. Let's speak after you have spoken to Clive…"*

133. In the meantime following late disclosure in the course of this Hearing, at ND195, Thursday 23 January 2020 at 1536, Mr Rennie's text to Jo Yellon,

> *"Jo please don't respond to this as you have been caught in the situation* [name redacted] *but agreed with John Webster final words last night re EMT unnerved me. Equally no phone call unnerved me. My presentation was*

> *deliberately about honesty and integrity and if the decision is not as discussed and committed by* [name redacted] *agreed at their hearing John Webster is the name – his words "trust me". Then difficult to picture how the situation could work. The options left to me would be very limited. I am hoping it does not come to this but I feel the hand of* [name redacted, but apparently the name agreed there is Melanie Craig] *directing the situation"*

134. Her reply the following morning at 10:47, ND197,

> *"Clive happy to talk but understand if you don't want to"*

135. Mr Rennie's response, ND198, dated possibly 24 January 2020 to Jo Yellon was,

> *"Thanks Jo I will see:- later but feel so let down and lost. I will just concentrate on business and making sure Ann (Miss S) is okay"*

136. In the meantime at 20:41, Mr Webster had emailed Mr Rennie, possibly on 23 January 2020, 389 in a text,

> *"We need to talk Clive, I'll call you at 1. Thanks John"*

137. A meeting was then suggested by Mr Webster in a further text at 22:12,

> *"Can you meet me at Costa at 1.30ish. I'll explain everything then re the interview. I genuinely hope you are not feeling bad towards me, this whole process has been very complex and you have always had my support"*

(page 389)

138. There then follows a further exchange of text messages between 27 January 2020 at 2240 from Melanie Craig to John Webster,

> *"Have just sent you an email from Clive Rennie, he is clearly exacerbating it regarding my assurance. Can you speak now?"*

139. This came about as a result of Mr Rennie's email to Jo Yellon, copied to Mr Webster, dated 27 January 2020 at 20:50 in which he states (page 408),

> *"I am sure that it will come as no surprise that I declined the offer of the Head of Mental Health role.*
>
> *As you are aware, John Webster had assured me (from September 2019 in fact) that appointing Ann-Louise Schofield to this post would be the right course of action and I would be allowed to leave the organisation as redundant. This agreement has been in place and reiterated on a number of occasions ever since that time. At no point did John ever even hint that the outcome of this process might be possibly be any different and I very much relied upon his regular assurances, including in deciding not to apply for your role when it was advertised. I was, frankly, staggered when it was hinted at the end of the interview – an interview which I had been told was merely my*

going through the motions before Ann-Louise was confirmed in post that this might not happen. It is something of an understatement to say that I have been left reeling at the organisation's attempt to renegue on an agreement at the very last moment and to simultaneously swindle Ann-Louise out of what, in reality, is her own job anyway. I would prefer not to speculate at this stage as to what really lies behind this mendacious sequence of events.

To reiterate, I reject the offer. I look forward to receiving confirmation of the terms of redundancy package and my termination letter.

Clive"

140. Mr Rennie had met Mr Webster at Costa on 24 January 20:20 at which, at that meeting, Mr Rennie was asked,

"Are you recording this meeting?"

He further said,

"I know you are angry, get it out"

Mr Rennie responded,

"No you explain the position"

Mr Webster said,

"I am sorry… well above the line for appointment and Ann-Louise was well below the line"

Mr Rennie said,

"This wasn't really the point. There was, "we had an agreement""

Mr Webster's response was,

"I know and I am sorry"

141. Mr Rennie responded,

"I told Mr Webster that his sorry was meaningless to me, that he had renegued on the agreement and that in any event, Ann-Louise was the right person for the job. Whereupon Mr Webster revealed that Melanie Craig had intervened at the last moment saying, "you know Clive whatever Melanie wants"*"*

142. Mr Rennie urged Mr Webster to reconsider and his response was,

"No, the decision is made and there will be no redundancies. Melanie has said this"

143. Again, the Tribunal noted that this was unchallenged evidence. Mr Webster acknowledging in cross examination Mr Rennie was an honest man and a man of integrity.

144. Around about 25 / 26 January 2020, Mr Rennie emailed Miss Yellon, copied to Mr Webster,

> *"Going off sick having been overwhelmed by events."*

145. On 27 January 2020, Mr Rennie formally rejects the Band 8D post for OH, (page 408).

146. In a letter in response to Mr Webster emailing Mr Rennie on 29 January 2020 ,

> *"Not lost your job and you are still required to do the job that you were employed to do"*

The letter went on to state,

> *"I understand how angry you feel and I would be happy to meet with you again if you think this would help. I would like to support your return to work to take up the position of Head of Mental Health."*

147. Once again, the Tribunal noted it is at odds to suggest that no agreement was in place, why would you be angry when being offered a job?

148. Then on 6 February 2020, Mr Rennie submits a Formal Grievance (page 425),

> *"My grievance is that I was fundamentally (and apparently deliberately) mislead by John Webster (Director of Commissioning). This relates to Mr Webster's agreement that my colleague Ann-Louise Schofield would be appointed the position of Head of Mental Health Commissioning and I would leave the organisation under redundancy and his subsequent attempt to renegue upon that agreement. Quite apart for the other consequences of Mr Webster's attempt to renegue, this action has significantly injured my mental health.*
>
> *My proposals for resolution are:*
>
> - *Ann-Louise Schofield is appointed to the Head of Mental Health Commissioning post of Norfolk and Waveney CCG with immediate effect;*
> - *I am made redundant;*
> - *Mr Webster is disciplined for his actions.*
>
> *Mr Rennie, 6 February 2020"*

149. On 12 February 2020, the Grievance was acknowledged by S Wright, Head of Human Resources at Arden and Gem which provide HR support to the Respondents. Mr S Stavrinou was appointed to investigate the Grievance.

150. On 4 February 2020, Miss Schofield, having emailed Mr Webster for an update following the conversations she had had with him on 24 January 2020 regarding where she stood in the organisation. Mr Webster eventually responded on 18 February 2020 having been absent from work, he apologised asking Miss Schofield to bear with him for a week and goes on to refer to an added complication that Mr Rennie had taken out a Grievance and suggesting HR wanted that resolved before asking whether Mr Rennie would accept the role. Which again is extraordinary given Mr Rennie's email of 27 January 2020 in which he quite categorically rejects the role, the role having been put to him.

151. In the meantime, on 7 February 2020, Miss Schofield has been referred to Occupational Health as she has been off sick since 27 January 2020.

152. Then on 25 February 2020, again quite extraordinarily, Miss Schofield was invited to a meeting described as *"Notice of Redundancy Meeting to discuss the next step"*. The meeting was to take place on 3 March 2020, the letter coming from Jo Yellon (page 442).

153. Ultimately the meeting was rearranged for 10 March 2020. The meeting was conducted by Miss Yellon and Ms Richardson from HR and Miss Schofield was accompanied by her Trade Union Representative.

154. Again, oddly there appears no minutes of this meeting. However, what is clear by this stage, Mr Webster has not met Miss Schofield as promised. It was raised that Miss Schofield was aware that Mr Rennie had turned down the job in January and therefore questioned why this meeting was taking place. At that point, oddly both Miss Yellon and Ms Richardson denied any knowledge of this, i.e. that Mr Rennie had turned down the post. Going on to make the point, if that was the case (that Mr Rennie had turned down the job), then Miss Schofield should be slotted into the post which is even more surprising given Mr Rennie's rejection of the role on 27 January 2020 was actually sent directly to Miss Yellon. All of which was unchallenged evidence by the Respondent's Solicitor Advocate.

155. At the end of the meeting Miss Schofield was simply told she was being made redundant.

156. Miss Schofield received a Termination Letter on 11 March 2020 (page 455) which stated,

> *"To clarify, at present we consider the post of Head of Mental Health Band 8D to have been filled. If during your notice period the occupant resigns from that post, you would be slotted in."*

157. The letter came from Jo Yellon and the notice period was to expire on 10 June 2020. The letter oddly concludes that the CCG much regret that it has been necessary to place Miss Schofield at risk of redundancy.

158. On 5 March 2020, Mr Rennie was interviewed in relation to his Grievance by Mr Stavrinou, notes of that in fact do exist at pages 537 – 541.

159. Upon Miss Schofield on 31 March 2020 emailing Jo Yellon about a return to work as Occupational Health had confirmed she was fit to return, (page 472), Ms Yellon then emailed Ms Richardson of HR at Arden and Gem on 31 March 2020,

> *"Can you please confirm to ALS* [Miss Schofield] *is on notice of redundancy! and when it ends? I am going to reply – I will let her know if there is suitable work (when she is fit). Very tired of this and managing it, Jo."*

160. Again, this email is entirely at odds with the situation given that Miss Yellon had a meeting with Miss Schofield terminating her employment and confirming the decision was by reason of redundancy. Again confirmed in a letter at page 477.

161. The Response from Ms Richardson on 31 March 2020 at page 472,

> *"Hi, yes the notice period is ticking 10 June will be the last day of service"*

162. As part of the Grievance Investigation, Mr Stavrinou interviewed the following:-

- Ewan Williamson, Senior Manager;
- Diane Smith, Mental Health Change Manager;
- Kate Blakely, Mental Health Change Manager;
- Dr Tony Palframan;
- John Webster; and
- Jo Yellon.

163. It is to be noted, Mr Stavrinou in his Witness Statement makes no mention of a Draft Grievance Report, as was originally maintained at the early part of these proceedings and of course, as we now know, when finally the Respondent's HR Advisors Arden and Gem responded to the Order for Specific Disclosure which originally they could not do for some time and had no further documents to provide, when they did comply there was a Draft Grievance Investigation Report. The Tribunal repeats, which for months and days at the start of this Hearing, the Respondent's Solicitors and seemingly Mr Stavrinou who wrote the Report was sitting at the back of the Tribunal, simply failed to admit such a document existed.

164. On 27 May 2020, Mr Rennie received Mr Stavrinou's Report and as we now know there were a number of drafts which Mr Stavrinou and the Respondent had tried to conceal, which clearly showed the original Report prepared by Mr Stavrinou was changed a number of times following input from Mr Simms and Mr Wright.

165. Notably the first draft of the Grievance Report by Mr Stavrinou was not only reframed, i.e. the Grievance, but was being sent to Mr S Wright on 17 April 2020, his response was that the Report did not come to a conclusion either way as to whether in particular there was agreement between Mr Rennie and Mr Webster. Mr Wright's email of 28 April 2020 suggests, ND155, further discussion with John Webster. Short of telling Mr Stavrinou actually what to report, in fact Mr Wright went further by stating it was not helpful not finding one way or other. The draft appears to have then had many inputs from Mr Wright and behind the scenes Mr Simms, leading to a final Report which the Tribunal doubt very much whether Mr Stavrinou actually wrote. The Report then concludes there was no clear evidence of an agreement between Mr Rennie and Mr Webster.

166. Mr Rennie, after receiving the Report considered the whole process a sham and felt very much that this was the last straw in undermining him and the integrity of the Respondent, tendering his resignation by letter of 9 June 2020 (page 585). The letter reads,

> *"Dear Joanna,*
>
> *I am writing to you to confirm my resignation from my post as Assistant Director Integrated Commissioning (Mental Health and Learning Disabilities). I would have written to you last week, but I have been seriously unwell as a result of this situation.*
>
> *As you know on 6 February 2020 I raised a Grievance with John Webster reneguing on his commitment to appoint Ann-Louise Schofield to the Head of Mental Health Commissioning role, and to make me redundant. John had made it clear that the guiding mind behind his volte face was Melanie Craig. In the circumstances, my trust in the organisation was significantly damaged. Nevertheless, I did the honourable thing and presented a Grievance in the vain hope that it would be considered promptly, independently and properly on its merits.*
>
> *It took almost four months for the Grievance Report to be produced. I have now had time to fully digest the Report which I finally received on 27 May 2020. I cannot overstate the anger I feel at the dishonesty with which this exercise has apparently been carried out. John Webster has plainly and obviously lied. Worse than that, the author of the Report appears to be complicit in the conspiracy to reach an outcome which pays little heed to such apparent irrelevancies as the truth, the evidence, fairness or justice. Moreover, it is clear that part of the strategy devised by these people is to disparage me and malign my character. This is done in the knowledge that*

my mental health is now fragile at best, and presumably in an effort to weaponise this against me.

My relationship with the CGG is now irreparably damaged. It is clear the entire process is tainted and that the outcome of my Grievance was a foregone conclusion. I therefore have no choice but to resign.

I await confirmation on my last day of employment from Human Resources.

Yours sincerely

Clive Rennie"

167. In the meantime, behind the scenes, the Grievance Report being prepared, from Jo Yellon to John Webster on 16 May 2020 at page 685,

> *"Sorry to text you now but I might forget Ann Schofield is now on leave until 10 June when her contract ends. Please don't let HR Steve bring Clive's situation to a head / end before the 10th as Steve is still advising that if Clive resigns / leaves before the 10th the job goes to Ann Schofield so I don't want Steve to mess it up. He seems to be losing his nerve."*

168. The reference to Steve would appear to be Steve Wright.

169. This is followed by Jo Yellon on 1 June 2020 (page 686) in a text to John Webster,

> *"Just don't get the grievance done before the 10th June or Ann Schofield gets her job back if Clive resigns"*

John Webster replies the same day, (page 686),

> *"No way will get concluded by then!"*

170. On 9 June 2020 at 2331, Jo Yellon to John Webster by text (page 687),

> *"Are you awake?"*

The Response,

> *"Just. Are you okay?"*

The Response,

> *"Yes we have a problem"*

The Response,

> *"Go on"*

The Response,

> *"Just got Clive Rennie's resignation and of course he knows Ann is due to leave the CCG tomorrow, I am beyond fury as I was assured HR would not conclude this before tomorrow. Do I just keep quiet?"*

The Response,

> *"Yes for now. Has he literally just sent it in? You suspected this didn't you, it's a fuck up"*

The Response,

> *"I knew it was his plan all along. I warned about this constantly but no one took me seriously. Sorry but I can't work with her"*

The Response,

> *"Can you email it to me now and I'll call you in the morning, then I'll speak to Steve. Don't worry just yet"*

171. Clearly, there had been a conspiracy all along going on behind the scenes. That although there was an agreement between Mr Webster and Mr Rennie, for reasons best known to Ms Craig and others, that decision was being overturned as clearly something had changed.

The Law

Constructive Dismissal

172. Section 94 of the Employment Rights Act 1996 ("ERA") confirms the right not to be unfairly dismissed.

173. Section 95(1)(c) ERA 1996 confirms a dismissal for these purposes includes where the employee terminates a contract under which he or she is employed in circumstances in which he or she is entitled to do so by reason of the employer's conduct.

174. In determining a case of constructive unfair dismissal, the Employment Tribunal must ask a series of questions posed in Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR1 CA(55), a breach of the implied term of trust and confidence requires that the Respondent has, with reasonable and proper cause, acted so as to destroy or seriously damage the relationship of trust and confidence between the parties.

175. In simple terms, in order to claim constructive dismissal the employee must establish that,

(a) There was a fundamental breach of contract on the part of the employer;

(b) The employer's breach caused the employee to resign;

(c) That the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

176. In summary, the Tribunal will be looking at conduct calculated to destroy or seriously damage the trust and confidence between the employer and the employee and, more importantly, the employer had no reasonable or proper cause for the conduct.

Age Discrimination

Direct

177. S.13 of the Equality Act 2010 ("EqA") provides,

> 13. Direct Discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

178. Under s.136 EqA 2010, the burden of proof that will be required under sub-section 2 and 3 is as follows,

> 136. Burden of Proof
>
> (1) …
>
> (2) If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

179. Therefore, the Tribunal are looking to see whether the Claimant has been treated less favourably than a real or hypothetical comparator.

180. For the purposes of a comparison required by the definition, there must be no material difference between the circumstances relating to each case and s.23 EqA 2010 provides,

> 23. Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of s.13 or 19, there must be no material difference between the circumstances relating to each case.

181. The focus for the Tribunal, therefore, is on the treatment of the Claimant and the reason for it, was it because of the Claimant's age, or was it something else?

Indirect

182. S.19 EqA 2010 provides,

> 19. Indirect Discrimination
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's [in this case age];
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

183. The burden of proof under s.136 EqA 2010 is as follows,

> The Claimant has the burden of proving that-
>
> (a) The Respondents did (or would) in fact apply the alleged provision criterion or practice for people of all ages, or
>
> (b) a PCP put people of this age group in general at a particular disadvantage, and
>
> (c) the PCP put the Claimant at that disadvantage.

184. It is only if the Claimant proves all of those elements the burden then shifts to the Respondents to prove that the PCP was nevertheless a proportionate means of achieving the legitimate aim.

185. In this Tribunal we have had the benefit of lengthy closing submissions from both Mr Ashley for the Claimant and Mr Moriarty for the Respondent

who the Tribunal had sympathy with as he only came into this case at the very late stages and of course did not have the benefit of seeing the cross examination of Mr Rennie, Miss Schofield or Mr Webster, only appearing on the resumed Hearing on 20 November 23 seeing only the cross examination of Mr Stavrinou. We did have the benefit of written submissions from Mr Moriarty.

Credibility

186. As far as Mr Webster is concerned, the Tribunal found him disingenuous, unconvincing and his evidence was very much like the tide coming in and out when he realised he was caught out. Indeed, Mr Webster admitted under cross examination his Witness Statement had been written for him and he did not seem to have read it. He accepted on a number of occasions it was misleading. Mr Webster finding it difficult justifying the content of some of his texts, plainly any objective assessment when reading suggests there was an agreement between him and Mr Rennie that he would be made redundant and that he should go through the process, "apply" and trust him, without using the words redundancy would get the result he wanted which was redundancy and that Miss Schofield would in fact be slotted in to the Band 8D post.

187. Whilst in contrast, Mr Webster did admit under cross examination, Mr Rennie was a man of integrity and an honest man.

188. We then have Mr Stavrinou. The Tribunal were quite frankly staggered that Mr Stavrinou would sit at the back of the Tribunal for a number of days knowing that there were Draft Investigation Reports he had prepared in relation to the investigation into the Grievance raised by Mr Rennie and remain silent whilst he watched the Solicitors for the Respondent repeat on a number of occasions there simply was no Draft Investigation Reports into the Grievance. That in fact there was no draft and the Report prepared by him and in the Bundle was the only Report. There is no other way to categorise it other than this is a man holding a responsible position who was in effect prepared to lie until the Order for Specific Disclosure, which not surprisingly the Respondent originally did not want to comply with because it would be shown that he was in fact not telling the truth. The Tribunal repeat, it is staggering he would sit in the back of the Tribunal and hear the Solicitors on a number of occasions confirm that no such Draft Report existed when all the time he was aware of Draft Reports he had prepared himself. Mr Stavrinou is a man who finds the truth an alien concept, clearly. Furthermore, indeed the Tribunal will go further, his final Report is wholly contrived and in fact ultimately it is clear from the evidence we have seen from the Draft Reports finally disclosed that the Report was re-written to suit the Respondent's objectives. In particular in the first Report there were no findings either way. Mr Wright then told Mr Stavrinou to rewrite the Report twice and to make a clear finding in favour of the Respondents that would therefore be binding on the person to hear the Claimant's Grievance, Mr Burgess.

189. In relation to both Mr Rennie and Miss Schofield, the Tribunal found them consistent, reliable and honest in their evidence throughout.

Conclusions

Constructive Dismissal

190. What is surprising in this case is the lack of any notes of any meetings held by Mr Webster, bearing in mind two people had been ring fenced for a position and there were clearly ongoing discussions between Mr Webster and Mr Rennie, Mr Webster and Miss Schofield and likely there were discussion with Miss Yellon and Ms Craig behind the scenes both of whom appear ultimately to be pulling the strings.

191. It is also surprising there was no Witness evidence on behalf of the Respondents from Miss Yellon or Ms Craig.

192. The Tribunal looking at the totality of the evidence, in particular the exchanges in text messages and the manoeuvring that appears to have been going on behind the scenes from what is said in those text messages, objectively viewed there was an agreement between Mr Rennie and Mr Webster that he would stand aside for the Band 8D job, Miss Schofield was the best candidate, that Mr Webster would have to go through the process ("apply", "trust me", reference to Mr Webster "and you will get the result you want"), all points to the fact there was an agreement that Mr Rennie would be made redundant. What other interpretation could you possibly put on a text message "trust me and you will get the result you want", you must "apply". Mr Webster's explanation for that was quite frankly unconvincing, suggesting that this was not an assurance but he could not explain what was meant by the text message.

193. There was a whole host of other text messages, for example Mr Webster to Ms Yellon where he refers to Miss Schofield being slotted in because he had a promise of redundancy (at page 683).

194. At page 672 Mr Rennie text Miss Yellon where he talks about going against the agreement.

195. There is the text on 23 January between Mr Rennie and Miss Yellon,

> "Jo please don't respond to this as you have been caught in this situation",

words Mr Webster redacted but agreed that is the reference.

> "Final words last night re EMT unnerved me, equally no phone call unnerves me",

That is reference to what Mr Webster said at the end of the interview.

196. It appears from that response by Miss Yellon she knew there was an agreement. Originally, interestingly enough, this text was withheld by the Respondents.

197. Again, the Tribunal repeats Miss Yellon's evidence would have been highly relevant but she was not called. It would also appear, for reasons best known to the Respondents, that Melanie Craig has been deliberately kept away from the proceedings as it would appear she has never been interviewed as part of the Grievance process and no Witness Statements were taken from her.

198. The Tribunal can only assume given the text messages and the evidence before the Tribunal, in some way Melanie Craig did give instructions to Mr Webster to change course from the agreement reached with Mr Rennie.

199. However, there was a problem, by 27 January (at page 408) Mr Rennie writes to Joanna Yellon and copied to Mr Webster,

> "As you are aware John Webster has assured me (from September 2019 in fact) that appointing Ann-Louise Schofield to the post would be the right course of action and that I would be allowed to leave the organisation as redundant. This agreement has been in place and reiterated on a number of occasions ever since that time. At no point did John ever even hint that the outcome of the process might possibly be different and I very much relied upon his regular assurances including in deciding not to apply for your role when it was advertised. I am frankly staggered when it was hinted at an interview which I had been told was merely going through the motions before Ann-Louise was confirmed in post. That might not happen."

200. The Respondents were clear at that stage Mr Rennie did not want the job and that as far as he was concerned there was an agreement in place to make him redundant.

201. Mr Rennie then puts in his Grievance (page 425) on 6 February. Oddly no one tells Miss Schofield about Mr Rennie's position, i.e. that he does not want the job.

202. In the meantime, Miss Schofield is trying to speak to Mr Webster (page 439) on 4 February as she has heard nothing. Then on 18 February she writes to Mr Webster as there has been no response and seeking clarity.

203. Then on 25 February, surprisingly Miss Schofield is invited to attend the interview for "Notice of Redundancy" at a meeting on 11 March, that is before Mr Rennie has been invited to discuss his Grievance.

204. Oddly, when Miss Schofield attends the meeting on 11 March and the post had not been filled, she is made redundant and the suggestion that Jo Yellon is writing to her to advise the Band 8D role has been filled, but if during her notice period the occupant resigns she will be slotted in. Set

that against the fact that Mr Rennie had made it quite clear he did not want the role.

205. We then have the extraordinary exchange of emails between Miss Yellon and Mr Webster about confirmation of the last day of Miss Schofield's employment being 10 June and then what was going on behind the scenes in relation to the Grievance and how that was being manipulated to ensure there was specific findings that there was no agreement between Mr Webster and Mr Rennie. Equally to ensure the Grievance is not resolved before 10 June.

206. Quite clearly the Respondent's behaviour can only be categorised as a breach of the implied term of trust and confidence showing that the Respondent without reasonable and proper cause acted to destroy or seriously damage the relationship of trust and confidence between the parties, is exactly what they did.

207. For those very reasons that caused the Claimant Mr Rennie to resign. He was therefore without doubt constructively unfairly dismissed.

208. Quite frankly the behaviour of the Respondents being a public body should be further investigated and those responsible face disciplinary action.

Direct and Indirect Age Discrimination

209. The Tribunal accepts it is not the Claimant's case that the reason for his selection was because of his age, rather because of cost. The Tribunal accepts the direct discrimination claim cannot be made out because the Claimant's pleaded case is that the reason for the differential treatment is cost not age.

210. The Tribunal noted it was not put to Mr Webster that the reason he reneged on the commitment to make him redundant was because of the Claimant's age. There is no evidence before the Tribunal that the reason Mr Webster, Miss Yellon or Ms Craig changed their mind over the commitment for redundancy was due to the Claimant's age.

211. There is therefore no basis on which any claim of direct age discrimination can be advanced as it was not put, and in any event it is contrary to the Claimant's case that the reason was due to cost. There is no basis therefore on which the burden of proof shifts.

212. In relation to the indirect age discrimination case, the Tribunal reminds itself the Claimant has the burden of proving that the Respondent did or would in fact apply the alleged provision, criterion or practice to people of all ages. The PCP put people of the Claimant's age group in general at particular disadvantage and the PCP put the Claimant at that disadvantage. The Claimant has to prove all those elements for the burden to then shift to the Respondent and then for the Respondent to

advance the argument that it was a proportionate means of achieving a legitimate aim.

213. Again the Tribunal repeats that the Claimant's case is that the reason for him being selected was cost. There is no evidence to establish that such a PCP was applied and that was not put to Mr Webster. There is no evidence at all that the Respondents were applying a PCP of making redundancy decisions by reference to cost. Therefore there is absolutely no basis from which the Tribunal can conclude that the Respondents applied the criterion of cost in determining who was selected for redundancy. Therefore the Claimant's case falls at that stage.

214. However, even if there were a PCP of the Respondents deciding who to make redundant by reference to cost, there is no basis on which there can be found to put those of the Claimant's age group at a particular disadvantage. Be that as the Claimant has never identified which age group he relies upon, other than those who are younger are more likely to be made redundant. If that were the case then the younger age group are put at a particular disadvantage as they are more likely to be dismissed.

215. Given the above conclusions, the question of justification does not need to be addressed. The Claimant's claims (Mr Rennie) of Direct and Indirect Age Discrimination therefore fail.

_____
Employment Judge Postle

Date Signed: 25 March 2024
Sent to the parties on: 30/04/2024

For the Tribunal Office.