EMPLOYMENT TRIBUNALS

Claimant: Ms M Bryan

Respondent: York and Scarborough Teaching Hospitals NHS Foundation Trust

Heard at: Hull **On:** 25, 26, 27 and 28 March 2024

Before: Employment Judge Miller

Representation
Claimant: Mr G Price – Counsel
Respondent: Mr A Sugarman- Counsel

JUDGMENT having been sent to the parties on ***10 April 2024*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is the claimant's claim for constructive unfair dismissal. The claimant was employed initially by Hull University Teaching Hospitals NHS Foundation Trust from 1 December 2014. Her job at that time was a band 7 Senior biomedical scientist. The claimant worked in the transfusion department at Hull Royal infirmary. She was responsible for quality control and improvement at that time.

2. In January 2018 the claimant was appointed temporarily to a role as deputy transfusion lab manager at band 8a while the then post-holder Ms Carol Botterill was on secondment to a project managing a new IT system.

3. There was another band 8a managerial post who worked with the claimant called Mr Bob Elshaw. He was the Transfusion Lab Manager. Mr Elshaw was towards the time this claim is about in poor health and thinking about retiring.

4. The role of the transfusion team was to conduct blood tests relating to blood transfusions used in operations and, presumably, other circumstances. This team was part of the pathology department and part of a sub-team dealing with blood sciences. The blood sciences team also included the haematology department. Before November 2021 the management

structure in the whole blood sciences departments in Hull, as far as is relevant, was a band 8B (more senior manager) managing haematology and transfusion, and then there were two band 8a's in the transfusion team, three band 7 Senior biomedical sciences under them and then a number of band 4, 5 and 6 workers carrying out the majority of the actual testing work. As I understand it the senior managers were, in simple terms, responsible for ensuring regulatory and quality standards were complied with, training, and ensuring the 24/7 testing shifts were covered. They also had responsibility for employee management generally.

5. There was a proposal to merge the Hull pathology services with the York and Scarborough NHS Foundation Trust pathology services and that was due to take place in the middle of 2021. In fact, it did not happen until November 2021. The structure at York and Scarborough (as it to related to Haematology and transfusion) was the same as in Hull except there was only one band 8A post managing the transfusion services. There were, however, also three band 7s and one band 8B managing haematology and transfusion.

6. There was some consultation, discussion and proposals for structures for the merged team about which I did not hear very much evidence. However, on 4 June 2021 the claimant and Mr Elshaw met with Ms Joanne Andrew who was the band 8C network lead for blood sciences (which is more senior to the 8B) initially at York ad Scarborough and then in the merged services to discuss their futures in the merged services.

7. I find that at that meeting the claimant was concerned that there would be only one 8B manager and one 8A manager dealing with all of the transfusion sites in the Hull, York and Scarborough. In fact, that was never the proposal and the claimant recognised that even if it was, it was just a proposal and not set in stone.

8. At that time Ms Andrew's understanding of the structure after the merger was there would be one band 8B manager managing just transfusion services in Hull, Scarborough and York and then one band 8A manager in Hull and one band 8A manager for York and Scarborough directly managing transfusion laboratories. In this way although the number of band 8B roles would appear to be reduced, in fact as far as the respondent was concerned, there was effectively half an 8B manager at each of Hull and York and Scarborough responsible for transfusion services before the transfer and the same would remain after the transfer because the haematology responsibility would be removed.

9. The claimant was made aware at some point during the consultation leading up to the merger that she would continue to act up as a band 8A until Mr Elshaw retired at which point the claimant would be able to apply for the single band 8A post in Hull. At some point, Ms Botterill's post was effectively deleted from the Hull side. The claimant believed that Ms Botterill's funding therefore remained available within the transfusion team. The evidence that Mr Oglesby (who was a director) gave was that, in effect and as far as it was possible to understand it, the funding for Ms Botterill's post was subsumed into the whole of the funding for the merged blood

sciences department and in fact the cost of managers after the merger was greater than that before. I am not completely convinced that Mr Oglesby understood the questions that were asked of him about this by me or Mr Price but I accept that as a very senior director with responsibility of the whole service he would have known better than anyone if there was any spare money for additional posts and it was reasonably clear that in his view there was not.

10. The merger happened on or around 1 November 2022 and the claimant's employment transferred to the respondent at that time. There was then a meeting on 15 November between the claimant, Mr Elshaw and Ms Andrew. The meeting was requested by the claimant and Mr Elshaw to obtain some clarity or assurances about their role in the merged organisation and the future structure. At this point the new structure, which for transfusion services comprised of one band 8A, three band 7s and a number of more junior grades, was approved and nominally in place, except that the respondent had accepted that Mr Elshaw would continue in his role until such time as he decided to retire. At that pint he would not then be replaced. One new band 8A manager would be recruited and it is probably fair to say that everyone expected that the claimant would apply for and be successful in that recruitment. By this time she had been carrying out the role for almost 4 years.

11. It is the claimant's case that at this meeting on 15 November 2022 Ms Andrew misled the claimant by assuring her that the departing 8A post would be replaced by a band 7 post. This effectively meant Ms Botterill's post because she would (hopefully) move into Mr Elshaw's post and the temporary upgraded post she had been occupying would be deleted. Mr Elshaw had been working 0.8 of a full-time job, but the new Band 8A would be a full-time role. There would, therefore, from the claimant's perspective, be 0.8 of a Band A 8A funding left over (although the claimant did not know at the time that Mr Elshaw did not work full time hours because he worked form home and did extra work beyond his contracted hours).

12. The claimant's evidence was that at this meeting she

> "expressed concern regarding there only being one Band 8A role within the Hull team, stating that I did not believe this would be sufficient to meet the workload as the Team was already stretched to maintain the quality and regulatory compliance of the transfusion service. In addition, I mentioned how there had already been cases of stress within the Team and a reduction in numbers from five full time positions to four would be untenable".
>
> And that
>
> "my preference would be to return to my substantive Band 7 role if the second Band 8A role were to be lost. As a Band 7 I would not be responsible for the whole Transfusion Team and I would not be expected to carry out the numerous duties expected of a Band 8A role - something I believed would be untenable without additional staffing. I was subsequently reassured by Ms Andrew that an additional Band 7 role

would be recruited into the team to alleviate the loss of the Band 8A role, resulting in there being one Band 8A role and four Band 7 roles. I believed this would be acceptable and the recruitment of an additional Band 7 role would be sufficient to manage the workload".

13. The claimant was concerned about the workload. She had been working with Mr Elshaw for over 3 years by this time and her workload would likely increase when he left. It also transpired, however, that Mr Elshaw had proposed at some point as part of his succession planning that the funding from the second Band 8A role could be repurposed as an additional Band 7 role when he retired.

14. I prefer the evidence of Ms Andrew about that meeting. Although the claimant may have referred to difficulties of the team, and used words to the effect that the proposed new structure was untenable, I find that Ms Andrew did NOT give the claimant any assurances that an additional Band 7 role would be added to the structure and the recruited to. I also think it is unlikely that the claimant said that without the additional band 7 role, she would prefer to return to her substantive Band 7 post. I think it is more likely that the claimant has retrospectively misremembered the content of that meeting in light of what happened subsequently. Mr Sugerman suggested there was an element of regret on the part of the claimant in taking up the Band 8A role and I think that is possible. To be clear, I do not think the claimant is being disingenuous – rather that her recollection of that meeting has been influence by subsequent events.

15. The structure of one Band 8A and three band 7s had been in place since at least June 2021. Although Ms Andrew had the authority to reallocate budgets within her department to create different roles within that budget, it is inherently unlikely that in the context of a merger between two NHS Trusts with a settled proposed structure she would be in a position to change that herself and even more unlikely that she would volunteer to do so in an informal, un-minuted meeting. It also transpired that in fact, and as I have already found, the Band 8A money was no longer available to reallocate.

16. It is more likely that Ms Andrew tried to be reassuring to the claimant about her role generally and that the claimant at the time, or latterly, misinterpreted those reassurances or mixed them up with Mr Elshaw's plans or aspirations. I suspect Ms Andrew's reassurances were non-specific as she was later in an email on or around 5 May 2022.

17. On 22 December 2021, the claimant sent an email to Ms Andrew and Ms Fullthorpe. Ms Fullthorpe was the claimant's new Band 8B manager. Unfortunately, she was absent from 18 November 221 until 31 January 2022.

18. The reason for that email was that Mr Elshaw had confirmed he was retiring so that, the claimant believed, there was then a discussion to be had about what would happen to the staffing of the service. In that email the claimant sets out the current structure (or rather, previous structure that was still retained temporarily) which had 2 Band 8a's (the claimant and Mr Elshaw)

three band 7's (including the claimant's substantive post that someone else was acting up into) and a number of other more junior roles. She also suggested that they advertise for a senior Biomedical Scientist (BMS) (Band 7) immediately to ensure a smooth handover when Mr Elshaw left at the end of February 2022.

19. She says

> "This would leave a Specialist Band 6 position to fill and following on from that a Band 5 position as internal promotion is highly likely. This is the same for two temp posts for haem and coag. These could possibly all be selected from 1 round of interviews".

20. This referred to the fact that a Band 6 person had been acting up into the claimant's substantive Band 7 role, they were likely to get her job leaving a Band 6 vacant and so on down the chain, ultimately leaving a Band 5 post to be filled.

21. The claimant then set out a future structure. The heading "future structure" is followed by 2 question marks tending to suggest that it was either a suggestion or that the claimant was unclear about the future. The claimant was still under the impression, (which was in fact shared by Ms Fullthorpe at this point) that there was scope to use some of the funding from the spare Band 8A post (once Mr Elshaw had left) to recruit additional staff. The claimant said in evidence that this could either be a further Band 7 person or more Band 5 people to stop the Band 7s from having to do Band 5 work, thereby increasing the support they could give to the Band 8A.

22. The claimant clearly still believed that either the final structure had not been agreed, or there was scope to change it. She says, at the bottom of the email in the part about the potential new structure that there are a number of vacancies at Band 5 and then adds "plus any staff from the defunct Band 8A position".

23. In this email, the claimant's position on this is not that there was already a proposal or agreement or promise to provide a Band 7 from the Band 8A money, but that there would be some spare money that needed to be repurposed. This supports my conclusion that the claimant was not promised that there would be a fourth Band 7 in the meeting on 15 November 2021. In cross examination the claimant said it was clear that she had been promised a Band 7 post but she was in this email trying to be flexible. That is not, however, consistent with what the claimant has written in her email.

24. Ms Andrew interpreted that email as the claimant understanding what the new structure would be. She explained that the Band 8A post would need to be filled first, and then the Band 7 and so on. She said "assuming that you are successful in getting the 8A we can then advertise the Band 7. We can choose to do this internally only if you feel we have good internal candidates. Following that we can complete the rest of the structure at the Band 5/6 level".

25. Ms Andrew did not correct the claimant's misunderstanding about the use of the 8A money, but it was also reasonably clear from that email that Ms Andrew was only expecting one Band 7 to be appointed – namely the substantive replacement to the claimant's Band 7 role. It would have been simple to say that there was no spare money from the deleted Band 8A post and Ms Andrew did not. I find that after that exchange the claimant reasonably believed that funding from the deleted Band 8A post remained available to use in determining the future structure of her department after the appointment of the Band 8A role. In my view, the claimant was reassured by Ms Andrew's response that there was still scope for reconsidering the number of Band 5 roles, if not the number of Band 7 roles, if and when she was appointed to the substantive 8a role.

26. Shortly after that email exchange, it was confirmed that Mr Elshaw's employment would end on 25 February 2022 and the claimant replied to acknowledge Ms Andrew's email and agree with her comments about the order of recruitment. The claimant replied to this email chain on 25 December 2021 acknowledging the points about the order of recruitment but not mentioning the deleted Band 8A funding. This is because both parties to the email were focussed in that exchange about the order of recruiting Band 8a and then Band 7s. The Band 8A post was advertised on 6 January 2022. There was no mention in the recruitment of the team structure. The claimant applied for the job and was offered an interview on 16 February 2022.

27. On 14 February 2022 Ms Fullthorpe phoned the claimant to inform her that the additional Band 7 role would not be recruited because the money from the deleted Band 8A post had been used elsewhere. Ms Fullthorpe had only just found out about this from Ms Andrew and she wanted to ensure that the claimant was aware of this before her interview.

28. On 15 February 2022 the claimant emailed Ms Fullthorpe and Ms Andrew for clarification about this. She said what she had been told about the funding and the team and said

> "If this is the case, could you let me know what the alternative proposal to fill this area of lab management might be please?
>
> Thinking of the immediate challenges ahead I would like to present on this knowing what the structure might be".

29. Ms Andrew replied half an hour later and said:

> "The new structure for blood transfusion with a Laboratory manager (8b) and chiefs (2 x 8a) has maintained the number of senior management posts, previously there were 3 X 8a posts across the network so no posts have been lost.
>
> The only Band 7 post currently available is the one to fill your substantive post. However, I am happy to work with the team to understand the staffing required to meet the challenges ahead".

30. This was the first time that it was made clear to the claimant that the funding from the second 8A post was no longer available. The claimant decided to go ahead with the interview knowing this. She sets out the reasons for this in her witness statement, which I accept, as follows:

> "I thought if I was successful in obtaining the Band 8A role I would be in a stronger position to put forward business cases for staff recruitment and therefore I thought in this more senior role I could seek to have the necessary additional Band 7 role recruited and hoped, due to the obvious need, that this would be agreed".

31. The claimant said that it was at this point that she felt she had been misled by Ms Andrew in the meeting on 15 November 2021. I have made my findings about what happened at that meeting. However, even if I am wrong about the detail of the meeting, it is unequivocally clear that by 15 February 2022 the claimant was aware that there was no spare money available from the deleted Band 8A post, or anywhere else, in the transfusion team except the post to replace her Band 7 role if she got the Band 8A job.

32. Ms Andrew's communication could have been clearer, earlier and some of this confusion might have been avoided. However, by 15 February 2022 the position was very clear.

33. It is also clear from the claimant's witness statement that she understood she would have to work to persuade the respondent to provide additional funding to support the team. She "hoped" she would be successful. This necessarily included the possibility that she would not be and that the team would remain as it was.

34. In oral evidence, Mr Sugarman suggested to the claimant that if it was her position in November that she would go back to the Band 7 post rather than do the Band 8a post without the additional staff she could have made that decision then. The claimant replied

> "I wish I had. I had 24 hours' notice before interviewing for the job I had been doing for the last 3 years. I believed if I was successful, I thought I would be in a better position to make sure I had some support from the 8a funding and I was wrong".

35. The claimant agreed in evidence that she took the job knowing she would have to make a business case for extra staff.

36. This supports my conclusion that the claimant is retrospectively misremembering her position from November 2021. It is also clear evidence, and I find, that the claimant went into the interview for the Band 8A job knowing what the structure was but believing she had a chance of persuading the respondent to change that.

37. The claimant was interviewed on 16 February 2022 by Ms Andrew and Ms Fullthorpe. She was successful and was offered the job there and then and the claimant accepted the job.

38. The claimant says that following her appointment

"there followed a complete lack of clarity from the Respondent regarding my role. The demands and workload placed upon me were excessive and I was effectively expected by the Respondent to undertake the workload of two full time Band 8A roles. For example, previously work such as auditing, overview and approval of all departmental Change Controls and completing blood compliance reports was shared between the two Band 8A roles, however now I was expected to undertake all of this work without support. Due to this excessive workload and lack of support, a number of internal audits were left undone in March 2022".

39. The lack of clarity, the claimant confirmed, related to the structure of her team and how the work that Mr Elshaw had been doing would be absorbed. There was no lack of clarity about what the claimant ought to be doing, or how. She had been in the role effectively for 4 years by this point and was a conscientious employee who appeared to be good at her job.

40. In respect of the workload, in my judgment the claimant was unable to identify any specific instances when she had had to work excessively, or when critical work had not been able to be done because of a lack of staff, or the respondent had or was at risk of a regulatory failure.

41. The respondent agreed that it was a difficult time. There was a peak of work in March and May 2022 and this was attributed to various factors including the requirement to increase work after the covid lockdown. However, overall the amount of work the Transfusion department was doing remained relatively stable.

42. The claimant had 1:1 meetings with Ms Fullthorpe at which workload was discussed and the claimant raised concerns about not being able to meet her usual high standards. Ms Fullthorpe offered to assist with completing the blood compliance report but the claimant did not want her to. Ms Fullthorpe encouraged her to prioritise tasks and let lower priority matters go. I find that Ms Fullthorpe had no reason to conclude from these meetings that the claimant was stressed to the point of imminent ill health. She was entitled to conclude the claimant was experiencing normal work pressures.

43. This was particularly the case in April when there was a UKAS inspection and an MHRA report to be completed by the end of that month. These were two important pieces of work that needed to be prioritised.

44. On 17 March 2022, the claimant emailed Ms Fullthorpe to discuss staffing resources. The claimant said in her statement

"I stated that I wished to discuss resources as I had concerns about how the team would continue to maintain the high standards required of them".

45. In the email the claimant said

"I would also like to discuss resources after this as I am concerned as to how the team will maintain the high standards of the QMS and implement Winpath (maybe Haemanetics) over the next year or so".

46. Winpath and Haemanetics were new computer systems. There is nothing in this email that suggests the claimant was having any particular problems relating to workload. It is a standard, professional communication about matters that are unsurprising for a manager of a team of people. The claimant and Ms Fullthorpe met on 21 March 2022 to discuss the claimant's concerns. There are no records of this meeting – I conclude that it was a standard meeting to discuss operational matters. The claimant agreed that her concerns about staffing and continuing to meet high standards were discussed. I think it unlikely that Ms Fullthorpe said a workforce review was being done as that came about later. The claimant said that no action was taken at that time to address her staffing concerns and I think that is probably correct. Ms Fullthorpe certainly did not have the authority to change the staffing structure. However, the absence of any real evidence about that meeting leads me to conclude that it was an innocuous operational meeting and Ms Fullthorpe could not have concluded from it that the claimant was under any particular stress because of her workload.

47. The claimant also refers specifically to a Governance Committee report where there is evidence that there was a higher than normal number of reportable incidents in the Blood Transfusion team and one of them had the root cause as inexperienced staff/inadequate staffing. I prefer the evidence of Ms Fullthorpe that in fact the reason for this reportable incident was an unachievable KPI because of reporting systems, and that there would inevitably be slippages when work was let slip to facilitate training.

48. In any event, however, it was not controversial that the team could be better resourced. On 24 March 2022 the claimant sent an amber alert to Ms Fullthorpe and Ms Andrew. This was a warning that due to a number of factors, there was a risk that there would be insufficient people to staff the laboratory to undertake blood tests ("benchwork"). This was because there were a number of people off sick – some longer term and some short term, and people were still going off with covid. The consequences would be that senior managers would have to step in and cover the benchwork. In the event, one of the employees tested negative for covid and was able to come in and the alert was avoided on that occasion.

49. On 12 April 2022 the claimant had a meeting with the senior members of her team at which they discussed the workload and tried to distribute it more evenly and consolidate roles and responsibilities. The claimant says that despite that meeting and redistribution of work the workload could not be adequately managed. In oral evidence, the claimant said the meeting would have been called because of the struggles the team could see she was having. I prefer the evidence in the claimant's witness statement. She was the manager and it was her job to manage the team. Such a meeting would be an obvious part of that and it seems likely that the claimant was doing her best to try to manage the work of her team.

50. I accept, however, that the view at that meeting was that the work was unmanageable because the claimant produced a proposal about staffing. She met with Ms Fullthorpe after 25 April when she returned from holiday and in that meeting they discussed staffing proposals. In that meeting, Ms

Fullthorpe said she was busy with a problem in Scarborough, but she would look at it when she had more time.

51. The claimant sent the staffing proposal to Ms Fullthorpe on 5 May 2022. The proposal was to fill two vacant Band 5 posts with lower graded posts, create an acting senior band 7 post at 0.8 WTE, and create 2 further lower-level posts. Thes proposals were based on the premise that the team had lost Mr Elshaw's post and that, despite the claimant's attempts on 12 April to try to redistribute the work, "there will be a number of departmental and network aims which the team feel will be unachievable with the current workforce structure".

52. The claimant also said

    "The current Senior Team (meaning Band 7s) and the promoted Chief BMS (meaning the claimant) have experienced higher levels of stress since this time".

53. The claimant set out the work that Mr Elshaw had previously done and that the claimant was now being expected to do and Ms Fullthorpe agreed it was accurate.

54. In her conclusion to the report the claimant said

    "Currently there is increased disruption for employees, extensive gaps in the 24-hour rota requiring covering and a high training burden. Low employee morale is evident from the burden of excessive workloads and reactivity to unexpected sickness".

55. Ms Fullthorpe agreed that the team had been through a difficult time, Mr Elshaw had retired, she was appointed as the new head, there had been a merger and the shift rota was "all over the place". She acknowledged that this could be perceived as a problem for the team.

56. In the covering email the claimant referred to the attached proposal and referred specifically to the implementation of the new IT systems and said

    "I know you are busy with Scarborough issues but do not feel this can wait until after that is solved. Can we discuss this next week and get a case / proposal to Joanna before I go on holiday if possible"?

57. Ms Fullthorpe replied "Let's work on this on Monday. Are you off for a week?" The claimant had sent the email and attachment at 5.35 pm on the Thursday and Ms Fullthorpe replied the Friday morning. Ms Fullthorpe was not based full time in Hull.

58. It was suggested on behalf of the claimant that, having regard to the language in the report, a fuller response was required expressing concern about the claimant.

59. I do not agree. The claimant had sent a proposal and had asked to discuss it next week. Ms Fullthorpe had agreed. The report does contain some emotive language, but it is about the impact on the team. There is nothing in

that report to suggest that the claimant was feeling unwell or that the situation was impacting adversely on her personally apart from an increase in stress levels. It was wholly appropriate for Ms Fullthorpe to agree to meet the next working day after her response to discuss it.

60. On the same day, 5 May, the claimant had sent an email separately to Ms Fullthorpe and Ms Andrew about immediate shift gaps and with some proposals to address that. The proposals were seniors covering empty shifts, recruitment of 2 lower-level posts, and to maintain a pay incentive to encourage overtime working.

61. The email response from Ms Andrew thanked the claimant for her email and acknowledged how difficult obtaining shift cover is. She said that the pay incentive had ended, that there were no vacancies in the establishment to appoint to lower-level posts and that seniors covering shifts is the only viable option.

62. She then concluded:

> "I agree the establishment needs a review. Workload has increased, likely to increase further with recovery plans, staffing has not been increased in line with this. I have discussed this with the Heads and the way forward is a detailed workforce review in Blood Sciences and a business case detailing the extra staff required. This is a long-term plan and I appreciate it does not solve the current satiation but it will ensure we benefit in the long run".

63. This was the first the claimant had heard of a workforce review and everyone agreed that this would take some time to complete and implement. Many months, if not longer. However, having regard to the way funding and structures are organised in the respondent, I accept that this was the only realistic way of achieving the claimant's goal of increasing her establishment. In the event, I understand the process had little impact on the overall staffing but that was some time after the claimant left.

64. The claimant replied saying that

> "This implies that the staffing structure for Haem and Trans at Hull since the SHYPS merger has been reduced by 1 Band 8A post and now also by 2 registered BMS posts? We do have two substantive B6 acting to B7 and consequently two substantive B5 acting to B6. Are these no longer in the haem trans establishment"?

65. Ms Andrew did not reply to that but explained at the hearing that in fact, even though from the claimant's perspective there were two vacancies, across the whole of blood sciences there were more people in posts than had been budgeted for (the department in total was three people over establishment).

66. This is relevant because some staff at Band 5 can be shared across Haematology and Transfusion and in limited circumstances depending on skills and experience Band 5s could potentially be moved to cover gaps. However, the fact of the department being over establishment or other

potential solutions to the short-term staffing problems were not discussed with the claimant.

67. On Sunday 8 May the claimant sent an email to Ms Fullthorpe with the subject heading “Burnout”. The claimant said

> “I'm afraid I am suffering highly with stress and feel totally burnt out and unable to face the workplace this week.
>
> Just the thought of another LIMS meeting to make further demands on the staff with no resources is making me feel physically sick.
>
> This has been building up for some time and I have tried extremely hard to try to put up with the issues whilst proposing solutions hoping for some improvement. This has not been forthcoming.
>
> With the reduction in the transfusion team since Bob retired I feel I have been placed in an untenable position, one I would not have accepted had I been given the truth at the time of the TUPE transfer or at Bob's retirement”.

68. She said that the pressure was adversely affecting her health and family time, that she is going on holiday at the end of that week and hoped she would be well enough to return after that. If not, she would visit her GP.

69. She concluded

> “I now also feel that I need to raise this with you as a formal grievance. When Bob and I asked Joanna Andrew directly for information on which he decided to retire and I took up the substantive 8A post, we were assured that his post would be replaced with a Band 7. I am now told this was never to be the case and recent events seem to show further reductions in the Haem and Trans team”.

70. Ms Fullthorpe said she understood the grievance to be just about Ms Andrew and the information given about the Band 8A role. She forwarded it to Ms Andrew who saw it on around 12 or 13 May. Ms Fullthorpe did not take any HR advice or any steps to progress it as a grievance. Ms Andrew may have obtained some HR advice but she also did not progress the grievance.

71. Ms Fullthorpe sent the claimant a text on 9 May. She said

> “So sorry you’re not well Mandy. I’m sorry it’s come to this Please have a good holiday and take care. Can I check is Stephania the only candidate to interview” and the claimant replies “Thanks me too, Yes, just stefania”.

72. In the context there is nothing wrong with Ms Fullthorpe’s text. At that point, she is expecting the claimant to be back after leave. I do not read anything into the phrase “I’m sorry it has come to this”. She is just expressing sympathy. I do not interpret it as showing the Ms Fullthorpe was aware before then of the extent of the claimant's stress. It is just a polite response. There is nothing in the information Ms Fullthorpe had had before then from

which she could have realised the extent of the claimant's stress or the impact of it on her health.

73. Around that time and probably from 9th or 10th May the claimant started applying for new jobs outside the NHS.

74. Ms Fullthorpe came to Hull on the Monday (9 May 2022) as previously arranged and discussed with the claimant's team how to manage the work. It was redistributed and she took on some of the claimant's work. This remained the case until around November 2022 when a new Band 8a was appointed.

75. The claimant did not return to work after her leave. On 20 May 2022 Ms Fullthorpe contacted the claimant to let her know she would be in Hull on the Monday and Tuesday to catch up. The claimant did not reply but sent a fit note for a month on the grounds of stress at work.

76. At some point it appears that management of the claimant's sickness absence was passed to Jenny Williams, her former line manager, although I have very little evidence about that. Ms Williams contacted the claimant on 24 May to arrange an occupational health referral and on 31 May 2022 the Occupational Health team said they did not need to see the claimant but she should complete an individual stress risk assessment. This advice from Occupational Health was sent to Ms Fullthorpe on 31 May 2022 but not then communicated to the claimant.

77. There was then no further contact between the claimant and Ms Fullthorpe until 17 June 2022. Ms Fullthorpe sent a text to the claimant on 17 June to arrange a catch up and potential return to work. The claimant replied later the same day and they agreed to meet at a Costa Coffee on 20 June 2022.

78. It is clear from the text and Ms Fullthorpe's witness statement that the purpose of the meeting was to discuss the claimant's health and talk about getting her back to work. There are no notes of this meeting. I find that Ms Fullthorpe discussed the stress risk assessment with the claimant and she offered to complete it with her before her return to work. The claimant believed at this point that her enquiries about occupational health had been ignored but in fact Ms Fullthorpe had just not done anything with the stress risk assessment advice until that point.

79. In oral evidence, Ms Fullthorpe said it was also her intention to discuss the claimant's grievance. There was a discussion about the staffing – this was clearly the underlying concern of the claimant. I do not accept, though, that Ms Fullthorpe had the claimant's grievance in her mind at this point. She thought the grievance was about Ms Andrew. The reality is that nothing happened with the claimant's grievance it was ignored or forgotten about completely.

80. In that conversation, Ms Fullthorpe did say "it is what it is". However, I prefer her evidence that she was not being dismissive of the claimant. Her comment was about the number of staff and resources – it was not intended to suggest that there was nothing that could be done about the pressure

this was causing the claimant. They are two separate issues. It was not possible to change the staffing structure in the short term.

81. However, there were steps that could be taken to alleviate the claimant's stress and this started with the completion of an individual stress risk assessment. Ms Fullthorpe did not inform the claimant about the workforce review, but she did explain how the work had been redistributed during her absence. Ms Fullthorpe clearly expected the claimant to return to work at some point in the near future and I prefer her evidence that she offered to complete the risk assessment and get adjustments in place before the claimant's return to work.

82. A week later, Ms Fullthorpe sent the individual stress risk assessment to the claimant's work email that the claimant did not access or receive.

83. The claimant says that after that meeting, she decided to resign as she was at breaking point and started looking for work. In fact, the claimant had started applying for jobs before then – from at least 13 June for her current role and in May for a role at the Spire Hospital. It was suggested that the whole reason the claimant was looking for a new job was to downsize and spend more time with her family. I do not need to make findings about that – the question for me is whether a cause of her resignation was repudiatory conduct by the respondent.

84. On 5 July 2022 the claimant submitted her resignation with one month's notice, although the claimant did not return to work. The claimant said that the respondent was in repudiatory breach of contract. She had raised this on 8 May and she had had no formal response. The stated reasons for the breach of contract were

    a. Matters relating to the merger which are not part of this case.

    b. That she was given reassurances on 15 November to prevent her returning to her Band 7 post

    c. On 15 February 2022 she was told there would not be a Band 7 replacement for the lost Band 8A post

    d. That there was a lack of clarity on her new role and she found the support in her role unsatisfactory.

    e. She was trying to do the work of two Band 8A posts by herself and no proposals were forthcoming to remedy that.

85. I find that this represents the real reason for the claimant's resignation. In summary, the claimant says she was told in November 21 there would be a new Band 7 post to take up the work of Mr Elshaw, that was removed in February 22 and when she then took the job there were no adequate proposals to address the fact that she was having to do the work of two people. This includes, in my view the failure to address at all the grievance of 8 May and Ms Fullthorpe's comments in the meeting on 20 June 2022 that 'it is what it is'. The claimant realised at that point, I think, that the staffing was not going to change.

86. However, I also find that the claimant believed that immediate or very quick changes to staffing were the only way to address the problem. She did not engage with Ms Fullthorpe in exploring other ways of alleviating her stress before resigning.

87. The claimant secured a new job at a much lower salary on 14 July 2022.

88. The claimant's resignation letter was treated as a grievance and allocated to Ms Mead to consider. I do not address that in any detail except to say that the evidence of Ms Mead was very unreliable. She clearly had no direct input into any investigation or decision-making process relating to that. She was unable to even say if it was a grievance, an exit interview or something else. Everything was left to an HR officer who did not give any evidence. It is unclear what information in the outcome letter was from the claimant, someone else or a conclusion. The outcome letter is of no evidential value whatsoever and I disregard it.

89. I consider the allegation by the claimant that Mr Oglesby was responsible for the alleged inaction of the respondent. In her witness statement the claimant said

> "I believe that the director of the Respondent, Dave Oglesby, had a structural plan for staffing and as he had already utilised funding to implement this plan he was not willing to make any changes or listen to any alternative proposals despite the detrimental effects of the current structure and excessive workload on the Respondent's employees including myself. I believe Mr Oglesby had a duty of care to myself and my Team to ensure the staffing was adequate and the workload not excessive and it seemed clear to me that this duty was not being fulfilled".

90. In my view, Mr Oglesby clearly had used the funding for his staffing plan as he is entitled to do. However, there was a process for making changes to staffing and Ms Andrew had embarked upon that process. In an organisation of the size and complexity of the respondent it is not realistic to expect changes to staffing structures – particularly after the merger of two NHS trusts – to address the claimant's concerns in the way she wished. This was obviously a long-term issue that needed addressing and steps had been taken to do this.

91. Mr Oglesby had no direct responsibility for how the claimant perceives she was treated by the respondent.

92. Finally, I accept the respondent's evidence that since the claimant's resignation the work was covered by the Band 7s and Ms Fullthorpe and has since been done by one Band 8A person.

Law

93. In order for a claim of constructive unfair dismissal to succeed, the claimant must show that she was dismissed in accordance with the provisions of section 95 (1) (c) of the employment rights act 1996. That says that

> an employee is dismissed by his employer if the employee terminates the contract under which she is employed (with or without notice) in

circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.

94. I raised the question of the relevance that the claimant had in fact entered into a new contract of employment from around 17 February 2022 so that any breaches before that date would not or could not amount to a repudiatory breach of the contract in place at the time of the end of her employment. However, I agree that in these particular circumstances that question is really addressed by the question of affirmation which I will consider below. In this case, it would be unrealistic to separate out the two contracts of employment.

95. In *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 the Court of Appeal confirmed that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'. In the case of *British Aircraft Corpn v Austin* [1978] IRLR 332 which was decided very soon after *Western Excavating* the EAT said that the conduct should be so intolerable that it amounts to a repudiation.

96. Things have moved on a bit since then and in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, [1997] ICR 606 it was held that contracts of employment include the following implied term:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." (The *Malik* term).

97. The question for the tribunal to determine is therefore whether the respondent without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, thereby breaching its contract of employment with the claimant.

98. In *Tullet Prebon Plc and ors v BGC Broker LP* [2011] EWCA Civ 131 The Court of Appeal said "the question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a "question of fact for the tribunal of fact". It is a highly context specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract".

99. I think that this is the intention to which Mr Sugarman referred. However the respondent does not need to intend to breach the contract by their conduct – they can do so from good intentions It is important to remember the that the test is whether the respondent is in repudiatory breach, namely a breach that is so serious that the claimant can treat the respondent as having abandoned the contract of employment.

100. I was referred to some cases on a breach of the employer's duty to provide a safe working environment. I think those cases are relevant in this case. A

substantial part of the claimant's allegations is that the respondent failed to do things it ought to have done or failed to do them adequately. The claimant must, therefore, be able to point to some obligation on the respondent to do the things she says they did not do before being able to show that any such failure amounted to a breach of the *Malik* term.

101. I have considered *Marshall Specialist Vehicles Ltd v Osbourne* [2003] IRLR 672 which quoted extensively from *Sutherland v Hatton* [2002] IRLR 263. The principles I take from that case are as follows:

    a. An employer is entitled to believe that the employee is up to the normal pressures of the job unless the indications of impending ill health from stress are plain enough for any reasonable employer to know they have to do something about it.

    b. There is no obligation on an employer to act reasonably, the conduct relied on as a breach of the *Malik* term must be so serious as to amount to a repudiatory breach; that is in the context of mutual trust and confidence, to go to the root of the trust and confidence between the employer and the employee and destroy it, or be calculated or likely to destroy it.

102. Although the claimant is not relying on the implied obligation to provide a safe working environment, the principles of being on proper notice of impending ill health must apply when deciding whether a failure to act is then a breach of the *Malik* term.

103. If the respondent is in breach of contract, I must consider whether the claimant resigned in response to the breach. It is well established that a repudiatory breach can be cumulative ending in a final straw. The claimant says that each of the alleged breaches of the *Malik* term individually amount to repudiatory conduct but in the alternative, she will rely on cumulative conduct ending with the comments at the meeting on 20 June 2022.

104. It is not necessary that the relevant alleged breach is the sole reason for resignation – it must just be ***a*** cause of the resignation.

105. If the claimant affirms the contract before she resigns in response to a breach, her claim will fail. If, however, after the claimant has affirmed her contract there is a further act by the respondent that individually or together with any previous acts amount to a breach of the *Malik* term this, effectively, revives the previous breaches so that all conduct can be considered as part of the alleged breach. The last act in these circumstances must be more than merely innocuous, even if it is itself not a repudiatory breach. It just has to contribute something to the ongoing breaches.

106. The question of whether the claimant has then affirmed the contract is whether the claimant has conducted herself in a way which demonstrates to the respondent that she has elected to affirm the contract and carry on. The mere effluxion of time will not amount to an affirmation. A positive act calling on the respondent to comply with their side of the contact is likely to amount to an affirmation. Periods of no contact with the respondent (for example

while off sick), or periods spent trying to address the alleged breaches through a grievance are unlikely to amount to affirmation.

107. Finally, even if the claimant resigns in response to an act which is not, legally, the last straw but is in reality for them the final straw, the question is then was there an earlier 'legal' final straw which the claimant resigned in response to and, if so, has she in the interim affirmed her contract. If there is a legal final straw and no affirmation before resignation, the claimant will have been dismissed.

108. If the claimant is dismissed, there is a question of whether she was dismissed for a potentially fair reason and if the dismissal was fair in all the circumstances. For reasons which will become apparent, I do not need to address that.

Conclusions

109. I address, therefore, the allegations of repudiatory conduct in breach of the *Malik* term that the claimant relies on the list of issues produced by Employment Judge Brain.

110. The first allegation is that Ms Andrews misled the claimant in the meeting on 15 November by assuring her that the departing Band 8A post will be replaced by a Band 7 post.

111. I found that this did not happen. Ms Andrew did not give any specific reassurances about the recruitment of the Band 7 role.

112. The next allegation is that the claimant was expected to undertake an excessive workload from February 2022 onwards. There was very little clear evidence as to what basis the claimant's workload was excessive. I think that in reality it was the fact that the work that had previously been done by her and Mr Elshaw was now being done by just the claimant. The respondent agreed that there was work that Mr Elshaw had been doing that the claimant was now expected to pick up. However, although I have not made findings about it earlier in my findings of fact the additional Band 8A post was implemented in response to an unfavourable inspection in 2011. York and Scarborough had been operating with one 8A post across two sites. The norm therefore appears to be one Band 8A in such settings.

113. I also take into account that before the claimant applied for the job it was made very clear to her that she would be working in the structure with one Band 8A and three Band 7s. The claimant knew full well what the work was because she had been doing it for 4 years by that time. She hoped that things would change and that she would be able to persuade the respondent to appoint more staff. However, she had no legitimate basis for thinking that they would do and so she entered into the new contract as the substantive Band 8A manager fully aware of the work that she had to do and how much resource there were to do it.

114. This is where the cases on a safe working environment initially become relevant. Even if the workload was high, the respondent had no basis for thinking that it was unacceptably high to the claimant because she had willingly agreed to enter into that new contract for the permanent Band 8A

role in full knowledge of the circumstances. It is right that the respondent did not make that clear until two days before the interview for the job but the claimant did, nonetheless, have time to decide whether to apply for it or not.

115. The respondent was therefore entitled to believe that the claimant was, from 17th February 2022, up to the pressures of that job.

116. I find therefore that the claimant was not expected to undertake an excessive workload from February 2022 onwards. She was expected to do the job that she had applied for in full knowledge of what the job entailed. In fact, the claimant was in a better position than many job applicants because she already knew what the job was and was in an excellent position to make an informed decision about whether to apply for the job or not.

117. The next allegation is that the respondent failed to adequately deal with the excessive workload. I have already found there was not an excessive workload. I address the allegations in the list of issues that relate to the claimant allegedly informing the respondent of the problems. Firstly, the claimant did express concerns in November and February about the potential workload but she went ahead and applied for the job anyway. That certainly did not impose any obligation on the respondent to do anything about it.

118. At the transfusion team meeting on 12 April there was nobody present more senior than the claimant. In any event, it seems to me that this was the claimant just doing her job and trying to distribute the work to the best of her abilities.

119. The document dated 15 April 2022 was sent to the respondent on 5 May 2022. It referred to stress but in a generic way relating to the stresses and the team generally and not referring in any way at all to potential impact on the claimant's ill-health. In my view this gave every appearance of being a document or a business case written in an attempt to persuade the respondent to allocate more resources to her. The respondent could have had no basis for concluding from this document that the claimant was about to be ill.

120. In any event, Miss Fullthorpe dealt entirely properly with this email by agreeing to meet the claimant early the following week.

121. The respondent did completely and without any good reason failed to deal with the claimant's grievance set out in her email on 8 May 2022. In fact, Ms Fullthorpe's overall response to the claimant's email and her absence left something to be desired. However, her initial response to wait until the claimant returned from leave was reasonable in the circumstances. I have found that the claimant gave the respondent no good reason to think before 8 May that her health was at risk. Initial indications to Ms Fullthorpe were that the claimant just needed a break.

122. On the claimant's return from leave when she went off sick Ms Fullthorpe ought to have done more to progress the grievance and to make enquiries into the claimant's health. She did not do so.

123. She said that if the claimant wanted her grievance dealing with, she ought to have chased it up. This is obviously not the correct response. However, Ms Fullthorpe did try to talk to the claimant about reducing her stress in the meeting on 20 June 2022 and she did attempt to complete a stress risk assessment with the claimant albeit that she sent it to the wrong place. These failings by Ms Fullthorpe were not acceptable and no doubt left the claimant feeling forgotten. In my view, however, the claimant was not in reality prepared to engage with alternative ways of managing her stress other than by the recruitment of additional staff. It had been perfectly clear to the claimant from 6 May when she received the email from Ms Andrew if not earlier that was not going to happen any time soon.

124. In reality, therefore, there was nothing that Ms Fullthorpe could have done to alleviate the claimant's concerns because the appointment of new staff was not in her power. All that could be done about that was being done in the form of a workforce review. This would take a long time and the proposals that Ms Fullthorpe was making about redistribution of work and adjustments was the only thing that could be done in the short term.

125. Therefore, the failure to address the claimant's grievance of 8 May was conduct that could damage the relationship of mutual trust and confidence but in my view it did not reach the high threshold required to seriously damage or destroy the relationship of mutual trust and confidence. This was because Ms Fullthorpe was seeking to address the underlying issue but there was nothing she would do or could do that would satisfy the claimant so that he could not be said to be the respondent's actions or lack of actions that seriously damaged the relationship of trust and confidence.

126. Finally, I consider Ms Fullthorpe's comment that 'it is what it is'. I accept Ms Fullthorpe's evidence that this related only to the staffing structure and not the pressure that was on the claimant. I have already said that the claimant would not have been satisfied with anything less than additional staff and Ms Fullthorpe's comment, although flippantly expressed, clearly stated to the claimant's that the staffing structure was not able to be changed in the short-term and she should look at other measures to facilitate a return to work.

127. In summary in my judgement the respondent's conduct has not reached the high threshold necessary to destroy or seriously damage the relationship of mutual trust and confidence between them and the claimant. The actions of the respondent from 15th November through to 6 May 2022 were reasonable and not conduct capable of destroying or seriously damaging the relationship of mutual trust and confidence. It is correct that there was some poor communication prior to February 2022 but that was remedied in Feb 22. From that date the claimant knew full well what the job would entail and how much work it would be.

128. The failure by Ms Fullthorpe to properly and formally deal with the claimant's grievance is not of itself adequate to mount to repudiate a breach of contract in circumstances where she did try to address some of the underlying issues. The fact is that the claimant did not actively pursue the

grievance and, in fact, she resigned before giving the respondent an opportunity to amend that oversight.

129. For those reasons the claimant was not dismissed within the meaning of Section 95 of the Employment Rights Act 1996 and her claim of unfair dismissal is not well founded and is dismissed.

130. It is not necessary, therefore, for me to go on to consider the fairness or otherwise of the dismissal under Section 98 of the Employment Rights Act 1996.

Employment Judge **Miller**

Date: 7 May 2024