EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105355/2023

Held in Person at Glasgow on 11, 12, 13 and 14 March 2023

Employment Judge: R McPherson

Dr Justine McCulloch	**Claimant** **Represented by** **Mr M Briggs - Counsel**
Forth Valley Health Board	**Respondents** **Represented by** **Mr R Davis - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal's judgment is that the claimant's complaint of constructive unfair dismissal does not succeed and is dismissed.

REASONS

Preliminary procedure

1. The claimant presented her ET1 on **Thursday 7 September 2023,** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on **Thursday 20 July 2023** and the issue of the ACAS Certificate on **Tuesday 8 August 2023**) against the respondents following termination of her employment with the respondent as a Consultant Psychiatrist

2. The ET3 was presented with the extended time permitted. Subsequently, in response to calls set out in the ET3, Further and Better Particulars were provided, referencing a Schedule of Loss and the respondent annotated its responses.

3. Mr Briggs, Counsel, represented the claimant, while Mr Davis, Solicitor, represented the respondents.

4. At the outset, I identified to the parties that before my appointment and, indeed, Mr Brigg's joining the Scottish bar, we had been in the same firm, and indeed, I had been the partner in that firm for a period. There was no objection.

5. For the claimant, it was proposed that the claimant's address be identified via the claimant's representative law firm as the claimant was in practice professionally. There was no objection. While proposed as an amendment, I considered the respective position of the parties, including having regard to the overriding objective, the respondent's employed witnesses would be identified c/o the employer. Further, having regard to Articles 8 and 10 of the ECHR, the application could be considered without amendment and was allowed.

6. The claimant attended in person and was the sole witness for the claimant, as had been identified in the date listing letter. The respondent's witnesses were **Dr Fergus Douds**, **Mr Ross Cheape**, **Ms Jacquline Sproule**, **Ms Linda Guy** and **Ms Sarah Hughes Jones**, all current or former respondent employees.

7. The Tribunal was provided with a Joint Inventory (supplemented at the outset with an extra final page 342 containing two emails).

Exchange of written submissions and supplementary comments at the Final Hearing

8. Following the conclusion of the evidential hearing on 13 March, parties were provided with the opportunity to provide written submissions (after mutual exchange) at midday on 14 March and to address the Tribunal on the same. Further, on 13 March and prior to written submissions, while not expressing a view, I queried, having regard to the list of issues identified at the outset, whether I was required to form a view as to the alleged incident, which is said to have occurred on Friday 22 June 2022.

9. Subsequently, on 14 March, following mutual exchange and receipt by the Tribunal of written submissions, parties were provided with an opportunity to address the Tribunal further. Following this, they were advised that no oral judgment would be issued, and that written judgment would follow. During the Tribunal's subsequent consideration, some additional potential authorities were identified, and parties' views were sought. Both the claimant and respondent provided further responsive written submissions, and where relevant, these are addressed below. In addition, parties' views having been sought on the application of Rule 50 (anonymisation), parties jointly confirmed that beyond the claimant address matter addressed at the outset, as above, no further application is made.

Issues for Tribunal at this Final Hearing

10. There being no agreed (or otherwise) provided list of issues proposed to the Tribunal, the Tribunal, at the outset, identified to the parties the issues which it considered relevant to the pled claim in consideration of whether the claimant was constructively dismissed as being:

    1. What is the most recent act or omission that the claimant says caused or triggered the resignation?

    2. Did the alleged breach or breaches of contract relied upon, viewed separately or in isolation, or cumulatively, amount to *a fundamental breach of the contract of employment, and/or did the respondent breach the implied term of mutual trust and confidence, i.e., did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?*

    3. If so, did the claimant "*affirm*" the employment contract before resigning? To *"affirm"* means to act in a manner that indicates the claimant remains bound by the terms of the contract.

4. If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation?

5. If so – was the dismissal unfair as a result of s95 of the Employment Rights Act 1996 (ERA 1996).

11. The parties did not propose any additional issues, although for the claimant it was intimated that an issue may arise as to whether an email of **23 April 2023** could amount to the final straw.

Remedy

12. If the claimant were unfairly dismissed, issues in relation to remedy would include what loss is attributable having regard to ss122 and 123 Employment Rights Act 1996 (ERA 1996), did the claimant minimise her loss, whether it be just and equitable to reduce the amount of the claimant's award because of any blameworthy or culpable conduct before the dismissal, under Section 122(2) and 123(6) ERA 1996, and if so, to what extent?

Findings in fact

13. The respondent is a Scottish regional Health Board that operates the Mental Health Unit at the Forth Valley Royal Hospital in Larbert, near Falkirk.

14. The claimant commenced employment with the respondent on **Saturday 1 October 2005**.

15. The respondent, at the material time, operated to a (NHS Scotland) Workforce Investigation Process, which includes operating the **Information Sharing Protocol** (**The Information Sharing Protocol**) and Guide for Investigators (**The Investigator Guide).**

16. The **Investigator Guide** provides that it forms part of the standard workforce policies that apply to all staff within NHS Scotland regardless of which Board they are employed by.

17. The **Investigator Guide** states that separate meetings will be held, and at least 14 days' notice will be provided for an employee under investigation**.** The respondent operates to that 14-day notice for all individuals from whom a statement is to be taken, and it is provided that individuals providing statements will be provided with 14 days to confirm the accuracy of a statement.

18. The Investigator Guide, under the heading Completing the Investigation and subheading Investigation Decision, states, "*The decision whether or not to take further action must be based on the information gathered, including the facts contained in the statements and notes of investigation meetings. This should include evidence that both supports and conflicts with the allegations…*

You will prepare a report taking into consideration:

- *the evidence provided by the employee under investigation and any witnesses*
- *the physical evidence (if applicable)*
- *conflicting evidence*
- *why you have accepted a particular line of evidence*
- *live conduct sanctions for the same or similar reasons or examples of similar patterns of behaviour*
- *reasons for the conclusion and recommendations.*

19. The **Information Sharing Protocol**, under the heading Investigation, identifies what are said to be key individuals, including the manager who requested the investigation, the employee under investigation and the member(s) of staff alleging misconduct /harassment or raising concerns, identifies that there is a Table which sets out the access entitlements of different relevant parties to information relating to an investigation and provides "*The sharing of information related to an investigation process under NHSScotland Workforce Policies should be restricted to those who need to know. In bullying and harassment cases, the complainant may feel they are*

entitled to all of the information collected as they are directly affected by the issues. Complainants should be provided with sufficient feedback to allow them to understand why their complaint has been upheld or otherwise. This should not, however, include statements and notes of meetings which essentially related to the employee under investigation rather than the complainant."

20. The relevant element of the **Information Sharing Protocol** table provides that a Complainant (such as the claimant in this instance), in relation to *Investigation outcomes and recommendations*, should be provided with "*Tailored access which maintains the confidentiality of employee under investigation*"; in relation to the *Investigation Report* should be provided with "Redacted access"; and in relation to Statements; Other evidence; Employees case and Hearing Outcome for each it is provided that the Complainant should have "*No Access."*

21. While the **Information Sharing Protocol** sets out that complainants should be provided with sufficient feedback to allow them to understand *why* their complaint has been upheld or otherwise, it expressly sets out that this should not include statements and notes of meetings which essentially relate to the employee under investigation, rather than the complainant, who has no Access as set out above. The Information Sharing Protocol does not set out that the complainant is entitled to the Investigation Report, and where they are afforded access to the Investigation Report, that access is expressly tailored. The Information Sharing Protocol does not require that a written explanation be provided, nor does it set out that a complainant be provided with *how* the investigation came to its conclusion.

22. Neither the **Investigator Guide** nor the **Information Sharing Protocol** set out any time frames for the duration or completion of any investigation nor any accelerated process, nor did they set out that there was any appeal process from the outcome of an investigation.

23. During **the spring** and **summer of 2022**, the claimant shared an office with fellow respondent employee **Dr Gary Cooney, Consultant Psychiatrist**

24. On **Sunday 26 June 2022**, at **6.07 pm (the Sunday 26 June email),** having commenced annual leave following the conclusion of her shift on Friday 24 June 2022, the claimant issued an email to **Dr Crabb**, the respondent's **Associated Director for Mental Health**, which alleged that an incident had occurred on the afternoon of (what was described as) **Friday 22 June 2022** at her work. The claimant described that fellow consultant psychiatrist Dr Douds had come into her office, which she shared with Dr Conney (who was not present) to speak with Dr Cooney. It was described that Dr Douds advised that he was going to see one of her patients. The claimant alleged that they had a clinical discussion around the same, and in the context of that discussion, Dr Douds narrated a personal anecdote that culminated in Dr Douds approaching her and slapping her hard across the face. The claimant alleged that Dr Douds had moved towards her. The claimant alleged that Dr Douds then stated that he had not meant to hit her so hard, and he subsequently left the office. The claimant did not describe any actual witnesses, nor that she had operated any personal alarm, or spoken to any colleagues or anyone else following the alleged incident before concluding her working day and/or prior to her issue of the Sunday 26 June email.

25. On **Monday 11 July 2022,** upon the claimant's return from leave**, Dr Crabb,** the respondent's Associated Director for Mental Health and, in effect, the claimant's line manager, made direct contact with the claimant**,** and in the view of the claimant, said all the right things. Dr Crabb followed that contact up with an email at **4.10 pm** setting out that he was shocked to read her email "*that described the incident between*" herself and Dr Douds and set out "*please be assured that myself and the organisation are going to treat this with the upmost seriousness, and to that end I'd be grateful if we could meet with*" Ms Guy from HR "*as soon as possible"* noting that the claimant may wish to have her BMA or union representative along to support her.

26. On **Thursday, 14 July 2022** at **2 pm,** the claimant met with Dr Crabb and a member of the respondent's HR team, Ms Linda Guy, at Stirling Community Hospital. While the claimant's BMA representative was dealing with another matter, the claimant confirmed that she was happy to meet. The claimant set

out what she indicated was her recollection of an event she complained had occurred on **Friday 24 June,** in the shared office she shared with Dr Cooney at the Mental Health Unit at Forth Valley Royal Hospital; that Dr Douds had entered the shared office unannounced, he asked if Dr Conney was present (he was not), launched into an anecdote about his father, after which Dr Doud struck the claimant in her face without warning, then spoke to the claimant and then left to find Dr Cooney. The claimant described that following this, she went on with her work for the rest of the day and described that due to matters related to family holiday arrangements, it was only when she arrived at the holiday destination on Sunday that she realised she should write it down (that is she should send the **Sunday 26 June email**).

27. The claimant intimated that she felt the initial response by the respondent had been poor, in response to which Ms Guy apologised if she felt this, describing that several members of staff, including Dr Crabb, had been on annual leave that week, and assured the claimant that the Sunday 26 June email had been actioned immediately. Dr Crabb and Ms Guy explained that the priority was for the incident to be formally investigated promptly and for all measures to be taken to help the claimant feel safe at work. The claimant intimated that she did not wish to have direct personal contact with Dr Douds. Although the investigation process was discussed and an Investigation Lead from outside mental health services of the Board would be appointed, no timescales were described. Dr Crabb proposed a number of arrangements to minimise the occurrence of contact with Dr Douds **(the minimise contact arrangement)** following his return from annual leave**.** It was noted that Dr Douds' was married to **Dr Seonaid McCallum**, Consultant Psychiatrist with the respondent and Community Clinical Director who worked closely as a Clinical Director alongside the claimant; conditions of confidentiality were discussed, and it was identified that the process would engage only with Dr Douds. The claimant was asked to consider 3 options: maintaining their working relationship, communicating via a third party, and facilitating to negotiate how they would interact.

28. The claimant agreed to consider the options intimated at the meeting on 14 July 2022 and was generally satisfied with those arrangements. Further, Dr Crabb offered practical support to the claimant, including the claimant taking a further week of leave and Dr Crabb picking up some management tasks.

29. In the conclusion of his personal minute of the meeting (Dr Crabb's 14 July Meeting Personal Minute), Dr Crabb recorded that "*Objectively JM seemed understandably anxious and distressed when recounting the incident. She shook at points, and her face twitched recounting events. She reported having poor memory of details around the incident. Aside from all of this all her speech and though processes were entirely normal, lucid and coherent.*

LG and JC encouraged JM to remain in close contact with them, and to let them know if there was any support she required. JC and JM agreed to meet up again on the 26th July at JC's office."

30. Dr Crabb's 14 July Meeting Personal Minute was not prepared as part of the Investigation Guide and was not provided to the claimant for agreement, although the claimant ultimately secured a copy via a Subject Access Request.

31. Following the meeting on **14 July 2022,** the claimant was not expected to come into contact with Dr Doud at work imminently.

32. Around the week beginning **11 July** after his return from annual leave, Dr Douds, having been made aware of the allegation which he denied, took the opportunity to sketch out a timeline for his movements on 24 June which identifies that "*Times are approx., but CCTV and also wipe card access (if kept) can perhaps make more exact"* and describes "*2 pm… Swipe would record that. …Saw patient in ward 1. Ward has CCTV at entrance, so the timings can be checked…"* described that the claimant "*I think may have said he had just popped in to see where I was (it was around 305 pm and I am known to be punctual). I think Dr McCulloch may have said where Dr Cooney was and I walked to that office (just inside the entrance to the corridor to Ward 3 and Ward 4)… No heated words were exchanged, as there was nothing to disagree about..."* he described meeting his colleagues, including Dr Cooney

and leaving the subsequent meeting at approximately 4.20 pm. He further described leaving the building at approximately 5 pm with Dr Cooney, walking to the same car park and speaking for approximately 15 minutes …"*At some point in that conversation Dr McCulloch walked past us both, going to her car*". He concluded his timeline: "*IF swipe access can be retrieved it would show who else had been in the medical offices adjacent to Ward 3. This is how these offices are entered… You entered a corridor with a locked door for Wards 3 and 4;… you can let yourself in if you have a swipe card. When in that corridor, the medical offices are the first corridor on the right: you can only get IN with a swipe (I think there is a button to get out).*"

33. On **Monday 25 July 2022**, the claimant had a remote interview with Dr Hull, Consultant Psychiatrist, author of the subsequent **Dr Hull Report 30 August 2022** report.

34. On **Tuesday 26 July 2022,** prior to the claimant commencing sick leave, Dr Crabb again met with the claimant and having raised if Dr Douds was not suspended, the claimant intimated that she would like to know that he was not going to be on the same site and there was no possibility of the two bumping to each other in a car park. Dr Crabb, along with the claimant, problem solved by running through the various locations where the claimant worked. She intimated that she would feel safe if she could be assured that Dr Douds would not visit those sites, which was intimated to be not a frequent occurrence. Mr Crabb did not seek to impose solutions which the claimant was not happy with. The claimant emailed Mr Crabb that she had found this meeting helpful.

35. On **Wednesday 27 July 2022**, the respondent completed an **Employees Relations Care Referral Form** to progress the Investigation, which identified that **Dr Juliette Murray,** the respondent's **Deputy Medical Director,** was the Investigation **Commissioning Manager**. The appointed **Investigation Manager** was **Jacqueline Sproule** (**Head of Service Woman & Children's Directorate),** and HR Support would be provided by **Ms Alison Thomson.** Ms Sproule had at a time prior to her administrative role as Head of Service Women & Children's Directorate, a clinical role and, further, in her

professional life, had experience of working with women and men who were subject to gender-based violence.

36. On **Thursday 28 July 2022,** at **10.27 am**, Dr Crabb emailed the claimant describing that Dr Crabb was not due to be back to work till Tuesday 2 August 2022 and described that they needed to put formal arrangements in place to ensure there was a workable solution for both and to have no contact and feel safe at work. Dr Crabb described "*Fortunately, I think we've managed to problem solve this from our earlier meetings- we just need to have a more formal meeting with HR and follow this up in writing*." Dr Crabb proposed a meeting with Ms Guy and the claimant on Monday 1 August 2022, along with the claimant's BMA representative.

37. On **Friday 29 July 2022,** Ms Sproule, the appointed Investigating Manager, commenced the investigation process. This was carried out in addition to her existing responsibilities, although she did not have a PA at the time. Ms Sproule considered that the appointment was, however, part of the type of role she held.

38. On **Monday 1 August 2022** at **1.05 pm**, the claimant's BMA representative intimated on behalf of (and cc'd to) the claimant, to Dr Crabb and Ms Guy that a meeting with the claimant scheduled for that afternoon required to be postponed.

39. Further, the claimant commenced what the respondent classed as sick leave on that day. That was before the minimise contact arrangements could be implemented upon Mr Douds' return to work on Tuesday 2 August 2022.

40. On **Tuesday 2 August 2022**

    1. At **10.20 am,** the claimant responded to Dr Crabb's email of 1 August (which was in response to the email above), setting out initially that she disagreed with the respondent stance regarding (the classification of) sick leave and raised other matters, criticising a different individual for what the claimant said were unprofessional actions, indicating that she was considering Occupational Health but

did not consent to a management referral at this time. The claimant set out in relation to documents provided, *"I have no issue with the measures to ensure no contact with*" Dr Douds "*I would have felt more protected by his suspension but accept the position".* She further stated that she wished "*clarity on a few points regarding the measures to ensure no contact with*" **Dr Seonaid McCallum**, respondent's Consultant Psychiatrist and Community Clinical Director.

2. At **6.10 pm,** Dr Crabb responded, apologising for his delay in doing so, which had been caused by clinical duties intimating that Ms Guy would raise the matter of the coding of the leave and that Dr MacCallum would not be going to specific huddles, nor would Dr Douds or Dr MacCallum be involved in any adverse events reviews which related to the claimant's patients, and in relation to the autism team, in the context of Dr McCallum make comments including asking if would be possible for this to happen remotely and concluded "*I'd be very happy to consider other suggestions though."*

41. On **Friday, 5 August** at **4.53 pm**, the claimant who remained on leave responded to Dr Crabb's email, noting a difference between the BMA and the respondent on the classification of the nature of the leave. Further, the claimant criticised what she described as conditions imposed on her husband via his manager in order that Dr McCallum return to work "*were tantamount to another slap on the face".* The claimant further described that her absence from work had allowed her to reflect*: "I am concerned that while provisional measures were intended to be supportive, they are to my ultimate detriment and not neutral. In short, I am concerned as to the impact on my reputation and credibility,… Notwithstanding, I do not feel I meet the criteria for sick leave but nor do I feel I can return to work under these circumstances. I am prepared to take my proposed annual leave as planned and intend to extend it to August 26. I hope this will act as a period of grace for the organisation to consider these points. I feel matters need to progress over this time frame to allow me to return to work thereafter. I would make the point that the original*

assault negated my first two weeks of annual leave, and this situation, as it stands, is to my ongoing detriment."

42. The claimant did not propose that any alternate methodology be adopted for investigation.

43. On **Monday 22 August 2022**, the claimant attended an **Investigation Meeting,** as provided for within the **Guide for Investigators,** along with her BMA representative, Ms Sproule, Ms Thomson and a notetaker. Ms Sproule opened by commenting "*So, we have only seen copies of the emails that instigate this process"*. Having asked the claimant to start by explaining in her own words why they were here, the claimant responded, "*It's essentially what I wrote down"*. In response Ms Thompson asked, *"Is this in your email to Jim Crabb on 26th June, which I've got"* with Ms Sproule noting that what was written down was 22 June, the claimant confirmed that it had been a mistake and that the date of the incident was 24 June. Ms Sproule asked the claimant to break down the sequence, and the claimant set out her recollection, including that it was between 2 and 3 pm and provided her description of the including of the events leading up to what the claimant described had occurred.

44. In response to Ms Sproule indicating that she anticipated that there would <u>not</u> be a personal alarm present "*because you don't see patients in your rooms"*, the claimant offered confirmation that she had a personal alarm on her desk and described being very shocked. In the context of her decision-making process around contacting the police, the claimant described it as a "*he said/she said"* situation.

45. In response to Ms Sproule asking if there was anything that the claimant remembered now that's coming back to her, the claimant described that she used to work with someone who was now a national trauma expert (although the claimant did not name that person) and that he had sent the claimant *"the acute stress disorder questionnaire and I was absolutely three weeks in and still scoring through the roof and things gradually have settled for me. You would anticipate that it would settle within a month. The way the incident has*

been dealt with subsequently has been incredibly difficult for me." The claimant described Dr McCallum as her counterpart in the South of the area and further that *"the time frame of this is I went on holiday for two weeks. I did the e-mail on the Sunday night before we went on the Monday*" the claimant also referenced a peer group.

46. Further, regarding Dr Hull, the claimant described that he "*has been really good in terms of lots and lots of support and again, talking through what you would expect in terms of symptom resolution."*

47. Mr Sproule confirmed that a copy of the notes would be sent to the claimant and that the claimant would have 14 days to make any amendments. The claimant subsequently took up that opportunity, on 30 August and 13 September 2022.

48. On behalf of the claimant, it was intimated that the claimant would wish Dr Hull (his first name was provided) to put forward a statement about how the claimant "*was presenting, immediately after the incident."* In conclusion, Ms Sproule asked for Dr Hull's contact details and noted that they had not appreciated that the claimant was absent from work, so following an appointment with Occupational Health, they would get feedback from OH regarding the claimant's fitness to participate in ongoing enquiries.

49. Beyond the reference to Dr Hull, the claimant, who was accompanied by her BMA representative, did not propose that Ms Sproule should, in preference to or in addition to her statement, consider the email she had sent on 26 June 2022, or any other narrative such as that taken by Dr Crabb on 14 July 2022 (when the claimant attended without a representative) nor make any contact with any other individuals.

50. Further, the claimant did not propose that the investigation be completed within any timescale or that the respondent operated according to any process.

51. On **Tuesday 30 August 2022,** following a further remote interview between the claimant and Dr Hull**,** a report commissioned by the claimant's

representatives and prepared by Dr Hull**,** Consultant Psychiatrist report was issued (**The 30 August 2022 Dr Hull Report**). The 30 August 2022 Dr Hull Report set out in the synopsis that he had been asked to prepare a report detailing the claimant's diagnosis, cause of illness and trajectory. It included a declaration that the claimant and Dr Hull had worked alongside each other for 5 months, Dr Hull as locum consultant and the claimant as a *"very experienced Specialist Registrar"* and that they had subsequently published two short papers together and "*Prior to our recent contact we had spoken perhaps twice in a five year-year period"* and listed the two remote interviews above (**The 30 August 2022 Dr Hull Report**). The 30 August 2022 Dr Hull report provided an opinion that the claimant had an unequivocal diagnosis of acute stress disorder ... and offered the view that this "*was the result of an assault at work, but for this assault, the claimant would not have developed this diagnosis." It described that the alleged event had occurred.* Further, it described that DSM-5 describes Acute Stress Disorder as the development of specific fear behaviours that last from 3 days to 1 month after a traumatic event and describes that of note what is set out as the claimant's "*traumatic event was inescapable and provoked a fear response"* and comments that "*Dissociative amnesia is perfectly understandable clinically and indeed likely in this setting."*

52. The **30 August 2022 Dr Hull report** did not set out that any other possible stress and/or trauma causes had been considered, although it identified what it noted was "*added significant additional stress and distress"* from a separate matter, nor was any exploration of any assumptions around same, nor that any documentation, had been reviewed.

53. Ms Sproule, when subsequently reviewing the 30 August 2022 Dr Hull report while not discounting the report, considered that it essentially reflected what the claimant told Dr Hull and further considered that the claimant was not in the same position as a layperson in any responses.

54. On **Thursday 8 September 2022** at **5.45 pm,** Dr Crabb emailed the claimant apologising for it having taken so long to get back to the claimant regarding clarification on whether her absence from work can be considered leave or

sickness "*We have had to get specialist advice which has taken time"* and commented that he *"remained extremely sorry that you are not feeling able to work. Myself and all your colleagues …miss you; and are thinking of you*". Dr Crabb described separate matters and concluded, having described, that they would not be able to grant special leave or similar "*As mentioned above I am deeply sorry that the situation has affected your health. In keeping with the policy for sickness absence we need to agree how we can maintain supportive contact with you after you have been off work for more than 29 days. On a personal level I would like you to know you are ok, or doing as well as can be expected in the circumstances. Please let Linda and I know if you would like to meet us or what kind of contact would feel right for you. Please let us know if there is any way we can support you".*

55. On **Tuesday 13 September 2022,** the claimant signed an NHS Scotland Workforce Policies Investigation Process Witness Statement Template setting out what the claimant indicated was her recollection of events on Friday 24 June 2022. The claimant alleged that after the alleged event, Dr Douds subsequently spent some time blocking the door, eventually opening the door, and continued to block the exit for a further period. She set out that the incident took place on the last day before her annual leave. She described that she was extremely busy, so she continued her work schedule and completed her tasks. The claimant described returning home around 6 pm and asserted that she had told her husband of the alleged incident by around 6.30 pm that evening.

56. Following the provision of the claimant's statement, Ms Sproul made arrangements to take a statement from Dr Douds, having concluded that it was appropriate to do so once the claimant had provided her own statement and been given the relevant period to review /sign it.

57. On **Monday 3 October 2022**, Dr Douds and his BMA representative attended an **Investigation Meeting,** as provided within the **Guide for Investigators** with Ms Sproul and Ms Thomson. Mr Douds denied the allegations, indicating that he had first been made aware of the allegation the week before he went on holiday and, while accepting that he had entered the office, the claimant

shared with Dr Cooney briefly shared a patient feedback, having done so, as he was seeking to meet Dr Cooney and asserted that he departed after a period of 4 to 5 minutes without recounting the childhood anecdote (used to draw a distinction between feigned and actual remorse) indicating that it must have been heard by the claimant previously. He further described that there would have been no relevant context to the patient feedback provided for the anecdote.

58. Dr Douds described "*Actually the IPCU is one of the few clinical settings where there is a CCTV camera . so I went into the IPCU … At 2 O'clock I had the meeting with Doctor Cooney… I thought I was meeting Doctor Cooney in there, so I went into the office as you said he shares with"* the claimant. *"I mean, Doctor McCulloch said I was in the room for about 5 minutes. I would say that's probably right… I don't think swipe card information will help.."* Ms Sproule responded, "*That was our view. We have pulled the swipe care information but it doesn't really tell you much… It will tell you that basically you went into a corridor really… We can look at CCTV but what does that, what is the CCTV going to tell us?"* Dr Douds responded, "*All its going to say is I went into the IPCU and I came back out*."

59. Ms Sproule described, following a break, that the claimant could provide information as to her mental state after the incident and in the context of Dr Douds proposing that a statement be obtained from Dr Cooney that they would do and she described, *"I think this it, it is very difficult to, to bottom this out. It comes down to, you know, two people in a room and whether there is corroborative information and details about what happened or is said to have happened".*

60. Dr Douds described that the allegation was outlandish and rejected additional character criticisms made by the claimant in her meeting with Ms Sproule, referring to several colleagues.

61. Ms Sproule confirmed that a copy of the notes would be sent to Dr Douds and that he would have 14 days to make any amendments.

62. Dr Douds, who was accompanied by his BMA representative, did not propose that in place of the meeting answering questions, Ms Sproule should consider the timeline he had prepared earlier.

63. On **Monday 31 October 2022,** Dr Cooney, who was no longer working in Scotland, attended a remote Investigation Meeting with Ms Sproul and Ms Thomson. The arrangements for the meeting had been delayed as Dr Cooney was no longer working in Scotland.

64. On **Wednesday 2 November 2022,** the claimant elected to opt out of the NHS Pension scheme by completing an Opt-Out Form. She did so having regard to household matters and in anticipation that she would move from full pay to half pay, having previously been on leave for unrelated reasons earlier in 2022. The claimant understood that she could, without penalty, opt back in within six months. The claimant did not communicate to the respondent in advance or during the course of employment that she had decided to withdraw at this time due to any asserted breach on the part of the respondent. The claimant did not subsequently opt back in.

65. On **Thursday 10 November 2022,** Ms Sproule prepared a first draft iteration of the Investigation Report and sent it to Ms Thomson for review.

66. On **Tuesday 22 November 2022,** the claimant's solicitors issued a letter to Ms Guy, narrating the allegation, raising matters relating to the claimant's leave, criticising what was said to be an unreasonable delay and concluding that they looked forward to hearing from Ms Guy urgently. While criticising what they described as an unreasonable delay, they did not set out any methodology, identify any documents that ought to be considered, or specify any specific time scale.

67. On **Tuesday 29 November 2022,** the Investigation Report, as completed by Ms Sproule, was emailed to Dr Juliette Murray, the Deputy Medical Director, as the Commissioner Manager.

68. The **Investigation Report** which was provided to the claimant in February 2023 **(**the **February 2023 provided Redacted Investigation Report)** set out

matters in headings: 1. **Introduction; 2. Remit; 3. Methodology;** and **4. Findings** which had subheadings including **Witness Interviews** (with a summary of the main point from each interview and which included, in relation to the interview with the claimant, generalised criticisms of what the claimant had asserted as Dr Douds' character, and further in relation to Dr Douds it being noted that similar to the claimant he was also emotional throughout the interview and tearful on one occasion and was upset by his colleague's character criticism and in relation to Dr Cooney who was also interviewed that Dr Douds had joined the meeting with Dr Cooney at approximately 3.10 pm; and Documentary Evidence being Swipe Card Information, CCTV footage from MH Unit, Photos of Room, Report on claimant provided by Dr Hull; and Summary of Facts Established; which set out a number of facts including that:

"Both have corroborated that a discussion took place within" the joint office *"within the Consultant corridor, MHU on the afternoon of 24 June.";*

"Both accounts indicate that Dr Douds entered the office looking for Dr Cooney, but on seeing Dr McCulloch he took the opportunity to provide a clinical update.";

"*It has been established that Dr McCulloch and Dr Douds were the only 2 people present during this discussion and alleged incident, and the office door was closed*",

And further, that "*Swipe Cards access has"* the claimant *"leaving at approximately 17:18"*

69. The penultimate heading is **6. Conclusion,** in respect of which it is set out in both the redacted and unredacted versions (as provided to this Tribunal) that:

"*Despite the very serious nature of the allegation, we cannot establish not is there evidence to support what happened between the two individuals within the office. Therefore, we are unable to establish whether Dr Douds slapped Dr McCulloch across the face. Dr McCulloch advises that the assault was sudden and unprovoked.*

The investigating team took a broad, holistic approach looking for facts and circumstances that may support or confirm the allegation. However, Dr McCulloch advises that immediately following the alleged incident, she completed her day's work, left the office, and drove home. There were no witnesses and she confided in no one within work about the alleged assault.

Due to COVID-19 restrictions being in place, Dr McCulloch would have required to wear a mask when moving from her desk, therefore we are unable to corroborate whether her face had been marked.

XXX

Dr McCulloch advises that she was fearful for her safety. As a practising Psychiatrist she works within an environment where violence and aggression can be commonplace. Therefore, as part of her practice, she requires to complete mandatory violence and aggression training. Crucially on the day in question, she had use of a Person Alarm. Yet, although stating she was fearful for her own safety, she did not use this alarm- nor did she verbally alert any colleague that she had been assaulted.

It is therefore the investigation team's view that distress (or Acute Stress) cannot corroborate whether Dr McCulloch was physically assaulted by Dr Douds.

XXX

70. The final (**7. Recommendations**) section shown to the claimant states, *"The conclusion reached by the investigating team is that there is no corroborating evidence to substantiate the allegation. XXX* "

71. An alternate (7. Recommendations) section of an unredacted iteration of the Investigation Report, which was not available to the claimant at any point prior to her resignation, is provided within the Joint Inventory, while not altering the conclusion, is differently worded, **"***The conclusion reached by the investigating team is that, on the balance of probability, there is no evidence to substantiate the allegation."*

72. Ms Sproule, on viewing the comparative wording in the hearing at **7. Recommendations** in the **February 2023 provided Redacted Investigation Report** and the alternate **7. Recommendations** above confirmed that she had not seen the Investigation Report in its redacted form and had locked the report for editing.

73. In preparing the Investigation Report, Ms Sproule carefully considered the documentation, including the transcripts of the meetings with the claimant, witness statement completed by the claimant, transcript of meeting with Dr Cooney, Transcript of meeting with Dr Douds, swipe card information, photos of room and corridor, and the Hull report multisource feedback on Dr Douds. From the swipe card information, she was able to broadly identify when the claimant finished; upon review, the CCTV information did not, however, assist. Further, Ms Sproule, having taken time to consider the terms of the **30 August Dr Hull Report,** concluded that it was essentially a report of what the claimant told Dr Hull and what Ms Sproule described as confirmatory in nature, it did not provide corroboration of the events of 24 June 2022 and was provided reflective of the claimant's self-reporting of the asserted incident.

74. Ms Sproule, while recognising that there was a clear disparity in the position taken by Dr Douds and the claimant, and while having identified that following the alleged incident, the claimant did not use a nearby personal alarm, had not notified anyone, including any colleagues within the workplace of her allegation before leaving work, and by that point described that she had gone home and spoken to her husband that evening but did not send the email until the evening of the 26 June, considered that she did not require to conclude whether the claimant's report should be regarded as accurate or not for the Investigation Report.

75. Ms Sproule had prepared the Report, in all the circumstances in accordance with the Guide for Investigators, taking into consideration the evidence provided by the employee under investigation and any witnesses, the physical evidence (if applicable) [including by reviewing CCTV/ swipe card information and attending site visit], conflicting evidence; Why she have accepted a particular line of evidence; Live conduct sanctions for the same or similar

reasons or examples of similar patterns of behaviour (having reviewed the Multi-Source Feedback Report), and set out Reasons for the conclusion and recommendations.

76. On **Wednesday 7 December 2022,** Ms Thomson emailed the Commissioning Manager to ensure that she was aware that she was required to provide feedback to the claimant and Dr Douds. Ms Thomson received an out-of-office email intimating that she was on leave and not due to return until 9 January 2023.

77. On **Thursday 8 December 2022**, the respondent's solicitors responded to the claimant's solicitor letter of 22 November 2022**,** setting out responses to issues raised**,** describing in conclusion that "*Our client has treated the allegations made by your client seriously and in a timeous manner. A Full investigation has been undertaken into the allegations and we are advised that your client is to be invited to a meeting on 19 December 2022 to discuss her ongoing absence and available support measures, in accordance with the Attendance Policy.*

We are pleased to note your client's willingness to participate and cooperate in this process. We hope this letter, in conjunction with the meeting to be shortly arranged, will give her comfort as to the steps our client has taken to date to investigate her concerns. As your client will be aware, if she remains dissatisfied with the Board's approach, she can choose to escalate her concerns via our client's internal policies."

78. Although not addressed to the claimant, she was informed of the respondent solicitor's response.

79. On **Tuesday 13 December 2022,** the Commissioning Manager confirmed that while she was on annual leave in the US, she was working remotely.

80. On **Thursday 15 December 2022,** the Commissioning Manager attended a remote meeting with Ms Thomson and Ms Sproule.

81. On **Friday 16 December 2022**,

1. At **12.12 pm,** Ms Sproule emailed the claimant confirming that she had completed her investigation and finalised her report, confirming she had sent it to the Commissioning Manager, Dr Murray, who she identified was working remotely but had advised that she agreed with the report findings and recommendation and was happy for Ms Sproule and Ms Thomson to feedback the outcome to the claimant. She noted that the claimant may prefer to meet with Ms Murray which would require to be arranged for the new year. Ms Sproule described that given the time of year, it may be possible to arrange before Christmas but that the claimant may prefer to wait until the new year "*therefore, I don't want to make any assumptions for you."* Ms Sproule confirmed that the claimant could be accompanied by a Trade Union rep or work colleague "*which may be harder to arrange at short notice. As diaries are tight for next week this would be very short notice with little ability to be flexible however I was keen to offer you this choice."* Ms Sproule further offered the option of a remote meeting if the claimant would prefer this over a face-to-face meeting at Ms Sproule's office where they had previously met. Ms Sproule concluded, "*Can you consider the above choices and let me know what you would preferences".*

2. At **3.21 pm** the claimant responded, "*Thank you for your email. In the circumstances I prefer to receive a written outcome of the investigation as soon as possible and before Christmas, it being nearly 6 months since the incident at work. Please confirm when this will be emailed to me.* "

82. On **Monday 19 December 2022** at **10.41 am,** Dr Crabb emailed the claimant, noting that she did not feel able to meet with Ms Guy and himself that day and confirmed that he had just heard from the payroll department and that based on her attendance record the claimant would move to 1/2 pay on 18 December 2022 while "*moving to no pay would occur on the 18th June 2023"*

(although not expressed the move to zero pay was absent the claimant return to work before that date).

83. On **Thursday 22 December 2022** at **3.05 pm,** Ms Murray as the Commissioning Manager, emailed the claimant, "*Please find attached as requested.*". The attachment was a letter dated 16 December 2022 from Ms Murray headed "**Investigation Outcome"** and set out:

"*I refer to the recent emailed communication from Jacqui Sproule, Investigating Manager, requesting to meet with you to feedback the findings of the investigation. I've been informed that you would prefer a letter detailing the outcome.*

I am now in receipt of the investigatory report. The conclusion reached by the investigating team is that there is no corroborating evidence to support your complaint that Dr Douds struck you across the face within your office at Forth Valley Hospital on 24th June 2022

I appreciate this may be difficult for you to accept. I am keen to meet with you in the new year to discuss and consider how the organisation can support you return to work.

If you have any queries regarding the above, please do not hesitate to contact me in the meantime, may I take this opportunity to wish you a peaceful Christmas season".

84. Ms Murray did not set out, in the letter emailed on 22 December 2022, that the Investigation Report would be provided at any such meeting. The respondent had arranged a meeting, which subsequently took place on Monday 16 January.

85. On **Thursday 5 January 2023** at **4.40 pm,** the claimant responded to Ms Murray, copying in Ms Sproule confirming receipt of the email of 22 December, ***"****I wish to express disappointment at the outcome that the organisation has reached in relation to my grievance. To enable me to further consider the matter. I write to request the following:*

1. *A. written explanation of how the organisation reached the outcome to my grievance. Alternatively, I am willing to attend a remote meeting to discuss this further, given the sensitivity of the matter. Should a meeting be arranged, I would like to request that a colleague of my choosing attends with me as a companion.*

2. *An explanation for the protracted timescale delay and investigating and concluding my grievance. As you are aware the incident happened on 24th June 2022 and the outcome was issued to me on 22nd December 2022.*

3. *Clarity around the process for appealing against the grievance outcome and when any appeal should be submitted.*

4. *The organisations proposals and assurances for ensuring safe working environment for my return to the workplace.*

Additionally, given the delay on the organisation's part in investigating and reaching a conclusion on my grievance which has had a direct impact on my ability to work in my health condition, my pay has reduced to half pay. Given the financial detriment that I am now experiencing, I therefore request that my pay is increased to full pay until the grievance process has been concluded in full and discussion has taken place regarding your proposal for my safe return to work

I would be most grateful if the above could be provided as soon as possible so I can prepare for any proposed meeting and achieve the best use of time for all.

86. On **Monday 9 January 2023** at **2.45 pm,** Dr Crabb emailed the claimant setting out they had been advised that the claimant had submitted a grievance via her lawyers and that they were in the process of identifying a Commissioning Manager and Investigating Manager and confirmed that they would be in touch *"to take this matter forwards as soon as these individuals are in place."*

87. On **Monday 16 January 2023,** Ms Sproule and Dr Juliet Murray as Commissioning Officer, attended with the claimant along with a colleague for support at a prearranged meeting and presented a redacted version of the Investigation Report**.** Ms Sproule went through the redacted version of the report section by section. In response to Ms Sproule asking 3 or 4 times if the claimant had anything she wanted to ask, the claimant responded that "*the organisation has made their position very clear*." Ms Sproule noted down that response. Ms Sproule also went through her timeline document generally, although not in detail. Ms Sproule's timeline covering a period up to 20 December was not wholly detailed in its narrative elements, and while Dr Douds had been contacted on 1 August 2022 and 9 August, Ms Sproule had concluded that it would be consistent with the respondent process for Dr Douds to provide a statement *after* the claimant had provided her own statement and been given 14 days to confirm and/or revise same. Ms Sproule considered that the Investigation Report**,** although redacted, explained why the complaint was not upheld and considered that she had made that clear. There was no objection set out at the time to the respondent process.

88. On **Wednesday 18 January 2023,** the claimant submitted a Data Access Request providing her own details "*Please can you arrange to supply the information to which I am entitled under the Data Protection Act 2018 relating to: The Investigation report commissioned by Dr Julliette Murray, Deputy Medical Director and carried out by Ms Jacqueline Sproule, Investigating Officer into my complaint regarding Dr Fergus Douds* " (the 18 January DPA request).

89. On **Tuesday 31 January 2023** at **2.23 pm,** Ms Guy emailed the claimant setting out that her points (set out on 5 January 2023) she had "*raised in addition to the points raised in the letter submitted by your Solicitor (dated 22nd November 22) and subsequent e-mail communication with them, it would be our position that an investigation is undertaken to enable all parties involved to respond to the points raised. Dr Andrew Murray, Medical Director will therefore commission this under the Once for Scotland Grievance Policy. Please note that Jilly Taylor, Head of Service, Woman and Children*

Directorate will take forward this investigation and will be in touch directly… if you wish to discuss this further or require any further information please do not hesitate to get back to me."

90. On **Wednesday 1 February 2023**, the claimant met with Dr Crabb and Ms Guy. At her request, she was accompanied by a fellow employee from another NHS Board.

91. At this meeting, Dr Crabb set out that he confirmed at the outset that he understood that the allegation that the claimant had been assaulted by another member of staff had concluded. That conclusion was that there was no evidence to substantiate the allegation and that no further action was being taken against any party. Dr Crabb confirmed that neither he nor Ms Guy had seen the Investigation Report, and any queries should be directed to the Commissioning Manager. He stated that he had been informed that the claimant submitted a grievance, which he had not seen, although he had been informed that an Investigating Officer had been appointed to take that forward. He noted that the claimant stated she did not have any suggestions as to how she could be supported to return to work "*however you stated you would be keen to hear suggestions from the organisation."* Dr Crabb noted the claimant expressed misgivings that the allegations she had made against Dr Douds were widely known, in response to which he fed back his impression that the allegations were not widely known "*I explained there was no desire to disadvantage you rather to try and support a safe return to work and discuss and agree what that would look like for you."*

92. Further, at this meeting, the claimant stated that she felt that she was being accused of lying, as no further action was being taken. Dr Crabb fed back that there was no suggestion that the claimant was "*lying. An allegation has been made, which the other party disputes. Therefore, going forward, we need to try and establish a situation where all parties feel safe and supported within"* the respondent.

93. At this meeting, Dr Crabb noted that the claimant wished to have no direct contact with Dr Douds "*or his wife who also works in mental health service in NHS Forth Valley".*

94. Further, at this meeting, Dr Crabb attempted to work "*through possible scenarios that would mean you would have no, or as little as possible contact with these parties. However, any such arrangement would mean that you would have to change your previous duties. You reflected that you were not really able to fully assess what would help you feel safe unless you knew more about what the other party had said in response to the investigation*." Dr Crabb and Ms Guy confirmed that they could not provide this information and had not seen it.

95. At this meeting, the claimant advised that she had submitted a subject access request requesting information and had been advised that she would receive a response by 17 February. *"All parties agreed it would be best to meet as soon after this date in order to see if potential solutions could be generated".*

96. At this meeting, the claimant expressed dissatisfaction that her absence from work was being considered as sickness absence rather than a work-related injury. Ms Guy advised that this was being considered part of the grievance process and could not be commented on further in this meeting. Ms Guy intimated that it would be helpful to have occupational health input after the claimant received whatever information could be shared from the investigation to inform a potential return to work. It was agreed by all parties that this would be discussed at the next meeting, which was agreed to take place in the week commencing 20th February.

97. On **Tuesday 7 February 2023** at **9.17 am,** the claimant responded to Ms Guy's email of 31 January 2023 asking her to confirm "*why Jilly Taylor has been appointed to address the issues set out in my solicitor's letter dated 22 November. These issues were related to the same incident and events which Dr Murray recently made conclusions on, following her investigation. I am still waiting on a response from Dr Murray in response to my email of 20 January 2023, following the meeting that I had with her on 17 January 2023… "*The

claimant further described that she had submitted a Subject Access Request and that *"As you will know, I am currently in receipt of half pay which is attributable to the lack of response from Dr Murray and the organisation's reluctance to provide me with investigation paperwork. I request that my full pay is reinstated in the meantime to reduce any further financial detriment*".

98. The claimant's pay had been reduced to half pay due to the cumulative effect of an earlier period of absence together with the most recent absence period, which absence continued beyond the claimant's notification of the outcome on 22 December 2022**.** The claimant understood there was no contractual entitlement to be returned to full pay during continued absence.

99. On **Friday 10 February 2023,** Dr Crabb wrote to the claimant as a follow-up from the meeting on 1 February, accurately summarising the agreed-upon discussions and actions. The claimant did not dispute the terms of Dr Crabb's letter of 10 February.

100. On **Tuesday 14 February 2023** at **12.03 pm,** the claimant issued an email to Ms Guy asserting "*concern that despite the increasing number of individuals being involved resulting in the matter… becoming unnecessarily complicated, I still await a response to the following points:*

1. *A written explanation as to Dr Murray's outcome decision to my grievance.*
2. *An explanation for the delay in investigating and concluding my grievance.*
3. *Clarity around the appeal process ... or written confirmation that I have no right of appeal to an "investigation" outcome.*
4. *Confirmation as to whether the organisation will increase my salary back to full pay, given your delay in progressing matters.*

I would appreciate if the above could be addressed prior to our meeting on Monday 20 February."

101. By that date, the claimant had been offered the meeting of 20 February in response to her first request on 5 February 2023. The respondent, having offered the "*in alternative"* option listed by the claimant on 5 January, the claimant had not refused that proposed meeting.

102. On **Thursday 16 February 2023**:

1. At **9.12 am,** Ms Guy responded to the claimant's email of 14 February, apologising for the delay. Ms Guy noted there were several issues the claimant raised in her email communications and the letter from her solicitors, including concerns regarding the process and actions taken by senior managers/HR from the claimant, who first raised her allegation to the conclusion of that investigation. Ms Guy set out that under the respondent Grievance Policy, there was an ability to progress with an investigation, subject to the complexity of the case, prior to holding a Stage 1 Grievance Hearing. Ms Guy set out the process and described that "*it is crucial that we have clarity on all the issues you wish to be considered."* Ms Guy further explained that as an alternative, they could go straight to a Stage 1 Grievance Hearing without an investigation as per the Grievance Policy. *"If this is your preferred way forward, please let me know."* Ms Guy further "*if you have not yet received a response from Information Governance"* provided contact details and confirmed that she was in discussion with the respondent Senior HR as she did not have the authority to extend pay as requested and confirmed that she would update as soon as she received an update. Ms Guy, in conclusion, agreed that a sole point of contact would be beneficial, noting, however, that she was going on leave and confirmed that she would discuss this with senior managers who could support this request.

2. At **5.26 pm,** the respondent's Information Governance Department issued an email to the claimant, *"As per our telephone conversation, please see attached our response to your subject access request,",* accompanying which was a cover letter and

document being the **February 2023 provided Redacted Investigation Report.** The accompanying Investigation Report sent to the claimant had elements redacted by the Information Governance Department by the use of XXX to replace wording (the **February 2023 provided Redacted Investigation Report**). The redactions had been made in accordance with the **Information Sharing Protocol**. The role of the Information Governance Department, so far as relevant, is to redact and not to change wording. Ms Hughes-Jones subsequently referenced the cover letter in her email of 24 April 2023.

103. The respondent had acted in accordance with the **Information Sharing Protocol.**

104. From about that time to April 2023, the respondent's Information Governance Department was not fully staffed, including due to a number of long-term absences, which cumulatively impacted responses and caused delays.

105. On **Monday 20 February 2023,** Dr Crabb and Ms Guy attended a remote meeting with the claimant. However, her colleague, who was also a psychiatrist from a different Board, could not attend. Dr Crabb discussed return-to-work arrangements. The claimant stated that she was keen to hear any suggestions they may have to support her return to work. Dr Crabb and Ms Guy attempted to do some problem-solving about how they could practically help the claimant feel safe at work and support her return to the workplace.

106. Dr Crabb explained that any arrangement need not be permanent and that, to his mind, any adjustment should be subject to regular reviews. Dr Crabb suggested that it may be best for the claimant to work in a single location and described that her clinical work as a General Adult Psychiatrist in the community and her work as a Neuro-developmental Disorder Specialist could be undertaken from this location. Dr Crabb set out that neither Dr Douds nor Dr McCallum (in the context that Dr McCallum was Dr Douds' wife) would be expected to attend the proposed location as part of their duties. Regarding

On-Call work, Dr Crabb suggested that they could ensure that they were each placed on the on-call rota part, and he proposed that if patient information needed to be handed over, this could be done through a third party (such as himself).

107. Further, Dr Crabb explained that while neither Dr Douds nor Dr McCallum were based at Forth Valley Royal Hospital, both its geographical location and its being a hub meant that they could be on-site at times that were difficult to predict and could not see how they could practically ensure no contact while the claimant was undertaking inpatient clinical work. There was discussion on how it would be difficult to ensure no contact at CPD and Division meetings, which the claimant intimated she would like to attend to remain up to date, with Dr Crabb proposing they could agree to turn the camera off during meetings.

108. Dr Crabb described that he currently thought that it would be very difficult for the claimant and Dr McCallum to remain working alongside each other as Clinical Directors; the claimant mentioned that while she would not wish to have contact with Dr Douds, she was more open-minded about the possibility of contact with Dr McCallum.

109. The claimant mentioned that she felt that all the adjustments were being proposed in her direction, and she described that without knowing more about the substance of Dr Douds response to the allegation, she could not risk a potential return to work, and this meant that problem-solving a potential return was not realistic or feasible. Dr Crabb and Ms Guy acknowledged the claimant's position and Ms Guy agreed to make enquiries about whether there was any possibility for more information to be shared with the claimant, or whether the information provided by the subject access request was the maximum.

110. At this meeting, the claimant believed that Dr Crabb was trying to establish provisions for her return to work so that she would feel safe returning to work.

111. On **Tuesday 21 February 2023,** the claimant emailed the respondent Information Governance Department, confirming that she had received a

response with the **February 2023 provided Redacted Investigation Report** "*I write to confirm receipt of the subject access request. I noted that certain parts of the report had been redacted. Please can you explain what parts of the report have been redacted and why. In addition, could you confirm whether or not you sought Dr Douds' consent to sharing the redacted information with me? If not, can you outline the factors that were taken into account to demonstrate that it was "reasonable" to redact the information from version of the report that was shared with me. I would appreciate if you could send this information to me as soon as possible*".

112. The claimant did not comment on the **February 2023 provided Redacted Investigation Report's** reference to, in the last few paragraphs, what the report sets out as *"Crucially on the day in question, she had use of a Personal Alarm*. *Yet… she did not use this alarm- not did she verbally alert any colleagues that she had been assaulted*", no reference was made by the claimant subsequently, including in the ET1 nor, in the Further and Better Particulars to same.

113. On **Wednesday 22 February 2023**

1. at **2.12pm,** Ms Guy emailed the claimant, referencing Ms Guy's email of 16 February to the claimant, asking, "a*re you able to confirm how you wish to proceed."*

2. at **5.13pm,** the claimant replied to Ms Guy *"I only received the investigation report in relation to my grievance (which was completed by Jacqueline Sproule and Alison Thomson on 31 October) from Nicola O'Donnell on 16 February 2023. Given that a significant portion of the report was redacted, I sent an email to Nicola on 21 February 2023 asking for an explanation of the redaction and for an understanding of the legal basis for doing so.*

   Until I receive this clarification and understanding from Nicola, I am unable to confirm whether I would like to progress to a stage grievance hearing without any further investigation. I will confirm my position once I have received a response from Nicola.

In the meantime, I look forward to receiving a response from you on my request for my full pay to be reinstated and my main point of contact."

114. The claimant had paused this grievance process by the terms of her email of 22 February.

115. On **Friday 24 February 2023** at **3.34 pm,** Ms Guy emailed the claimant confirming that, following their meeting (Monday 20 February), she had "*made contact with Information Governance regarding your having either the full report and/or a copy of the statement made by"* Dr Douds*"/his response to the allegations. Unfortunately, they have not been able to get back to me before going off on my leave. I have made"* Dr Crabb "aware *of this too as the plan was to meet you again early next week. In relation to your pay situation, I have progressed this via Senior HR and await a response."* Ms Guy further provided an alternate HR contact to allow the claimant to contact during her period of annual leave.

116. On **Monday 27 February 2023**, Dr Crabb issued a letter to the claimant reflecting the meeting and discussions on 20 February 2023. In that letter, he described that *"I hope I explained that it is not our intention to penalise you, rather it is our intention to support you. During our discussion I was attempting to establish a framework that might help you feel safe in the workplace and which we might then take to other parties for their consideration."*

117. On **Friday 24 March 2023** at **12.09 pm,** Ms Guy emailed the respondent HR colleagues regarding the extension to sick pay and stated that, further to previous discussions (which were about increasing), she had completed the application they usually used to extend sick pay (that is, to continue rather than increase, there being no procedure to increase).

118. On **Wednesday 3 April 2023:**

    1. At **5.39 pm,** Dr Crabb responded to the claimant's email of 31 March, which described that she had not received a response from

Information Governance and set out, "*I'm sorry to hear things have not moved forward. Linda and I will chase this."*

2. At **5.43 pm,** Dr Crabb chased Information Governance, setting out that the claimant wished to appeal the Investigation Report and/ or request that the information that has been shared with her is the maximum she is entitled to "*Please could you provided us with an updated or final statement on this."*

119. On **Monday 17 April 2023**, the claimant completed an Athona Candidate Details Form, which stated, *"Please complete this document in full to register with Athona."* The claimant also completed and provided to Athona an HMRC form headed "*Send these details to your employer,"* providing in response to the employment start date, which was **29 May 2023** and signing the declaration as accurate. (cumulatively the Athona forms).

120. The claimant completed the **Athona forms** in the context that she knew, as of 22 December 2022, that her complaint had not been upheld. The claimant continued to be absent from work. Dr Crabb had confirmed on 19 December (absent return to work as Dr Crabb had sought to address as above) that the claimant would move to nil pay with the respondent on 18 June 2023 By the date of the completion of the Athona forms, the claimant did not plan to return to work with the respondent.

121. While the claimant had expressed dissatisfaction with the non-provision of the unredacted Investigation Report, she understood that Dr Douds had not accepted her allegation and the respondent had not upheld her complaint.

122. The claimant had elected to opt out of the NHS pension scheme on 2 November 2022 and did not, by the date of the completion of the Athona form on 17 April 2023, plan on re-joining the NHS pension within the expiry the 6-month period, which the claimant understood was permitted to avoid any impact or rejoin at all.

123. By the completion date of the Athona forms, the claimant had resolved to terminate her employment before 29 May 2023, slightly less than a month

before (she had been advised) the expiry of the half pay as she, by that time, did not plan to return to work with the respondent. The claimant's subsequent employment provided higher pay than the claimant's full pay with the respondent.

124. On **Tuesday 18 April 2023** at **5.57 pm,** Ms Guy received a response to her email of 24 March 2023 raising sick pay query for the claimant, which confirmed that the claimant would not exhaust half pay until 19 June 2023 and that the respondent would reconsider the application at that time. That was because the respondent did not have a policy to increase 1/2 pay to full pay in the circumstances. At this time, Ms Guy anticipated a meeting with the claimant in May and considered that it would be appropriate to communicate face to face in all the circumstances, including that she understood that the claimant was off work with stress.

125. On **Friday 21 April 2023** at **10 am,** the claimant emailed Dr Crabb and Ms Guy describing that, as previously, she was concerned that despite prompting, she had not had a response from Information Governance, describing *"this acting to the detriment of my return to work. Linda agreed at the time of our last meeting to make enquiries about whether there was any possibility of more information to be shared with me and I would welcome an update on the outcome to we may schedule our next meeting… I am very disappointed that I continue to receive no response from any anyone."*

126. On **Monday 24 April 2023**

    1. at **10.36 pm,** Dr Crabb responded to the claimant's email of 21 April: "*I can only apologise on behalf of the organisation for the delay in getting back to you on this. I did chase the head of information governance who informed"* them "*that she would be writing to you. I requested that they let me know when the letter had been sent so we could set up another meeting. I will chase this again."*

    2. at **5.26 pm, Ms Sarah Hughes-Jones,** the respondent's **Head of Information Governance,** as prompted by Dr Cabb that day,

issued its response to the claimant's 21 February questions**.** That response had been delayed due to absences and other pressures on that department. The response set out that they had provided "*a copy of the information you are entitled to under subject access process on 17 February. Within our letter to you we explained some of the information within the report had been withheld (redacted) because it either did not constitute your personal data (and is therefore not captured by your subject access right; or it formed personal data relating to another person and is exempt under schedule 2 Part 3 , section 16 of the Data Protection Act 2018 relating to the protection of the rights of others.*

I understand that you wish to seek some reassurance and clarification around the redactions made. I am sorry it has taken me so long to respond to your query. Given the nature of your enquiry I think it is helpful to reflect and explain that the rights provided to everyone under data protection legislation relate only to their own personal data. This means that while you have the right to access personal data held about you, you do not have an automatic right to access personal data about other people.

Consequently, when we receive a subject access request and the information captured includes personal data relating to multiple people, it is always necessary to balance the individual data protection rights of all involved. In doing so we follow guidance from the UK Information Commissioner and carefully consider the specific circumstances of each situation. We will generally disclose information about other people where the information is reasonably already known to the applicant, and we will withhold information where the person to whom it relates can reasonably expect it to be protected. When making these assessments, we would not normally seek the consent of individuals to disclose information in these specific circumstances. This is because there is an inherent unfair balance of power within employer/employee

relations which means that consent, in data protection terms, may not be valid.

I've reviewed the information captured by your request and the redactions which have been made. I'm satisfied that information has been provided and withheld appropriately in accordance with your subject access rights. I appreciate that this response will be frustrating to you. As we advised in our original letter, if you have any concerns around how we handled your request, you have the right to refer your concerns to the UK Information Commissioner… The ICO is responsible for promoting and enforcing data protection legislation across the UK and can be contacted via their website … you also have the right to seek judicial remedy through the courts.

I hope this is helpful in explaining our approach to your request, however if you have any questions, or if I can help in any other way, please don't hesitate to contact me again.

3. At **5.29 pm** Ms Hughes-Jones emailed Dr Crabb that day apologising and confirmed that she had emailed the claimant "*today and confirmed my assessment that she has received all the information she is entitled to under the subject aces process."*

127. While Ms Hughes-Jones' email to the claimant erroneously referenced their letter as 17 February 2023, her colleague having responded on 16 February 2023, she provided effective responses to the four questions (including by reference to the previous cover letter) previously raised while acknowledging that the response would be frustrating to the claimant. This included *why* it had been redacted, as it either did not constitute the claimant's personal data or was related to another person. It further addresses the issue of raising with Mr Douds identifying that a request (by an employer) to an employee may mean consent is not validly given.

128. Thereafter, the claimant did not respond to Ms Hughes-Jones' email of 24 April 2023, nor did the claimant make contact with Dr Crabb to resume the

discussions; and did not otherwise substantively engage with the respondent until her issue of letter dated 19 May 2023.

129. On **Tuesday 2 May 2023** at **5.11 pm,** Dr Crabb emailed his PA, Ms Kane, asking her to organise a remote meeting with Ms Guy, the claimant, and himself.

130. On **Wednesday, 3 May 2023,** Ms Kane emailed Ms Guy proposing a meeting for 15 May. However, as Ms Guy could not attend, a meeting was proposed for 17 May 2023, but the claimant did not confirm.

131. On **Wednesday 17 May 2023** at **4.15 pm,** Ms Guy emailed Ms Kane, "*I had called earlier to find out if"* meeting with the claimant "was *going ahead today. Are you able to let me know if another date is being arranged."*

132. The claimant did not reply as she was composing her resignation letter. The claimant had previously resolved by the completion date of the Athona forms, to leave employment with the respondent and had resolved to formally terminate her employment before 29 May 2023, slightly less than a month before (she had been advised) the expiry of the half pay. She had not planned to return to work with the respondent; and did not consider that there was value in meeting.

133. On **Thursday 18 May 2023,** Dr Crabb sent a letter to the claimant, copied to Ms Guy *"During our ongoing communication during your sickness absence, we agreed at our last meeting that we would meet again following a response from Information Governance to consider how you can be supported during your absence from work. I understand that you have now received further communication from Information Governance. I can now confirm that the meeting arrangements are"* Thursday 1 June at 1 pm remote "*At this meeting we will discuss:*

- *How your recovery is progressing and any treatment or developments that may impact on the timescales for your return to work*
- *Any medical advice or information that you wish to share e.g. from an Occupational Health service (OHS) self-referral.*

- *If appropriate, a further management referral to OHS in supporting your return to work.*
- *Any workplace alterations which would support your return to work.*
- *Any other relevant points"*

134. Dr Crabb identified that he had asked Ms Guy, to provide HR advice at the meeting and confirmed that the claimant might wish to be represented by a trade union colleague or accompanied by an NHS colleague. He asked that prior to the meeting; "*please.*

Confirm your availability to attend.

Advise who will accompany you if you have not already notified me of this."

Dr Crabb concluded *"If you have any questions in the meantime, please do not hesitate to contact me".*

135. On **Friday 19 May 2023,** the claimant issued her resignation letter to the respondent (addressed to Ms Guy), resigning with immediate effect (**the claimant's May 2023 Resignation Letter**), stating that "*after taking time to consider matters, I feel that I have no option to resign from my posts of Consultant and Clinical Director with immediate effect. My final date of employment ... is the date of this letter.*

.. This has been an extremely difficult decision for me to make. However, following the events of the last 11 months, my position has become untenable.

As you will be aware, I have had serious concerns with my employment since being assaulted at the workplace by a colleague, Dr Douds, on 24th June 2022. You will have copies of all my previous grievances, subject access requests, meeting notes and emails on my file which set out my concerns and the numerous breaches of contract. My decision to resign from my employment is entirely linked to my assault at the workplace, my employer's handling of all matters thereafter and the delay in dealing with matters. It is important to note that the delay continues as we approach the first anniversary of the date of the workplace assault.

For the record, my employers continued delay in dealing with matters and tardy responses to my repeated reasonable requests for information and outcomes, including my request for explanations of outcomes and for my pay to be reinstated, has been calculated and has had the effect of completely destroying the trust and confidence which must exist in the working relationship. This culminated in the dilatory Information Governance response failing to address the questions posed and the organisation's subsequent inertia following this up in terms of any safe return to work plan.

All of the above amounts to a fundamental breach of my employment contract. Despite having a duty of care towards me, I have no faith that my employer has a clear safe plan for my return to work almost one year down the line.

I feel exhausted by the process and whilst I regret that this decision is necessary, I cannot continue to participate in discussions that lead to no-where, while Dr Douds continues to work as normal. I need to prioritise my health and well-being, both of which have been significantly affected by the events.

I look forward to receiving a payment in lieu of my accrued and untaken holidays at my full rate of pay and my P45 in due course.

I regret that it has been necessary to make this decision. I have been constructively dismissed and resign with immediate effect.

136. **Tuesday 23 May 2023,** proposed by the claimant as the effective date of termination by reference to the Schedule of Loss (which was referred to within the claimant's Further and Better Particulars and provided within the Joint Bundle), was agreed to by the respondent (in their annotated response to the Schedule of Loss).

137. While the Schedule of Loss identified that the claimant commenced her new job on **Wednesday 17 May 2023,** and although no documentation was provided in relation to same, the claimant's recollection at the hearing was that she did not start the new job until **Wednesday 24 May 2023**, that is after

the resignation letter and around 5 days before the employment start date the claimant had set out in the Athona documentation on **17 April 2023.**

138. On **Monday 19 June 2023,** the claimant would have exhausted half-pay entitlement and moved to nil pay based on a continued absence from work.

Conclusions on witness evidence

139. The Tribunal has already set out it has concluded that it is not required to adjudicate on the alleged incident on Friday 24 June 2022; the following conclusions are made in that context.

140. The Tribunal heard evidence from the claimant. In relation to those matters relevant to the issues before the Tribunal, and while the claimant was seeking to honestly recall matters it was the claimant's honest but mistaken recollection that she had not decided to resign until she received Ms. Hughes-Jones's email on 24 April 2023. Further, it was the claimant's honest but mistaken recollection that she had intended to rejoin the pension scheme; the claimant believed that she could do so without penalty within 6 months of leaving the scheme but did not do so.

141. While Ms. Sproule, in cross, was criticised, including it was suggested for seeking an easy way out, the Tribunal concludes that she was credible and honest in her evidence. While she had speculated in her deliberations on a possible clinical explanation for the disparity in evidence, it was not one Ms. Sproule substantively considered. As such, she did not consider this required further exploration.

142. The Tribunal also heard evidence from Dr Douds regarding matters relevant to the issues before it. The Tribunal accepts Dr Douds' evidence as straightforward in his responses and credible in relation to the matters before the Tribunal.

143. In addition, Ms. Linda Guy, Mr Ross Cheape, and Ms. Hughes-Jones were wholly credible and straightforward in their evidence.

Submissions

144. Following the conclusion of the evidential part of the hearing, the parties provided detailed written submissions, having exchanged them in advance of doing so and provided additional comment on same.

Claimant submissions

145. In the interest of brevity, it is not considered necessary to repeat the claimant's submissions. It was comprehensive, extending to 69 paragraphs and over 22 pages.

146. However, it is considered useful to briefly summarise elements of the claimant's position in relation to the heads of claim.

147. It is argued that the respondent breached the implied term of trust and confidence in the way the respondent *responded* to the claimant's complaint about a colleague on 26 June; in particular, the respondent took too long to commence the investigation; the investigation was carried out and concluded in a way that no reasonable employer could have, the claimant was not provided with the reasons for the decision and the reasons she was provided with were false; the investigation was both procedurally and substantively unfair.

148. The respondent breached an implied term of providing redress for grievances by carrying out an investigation which suffered from procedural defects. It is argued that the reasons given to the claimant for the decision were false and unsatisfactory.

149. The claimant is said to have resigned in response to an e-mail from the Information Governance department, which amounted to the final straw e-mail and was the bottom of the latest blind alley. The claimant resigned a matter of weeks after receiving the e-mail. During this time, she was absent and did not engage with the respondent about either a grievance or return to work.

There was no positive conduct from which the Tribunal could conclude the claimant affirmed the contract in that period.

150. For the claimant, a summary of proposed findings (summary of facts) was set out.

151. The claimant complains of breach under s94 ERA 1996. It was argued that the relevant four tests (there being a breach of contract, it being sufficiently important to justify resignation, the claimant resigning in response, and not delaying too long in resigning) were met in this complaint.

152. It was argued that there are three relevant implied terms:

1. Neither party shall, without proper cause, conduct themselves in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence.

2. The employer shall reasonably and promptly afford a reasonable opportunity for their employees to obtain redress of any grievances they may have.

3. The employer will provide and monitor for its employees, so far as reasonably practicable, a working environment that is reasonably suitable for the performance of their contractual duties.

153. In relation to grievance procedures, reference was made to obiter comments of LJ Singh para 46, 47 and 48 of **Burn v Alder Hey Children's NHS Foundation Trust** [2021] EWCA Civ 1791 (**Burn**):

"… it must be recalled that fairness can have either a substantive aspect or a procedural aspect. I can well see that the common law will not imply a requirement that there should be substantive fairness in the employment context, otherwise this would cut across the fundamental principle that an employer has the power to dismiss at common law provided it acts in accordance with its contractual obligations, for example by giving the appropriate period of notice to terminate the contract. Substantive fairness, and not only procedural fairness, is required by the law of unfair dismissal ..

there may be a narrower basis of an implied terms that disciplinary processes will be conducted fairly which is not conceptually linked to the implied term of trust and confidence… I would prefer to leave this important issue of principal open for a future case… the employer's decision making process in a case such as ***Braganza v BP Shipping Ltd*** *[2015] UKSC 17) had to be reasonable in the Wednesbury sense…. In my view, if the law were to imply a term enter the contract of employment the disciplinary process must be conducted fairly that would be a short step which builds on* ***Braganza****".*

154. It was argued that Ms Sproule had made no attempt to engage with the subject matter properly, and the conclusion was the only one that resulted in no further repercussions for either individual. It is argued that Ms Sproule, in effect, identified this as the easy way out, and Ms Sproule is criticised for watching CCTV footage and analysing swipe card data, which is argued served no discernible purpose. The claimant further criticises Ms Sproule for not ingathering contemporaneous accounts, the claimant's email of 26 June 2022 and what is referenced as Dr Douds *"purportedly*" producing a timeline within 3 weeks.

155. For the claimant, Ms Sproule is criticised for her approach to the **30 August 2022 Dr Hull report** having, in cross, accepted the (hypothetical) proposition that evidence of an injury can, in principle, corroborate an assault. It is argued that distress can corroborate the claimant's account, and it *"ought to be capable in principle of corroborating the claimant's account of slap within an employer's internal investigation*" noting that Dr Crabb in his meeting on 14 July 2022, in the personal minute recorded distress.

156. For the claimant, it is argued that the personal minute taken by Dr Crabb at earlier meetings on 14 July 2022 ought to have been considered and was deliberately ignored.

157. The claimant criticises what it describes as an irrational focus on the emergency alarm and argues that, in effect, the claimant's narrative, as it is said that Dr Douds had left shortly after there would have been no need/purpose to use the emergency alarm.

158. The claimant criticises that Dr Douds' interview was some three months after the alleged incident. It is proposed that the allegation was that Dr Douds became overly animated during the discussion and delivered a slap. It is further argued that Ms Sproule advanced no reasons for having rejected the claimant's account. The respondent also argues that Dr Sproule's speculation during cross-examination as to whether a medical explanation (an episode) could offer an explanation was unreasonable in the Wednesbury sense.

159. The claimant references the **Information Sharing Protocol** which states that "*Complainants should be provided with sufficient feedback to allow them to understand why their complaint was upheld or otherwise".*

160. It is argued that the only explanation given in writing at the time was the letter, dated 16 December, issued to the claimant, which is said to have wrongly stated that there was no corroborating evidence.

161. The claimant is critical of the wording of both Recommendations, including arguing that there were corroborative sources of evidence.

162. Procedural Fairness: It is argued that the effect of procedural failing was to deprive the claimant of any meaningful right of appeal. For the claimant, it is noted that (prior to sight of the report), the claimant asked for a "*written explanation of how*" the respondent reached its decision. The claimant is critical of the provision of what is described as the "*heavily redacted report"* arguing that the redaction goes beyond what is required by legislation. It is argued the change in the wording of the recommendation section was "*perplexing*",

163. Reasons for Resignation: It is argued that the claimant's evidence was clear that during the investigation, she intended to return if the grievance could be dealt with.

164. Final Straw: Series of Acts: It is argued that the Tribunal is entitled to consider the cumulative impact of the employer's conduct across the period and referencing **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1, CA

(**Kaur**) and **Omilaju v Waltham Forrest London Borough Council (no 2)** [2004] EWCA Civ 1493 (**Omilaju**).

165. The claimant argues that Ms Hughes-Jones's email of 24 April 2023 is capable of amounting to a final straw. *"The acts complained of are the respondent's failure to properly investigate the Claimant's complaint she first made on the 26 June 2022*", and while the employer carried out an investigation it gave what the claimant argues was false and misleading reasons for its conclusions (that there was no corroborating evidence). The claimant had a right to grieve about this investigation process but could only meaningfully exercise that right *if* she was provided with the employer's reasons.

166. On delay/affirmation, the claimant refers to **Bashir v Brillo Manufacturing Co** [1979] IRLR 295 (**Bashir**).

167. The claimant argues that throughout this process, she was open to finding a way to resolve her grievance. However, this was contingent on the respondent's ability to resolve (the second) grievance.

168. Losses: The claimant argues that the only element of the compensatory loss is pension loss. Based on her evidence, the claimant left the scheme, and it is argued that had she returned to full pay, she would have opted back into the scheme. The claimant also argues that she currently accrues a more limited pension in her new role.

169. In supplementary oral comments for the claimant, it was maintained that the incident took place as alleged, and that evidence supports this.

170. The claimant's response to the Tribunal's request for additional comments was provided on 19 April 2024; it extended to 17 paragraphs. For the sake of brevity, it is not summarised here but addressed below so far as relevant.

Respondent submissions

171. The respondent submissions were detailed, extending to 28 pages with around 22 Headings. In the interests of brevity, it is not considered necessary to repeat the respondent submission.

172. It is, however, considered useful to briefly summarise elements of the respondent's position.

173. The respondent does *not* argue that the claimant affirmed the contract after the email of 24 April 2023. However, the respondent argues that the email of 24 April was not in itself a repudiatory breach of contract, there was no preceding cumulative breach of contract for a final straw to revive, and it was in any event objectively innocuous, justifiable and reasonable.

174. In relation to **Burn**—that is obiter—the point was not determined (and in any event, it refers to the disciplinary process rather than constructive dismissal).

175. In summary, it is argued that if the incident did take place (which is not accepted), it did not have a sufficiently close connection to what Dr Douds was employed to do for there to be vicarious liability. Reference was made to **Hilton Hotels v Protopapa** [1980] IRLR 316, **Dubai Aluminum Co v Salaam** [2002] UKHL 48 Lord Nicolls at 23 and **WM Morrison Supermarkets plc v various claimants** [2020] UKSC 12 para 25 and 32 and **Lister v Hesley Hall** [2001] UKHL 22 Lord Steyn at 23, **Mohamud v Wm Morrison Supermarkets plc** UKSC 11 and **Kooragoong Investments Pty Ltd v Richardson & Wrench Ltd** [1982] AC 462 at 473.

176. The respondents note that the pled position (Further and Better Particulars paragraph 9) was that "*The continued presence of the Claimant's assailant at Forth Valley Hospital made this place unsuitable. The claimant could not safely return while Dr Douds remained there".* It is argued that at no point was the claimant expected to be in contact with Dr Douds; arrangements had been put in place; the claimant was satisfied with those but commenced sick leave before they were implemented. There was no breach of duty to provide a suitable working environment during July 2022. In any event, it is argued that Dr Douds did not strike the claimant.

177. Addressing Grievances- Braganza - Wednesbury Reasonableness: For the respondent, it is observed that while the pleadings identify specific contractual duties, this duty is not pled, it is argued the respondent did not have notice of same and refers to **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**)

178. So far as the claimant relies upon the pled duty to uphold trust and confidence, there was no breach of the requirement to have cogent evidence to support a conclusion. The outcome was not one, *no* reasonable decision-maker could have been made and refers to Lord Hodge (para 61) in **Braganza.**

179. For the respondent, the duty also applied to Dr Douds, and to the extent there was any breach of that duty, it did not amount to a fundamental breach of contract in terms of **Malik v BCCI SA** [1997] 606 (**Malik**),

180. The respondent argued there is no reliable evidence that the claimant resigned in response to such an asserted breach of duty.

181. Addressing grievances – the investigation: The respondent set out that the test is objective (thus not how the claimant felt), the Tribunal is required to look at what the employer did, the investigation was carried out in accordance with the policy, and there was no breach of an implied duty to address grievances. This was not dissuading an employee from a grievance (it was not fobbing off).

182. For the respondent, it is argued that Ms Sproule took relevant matters into account. While the investigation took many months, this is against the background of procedural safeguards and noted that it had not been intended initially to interview Dr Cooney. However, he potentially provided corroboration, and this (as he had moved to Ireland) slowed matters down. While Ms Sproule spent 2 days reviewing CCTV, carried out 2 site visits, and reviewed swipe card data this cannot be criticised. The respondent argued that there was no fundamental breach of duty nor breach of any implied duty to address grievances.

183. Addressing grievance- redacted report: It is not accepted that the redacted report was (as set out in para 8 of the Further Particulars) "*virtually indecipherable"* nor that the reasons were *"almost entirely obscured"*. The respondent argues that redactions were compliant with the Information Sharing Protocol which limited the extent of the implied duty in this case. For the respondent, it is argued that the claimant wanted to understand exactly what Dr Douds had said, which goes well beyond the scope of any implied duty.

184. The respondent conceded that there was a delay in getting the answer on sick pay. However, that arose because Ms Guy considered, in the context that the claimant was off with stress, that this answer would be better delivered at the subsequent meeting, although (in fact) no meeting took place in May. The context was that the claimant had requested that her full pay be reinstated; there was no policy nor contractual expectation on the same.

185. Remedy: The figure of £394.04 for weekly pension loss was agreed upon. The wage differential between the claimant's full pay with the respondent and her current pay was also agreed upon, with the claimant receiving a higher sum.

186. Basic Award: This was potentially awardable – the claimant figure is agreed.

187. Compensatory award: The claimant started on higher pay, so there is no wage loss. The claimant had withdrawn from the pension scheme in November, so the pension loss was not "*in consequence of dismissal."*

188. The respondent's response to the Tribunal's request for additional comments was provided on 22 April 2024; for the sake of brevity, they are not summarised here but are addressed below so far as relevant.

Constructive Dismissal

Relevant Law

189. Section 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c)

ERA 1996 provides that an employee is to be regarded as dismissed if "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

190. The leading case relating to constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221 (**Western Excavating**), in which it was held that in order to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach; the final act must add something to the breach even if relatively insignificant. Further, the employer must act reasonably in the treatment of their employees; if the employer conducts its affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, they are justified in leaving.

191. The Tribunal noted that in a complaint of constructive unfair dismissal, Langstaff P in **Wright v North Ayrshire Council** [2014] ICR 77 (**Wright**) at paragraph 2 set out that in considering such a claim "*that involves a tribunal looking to see whether the principles in* ***Western Excavating (ECC) v Sharp*** *[1978] IRLR 27 can be applied" and sets out 4 issues to be determined:*

"that there has been a breach of contract by the employer";

"that the breach is fundamental or is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract";

"that the employee has resigned in response to the breach, and that"

"before doing so she has not acted so as to affirm the contract notwithstanding the breach"

192. As set out above, the resignation must be in response to the breach, and as described by the Court of Appeal in **Omilaju v Waltham Forrest London**

Borough Council (no 2) [2004] EWCA Civ 1493 (**Omilaju**) the *"final straw"* in a series of actions by an employer which cumulatively resulted in a breach of the implied term of trust and confidence justifying repudiation of the contract by an employee need not be blameworthy or unreasonable conduct; however, the test of whether an act was capable of contributing to a breach of the term was objective and it would be an *unusual* case in which conduct which was perfectly reasonable and justifiable satisfied the requirement.

193. Further, as Langstaff P confirmed in **Wright** para 10, the correct position with regard to causation was set out in the judgment of Keane LJ in **Meikle v Nottinghamshire County** [2004] IRLR 703 at paragraph 33:

'…the repudiatory breach by the employer need not be the sole cause of the employee's resignation…there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job."

194. Langstaff P in Wright at para 15 continues "*that the crucial question is whether the repudiatory breach played a part in the dismissal. …It follows that once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon.".*

Repudiatory Breach

195. Not every breach of contract will justify an employee resigning their employment without notice. The breach must be sufficiently fundamental that it goes to the heart of the continued employment relationship. Whether or not an employer's actions or omissions amount to a repudiatory breach of a term of the contract is an objective test (**Bournemouth University Higher Education v Buckland** [2010] IRLR 445 (**Buckland),** considering the question it requires to answer.

196. A breach of the implied term of trust and confidence is always repudiatory. The '*duty of trust and confidence'* was defined in the well-known decision of **Malik** as being an obligation that 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."*

197. When looking at the manner of an employer's conduct, "*the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*" (**Woods v WM Car Services (Peterborough) Ltd** [1981] ICR 666, EAT (**Woods**)

198. In **Kaur**, the Court of Appeal noted that the breach must not have been waived or affirmed prior to resignation and offered guidance in cases where an employee alleges that the implied term has been breached because of the cumulative effect of ongoing conduct.

    a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

    b. Has he or she affirmed the contract since that act?

    c. If not, was that act (or omission) by itself a repudiatory breach of contract?

    d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign.

    e. Did the employee resign in response (or partly in response) to that breach.

199. The claimant referenced **Bashir** in relation to affirmation. **Leaney v Loughborough University** 2023 EAT 155 is accepted to more recently

restate that the mere passage of time prior to resignation will not of itself give rise to affirmation. Instead, the question is whether there was conduct or other circumstances occurring during that period from which affirmation could be inferred. The claimant observed in that the relevant comment in **Brooks v Leisure Employment Services Ltd 2023** EAT 137 (**Brooks**) is arguably obiter with the point more closely related to **Kaur**.

200. The employee must resign, at least in part, because of the professed breach **Nottinghamshire County Council v Meikle** [2004] EWCA Civ 859 (**Meikle**).

201. Where an employee relies on a course of conduct, the Tribunal must look at the totality of the evidence and consider whether, when taken as a whole, the employer's conduct as amounted to a breach of the contract **Lewis v Motorworld Garages Limited** [1985] IRLR 465 (**Lewis**).

Relevant case law re the 3-claimant asserted implied terms

202. The first, being that neither party shall, without proper cause, conduct themselves in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence, see **Malik**, although Lord Steyn in Malik describes the term applied to conduct calculated *and likely* to have the requisite effect, the EAT in **Baldwin v Brighton and Hove City Council** [2007] ICR 680 (**Baldwin**) confirmed it is *calculated **or** likely*.

203. The second being that the employer shall reasonably and promptly afford a reasonable opportunity for their employees to obtain redress of any grievances they may have (which the claimant describes as a duty to address grievances), is agreed to derive from **WA Goold (Pearmak) Ltd v McConnell** [1995] IRLR 516 (**McConnell**), which the respondent referenced- in which Mr McConnell and Mr Richmond suffered a substantial reduction in their take-home pay when their employer, WA Goold encountered financial difficulties in 1992. Both employees were dissatisfied and sought to pursue their grievance with the company chairman, but their immediate manager obstructed them. They eventually resigned and claimed constructive unfair dismissal. Their terms of employment contained no reference to any grievance procedure. The employees' claims succeeded before the Tribunal,

which held that the employer's failure to provide and implement any grievance procedure at all amounted to a breach of contract that was sufficiently serious to justify the employees walking out. The employer appealed. It was held, dismissing the appeal, that the Tribunal was entitled to conclude that a contract of employment contained an implied term that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of the grievance they might have.

204. The third duty, the employer will provide and monitor for its employees, so far as reasonably practicable, a working environment that is reasonably suitable for the performance of their contractual duties, is agreed to derive from **Waltons & Morse v Dorrington** [1997] IRLR 488 (**Dorrington)**. In Dorrington, the employer acted in breach of the term by requiring a non-smoking secretary to work in a smoke-filled environment (before the relevant ban on smoking in 2007), having made numerous representations about the effect the firm's then-smoking policy the Tribunal had found that the employer's refusal to take what was found to be a reasonably practicable step of telling smokers they would not be permitted to smoke within an area breached an implied term that the employer was to provide and maintain for employees, so far as reasonably practicable, a working environment which is reasonably suitable for the performance by them of their contractual duties.

General comments

205. The respondent submissions refer to **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**) in which Langstaff J, commented at para 18 parties are expected to set out the essence of their respective cases in the ET1 (including written Further Particulars), and "*requires each party to know in essence what the other is saying, so they can properly meet it*".

206. In **Burn** (referred to in the claimant submissions in the context of the second implied duty)**,** the Court of Appeal was considering fairness in disciplinary processes where a consultant was subject to investigation following the death of a child patient. It was identified that such an implied duty exists, arising from the nature of the process and independently of any implied duty of trust and

confidence. In **Burn** internal investigations into staff conduct carried out by NHS Trusts under the Maintaining High Professional Standards regime, the obligation to give the employee "*the opportunity to see any correspondence relating to the case"* however did not impose a general disclosure obligation in relation to documents relating to the investigation or its subject matter. In its natural meaning, the word "*correspondenc*e" referred only to communications sent by one person to another and could not be construed as referring to all documents of any character.

207. The Tribunal notes that in **Braganza** (identified in the claimant quotation from **Burn** and referred to by the respondent in its submission), the issue arose in the context the employer had formed the opinion that the most likely explanation for the disappearance of a Chief Engineer from an oil tanker in the mid-Atlantic was suicide, which contractually meant his widow did not receive contractual death benefits. The question on Wednesbury was whether the correct matters were taken into account when making the decision, and even if the right matters were taken into account, was the result so unreasonable that no reasonable decision-maker could have made it. The respondent references Lord Hodge (at para 61) who describes:

"I am inclined to think that it is consistent with the duty of trust and confidence that where, as here, the evidence is exiguous, the employer should ask itself whether there was evidence of sufficient quality to justify the finding, and when there is no cogent evidence, it should refrain from making a positive finding.... Unlike a judge in civil disputes or in family justice cases, an employer can sit on the fence..."

208. While the Tribunal had noted the Court of Appeal comments in **Hussain v Elonex plc** 1999 IRLR 420, CA, (**Hussain**) and Elias J obiter comment in **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 (**Roldan**), having regard to parties' helpful supplementary submissions, the Tribunal has disregarded both **Hussain** and **Roldan** as not relevant, both were concerned with the application of the Burchell test.

209. In relation to remedy, the level of any Basic Award is not in dispute. In relation to any Compensatory Award **s123**(1) of ERA 1996 provides" *... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

Discussion and Decision

What is the most recent act or omission that the claimant says caused or triggered the resignation?

210. While the claimant describes in her May 2023 Resignation Letter that matters culminated in *"the dilatory Information Governance response*", the claimant was incorrect in suggesting that Ms Hughes-Jones's email of 24 April 2023 failed to address the questions posed, it addressed the questions and was, so far as relevant, consistent with the Information Sharing Protocol and the Investigator Guide. It was not dismissive, nor can it reasonably be regarded as insulting.

211. Further, the claimant in her May 2023 Resignation letter giving detail of what is said to have been calculated and amounting to breach of trust and confidence describes "*This* ***culminated in the dilatory Information Governance response*** *failing to address the questions posed* ***and the organisation's subsequent inertia*** *following this up in terms of any safe return to work plan" (emphasis added).* There was no *subsequent* inertia following the Information Governance response, and there had been no material inertia, Dr Crabb proposed the minimise contact arrangement on 14 July. In any event, the claimant had by her email of 22 February paused discussion with Dr Crabb and Ms Guy following their meeting on 20 February 2023, at which meeting the claimant believed Dr Crabb was trying to establish provisions for her return to work so she would feel safe returning to work; the claimant had not renewed those discussions.

212. While the claimant's letter of resignation set out what she described as continued delay and tardy responses, describing that they had been

calculated, the claimant did not describe any suspicion that she considered the Investigation Report false or unfounded.

213. The claimant's May 2023 Resignation Letter, while referencing it being almost 12 months after the alleged assault, was also more than 10 months *after* Dr Crabb proposed the minimise contact arrangement on 14 July; *after* the claimant had referenced the alleged incident as a he said/she said situation, on 22 August; *after* the claimant was notified of the outcome on 22 December; *after* Dr Crabb set out a return-to-work plan on 1 February 2022; *after* the Ms Hughes Jones's response on 24 April; and *before* the claimant was due to move to nil pay (as Dr Crabb had confirmed on 19 December 2022).

214. The Tribunal does not agree, on the facts, that Ms Hughes-Jones's email of 24 April 2023 amounted to a final straw. In particular, the claimant had resolved by 17 April (the date of completion of the Athona forms) to resign and take up alternative employment in or around May 2023 and before the expiry of half pay.

Did the alleged breach or breaches of contract relied upon, viewed separately or in isolation, or cumulatively, amount to a fundamental breach of the contract of employment, and/or did the respondent breach the implied term of mutual trust and confidence, i.e., did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?

215. The respondent accepts that they had notice of the three implied duties set out in submissions by reference to Further Particulars set out as Further Particularisation on behalf of the Claimant and provided on 27 November 2023, although, to the extent that the claimant argues for a further implied term, they did not have notice of same by reference to **Chandhok.**

216. In respect that the claimant argues that the respondent breached the implied term of trust and confidence in the way the respondent *responded* to the claimant's complaint about a colleague on 26 June, the Tribunal concludes that it is not required to adjudicate upon the alleged events on 24 June.

217. The respondent offered support, including via Dr. Crabb, and operated according to the **Investigator Guide,** including appointing Ms. Sproule.

218. While the claimant, in submission, in relation to procedural fairness in the context of the implied duty to reasonably and promptly afford a reasonable opportunity to obtain redress of any grievance, criticises **delay,** including Dr Douds being interviewed some three months after what is said to be the incident, the Tribunal concludes that period reflected the respondent process, including interviewing the claimant, allowing her a period to review and adjust notes, and then operating to the same procedure for Dr Douds. The claimant and her representatives had not proposed a specific time frame during the process. While there were some practical delays in achieving a conclusion, those delays, which arose in part from operating to the **Investigator Guide,** providing notice of meetings for statements and affording a period thereafter to individuals, including the claimant, for review and practical delays in arranging for a statement from Dr Cooney, these did not amount to breach of this implied duty and did not amount to conduct which was calculated or likely to seriously damage the relation of trust and confidence between employer and employee, either individually or cumulatively.

219. While it is argued for the respondent that **personal minutes taken by Dr Crabb,** of a meeting at which the claimant was unrepresented on 14 July (and which had not been previously raised by the claimant) and which unlike the notes of her meeting with Ms Sproule on 22 August it is not suggested had been provided for review by the claimant, ought to have been considered and were deliberately ignored. The Tribunal does not agree that there was a breach of implied terms, absent proactive statement by the claimant and or her representatives (or others) identifying same as having utility, on Ms Sproule to seek out any narrative taken by a person, such as personal minute taken by Dr Crabb, which had not been reviewed by the claimant, which may narrate what the claimant (subsequently) described to have occurred on 24 June or otherwise narrates its authors view of how the claimant may have presented or appeared. The claimant, in attending the meeting on 22 August 22 August, did not propose that any notes (which she had not seen) of the 14

July meeting ought to be reviewed. Viewed objectively it cannot be said there was no reasonable and proper cause for Ms Sproule's approach, it did not amount to a breach of the implied duty to address grievances, and the Tribunal concludes did not amount to conduct which was calculated or likely to seriously damage the relation of trust and confidence between employer and employee, either individually or cumulatively.

220. While the claimant at the outset of the meeting on 22 August referenced her email offering the comment that the date identified in same was a mistake, Ms Sproule had not been asked to consider either **Sunday 26 June email**. It cannot be said there was no reasonable and proper cause for Ms Sproule's approach, it did not amount to a breach of the implied duty to address grievances, and the Tribunal concludes did not amount to conduct which was calculated or likely to seriously damage the relation of trust and confidence between employer and employee, either individually or cumulatively.

221. By contrast to the Sunday 26 June email and the personal minutes taken by Dr Crabb on 14 July, Ms Sproule *had* been advised in the meeting of 22 August 2022 that the claimant would wish Dr Hull to provide a statement and Ms Sproule took the **30 August Dr Hull Report** into consideration**.** The Tribunal concludes that Ms Sproule, in her review, was reasonably entitled to conclude that the 30 August Dr Hull Report, secured by the claimant representatives, essentially provided a view based on what the claimant reported; it did not suggest that any alternate causes or explanation for the offered diagnosis had been considered or explored. Viewed objectively it cannot be said there was no reasonable and proper cause for Ms Sproule's conclusion, which the Tribunal concludes did not amount to conduct which was calculated or likely to seriously damage the relation of trust and confidence between employer and employee, either individually or cumulatively.

222. While the respondent criticises what it describes as an irrational focus on **personal alarm**, the Tribunal notes that the non-use of the personal alarm is expressly set out in the disclosed **February 2023 provided Redacted Investigation Report** but that the claimant did not when Ms Sproule went

through the redacted report at the meeting on 16 January, nor when she received the **February 2023 provided Redacted Investigation Report**, raise this as being either wrong or materially irrelevant. Viewed objectively, including having regard to the claimant's response to Ms Sproule in the meeting on 22 August, Ms Sproule, in all the circumstances, had been reasonably entitled to take into account the non-use of what the claimant had confirmed was the available personal alarm. It cannot be said there was no reasonable and proper cause for Ms Sproule's conclusion, it did not amount to a breach of the implied duty to address grievances and the Tribunal concludes was not conduct which was calculated or likely to seriously damage the relation of trust and confidence between employer and employee, either individually or cumulatively.

223. While the claimant argues that Ms Sproule's speculation identified during cross-examination as to whether a medical explanation (an episode) could offer an explanation was unreasonable in the Wednesbury sense, Ms Sproule did not conclude that there was such a medical explanation merely, this was a thought that had occurred in the course of the investigation, however, it was not a conclusion and was not something Ms Sproule required to investigate. Viewed objectively, such an occurrence of such a passing thought which did not proceed to a substantive query did not amount to a breach of an implied duty and conduct which was calculated or likely to seriously damage the relation of trust and confidence between employer and employee, either individually or cumulatively, including having regard to the claimant's description that this was a he said/ she said scenario.

224. Further, looking at the circumstances objectively the Tribunal concludes that Ms Sproule was reasonably entitled to conclude that reviewing both the Swipe card and CCTV information assisted her investigation. It cannot be said there was no reasonable and proper cause for Ms Sproule to do so, and indeed, as identified in the **February 2023 provided Redacted Investigation Report**, it was from the Swipe card review that Ms Sproule drew information on when the claimant left on the day.

225. While the claimant argues that Ms Sproule advanced no reasons for rejecting the claimant's account, the Tribunal does not accept that the **February 2023 provided Redacted Investigation Report**, offers no reasons, including by reference to the Summary of Facts Established and the Conclusion.

226. While the claimant references the **Information Sharing Protocol**, *"Complainants should be provided with sufficient feedback to allow them to understand why their complaint was upheld or otherwise*," it provides specific limitations at the access Table which the respondent adhered to. Further, the claimant did not ask questions when the Investigation Report was reviewed.

227. While Ms Sproule was criticised, having, in cross, accepted the (hypothetical logical) proposition that evidence of an injury, such as a black eye, could in principle corroborate an assault, the expressions and appearance of distress (as a manifestation of injury) some period after the alleged incident, were not confined to the claimant, as set out in the Investigation report Ms Sproule noted that in the context of the interview responding to the allegation "*and similar to Dr McCulloch, Dr Douds was also emotional through the interview and tearful on one occasion"* and "*He was very upset"* by what were general character criticisms suggested by the claimant in her interview. In all the circumstances, viewed objectively Ms Sproule had not acted without reasonable and proper cause to conclude that manifestation of distress by the claimant some period after the alleged incident did not amount to corroboration of the claimant's narrated description. In doing so, this did not amount to a breach of implied duty, this was not conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence either individually or cumulatively.

228. The Tribunal concludes looking at the circumstances objectively, Ms Sproule had not acted without reasonable and proper cause, to conclude her position as set out in the **February 2023 provided Redacted Investigation Report** in all the circumstances, including having regard to the claimant's fair description that this was a "*he said/she said*" scenario. That outcome was communicated to the claimant on 22 December 2022.

229. The Tribunal concludes looking at all the circumstances objectively, Ms Sproule, as the person appointed to conduct the investigation, was reasonably entitled to conclude that the allegation was not made out in all the circumstances and that they were unable to corroborate the allegation, which had been first made to the respondent on the evening of Sunday 26 June. In all the circumstances viewed objectively, it cannot be said there was no reasonable and proper cause for this conclusion, and which conclusion the Tribunal concludes did not amount to conduct which was calculated or likely to seriously damage the relation of trust and confidence between employer and employee, either individually or cumulatively.

230. While the claimant argues that the only explanation given in writing at the time was the letter, in so far as the letter from Dr Murray dated 16 December 2022 was issued to the claimant, above that was the only written explanation, the Information Sharing Protocol does not require that a written explanation be provided.

231. The Tribunal concludes, having considered Ms Sproule's evidence in respect of same, including in cross, and submissions on same, that while the claimant has understandable concerns that the language deployed in **7. Recommendation** section in the iteration of the Investigation Report provided to the Tribunal in un-redacted form is different (although broadly has the same effect) from that shown to her prior to her resignation, that the narrative set out as **7. Recommendation** within the iteration provided to her in the **February 2023 provided Redacted Investigation Report,** accurately sets out Ms Sproule's conclusions at the end of her investigation**.**

232. So far as it is relevant to the issues before, while the differently worded **7. Recommendation** was not provided to the claimant prior to the issue of her letter of resignation, the claimant was not provided with false and misleading information for the respondent's conclusion. The **February 2023 provided Redacted Investigation Report,** reflected Ms Sproule's conclusion that there was no corroborating evidence. While for the claimant, it is argued that both the claimant's (subsequent) distress and the **30 August Dr Hull Report** are *potentially* corroborative of the allegation, the Tribunal concludes that the

February 2023 provided Redacted Investigation Report in expressly setting out that at **6. Conclusion** that distress (or Acute stress) cannot corroborate**,** is simply a contextual reference to the preceding paragraphs and accurately summarised Ms Sproule view, for which she had reasonable and proper cause to reach, that there was no corroborative evidence. As the claimant accepted, the respondent was facing a straightforward *he/she* said scenario. Ms Sproule, assisted by Ms Guy, carried out a genuine investigation and reasonably concluded that they did not uphold the claimant's allegation. Viewed objectively, Ms Sproule was reasonably entitled to conclude, as set out in the **February 2023 provided Redacted Investigation Report**, that there was no corroborating evidence. That was a conclusion which was reasonably open to the investigation, including having regard to the claimant not notifying anyone within the respondent until the **Sunday 26 June email.** In all the circumstances, it cannot be said there was no reasonable and proper cause for this conclusion, and which the Tribunal concludes did not amount to conduct which was calculated or likely to seriously damage the relation of trust and confidence between employer and employee, either individually or cumulatively.

233. The respondent had not committed a repudiatory breach in executing, issuing, or relying upon the **February 2023 provided Redacted Investigation Report**.

234. The claimant understood that her allegation had not been accepted. That could only arise on the basis that Dr Douds did not accept the allegation.

235. In her 5 January 2023 email, the claimant confirmed that she had been aware on 22 December 2022 that her complaint regarding the alleged incident she had reported on 26 June 2022, had not been upheld, and her subsequent requests to the respondent in this email were received by them in that context.

236. While for the claimant, it is noted that on 5 January 2023, she asked for a "*written explanation of how*" the respondent reached its decision, the claimant did not ask *why.* This was because the claimant knew her version had not been accepted; in any event, there was no obligation under the respondent

process to set out the mechanism. In the claimant's email**,** she described that alternative to a written explanation that she was willing to attend a remote meeting and was expressed in the context that the claimant also criticising what she described as delay. Further, this was prior to sight of the **February 2023 provided Redacted Investigation Report**.

237. While the claimant is critical of the provision of what is described as the "*heavily redacted report,"* in relation to **February 2023 provided Redacted Investigation Report** arguing that the redaction goes beyond what is required by legislation, no specification or notice was given of that challenge. The Tribunal sympathises with the claimant on what is described as the "*perplexing"* difference in the wording of the 7. Recommendation. The Tribunal, however, concludes that by 16 February 2023, the claimant had received sufficient feedback, by the provision of the **February 2023 provided Redacted Investigation Report**, within the terms of the **Information Sharing Protocol,** to understand why her complaint had not been upheld. That was that the alleged incident, which the claimant had identified in her meeting with Ms Sproule on 22 August 2022 as a he said/she said incident**,** had not been upheld. Viewed objectively, in all the circumstances it cannot be said that the respondent had operated without reasonable and proper cause in the provision of the redacted report and non-provision of Dr Douds' witness statement, including having regard to its assessment of processing of data obligations. Viewed objectively, the Tribunal does not accept that the respondent had, without reasonable and proper cause, failed to provide either the Investigation Report without redaction, or Dr Doud's statement. Further the Tribunal concludes this did not amount to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant either individually or cumulatively.

238. For the claimant, in relation to procedural fairness in the context of the implied duty to reasonably and promptly afford a reasonable opportunity to obtain redress of any grievance, it is argued that the effect of what is argued to be procedural failing was to deprive the claimant of any meaningful right of appeal. The Tribunal notes that the Investigation Guide does not identify that

it offers any "*appeal process".* However, the claimant, in her email of 5 January 2023, does not set out that she is unable to appeal, rather she asks for clarity around the process for appealing and when any appeal should be submitted. Further, Dr Crabb, on 9 January 2023, described that they had been informed that the claimant submitted a grievance via her lawyers and described that the respondent was in the process of identifying a Commissioning Manager and an Investigating Manager. Subsequently, on 22 February, the claimant paused the ongoing grievance process and did not seek to restart same. Viewed objectively, the Tribunal does not accept that the asserted procedural failing amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant, either individually or cumulatively.

239. While mere delay is not sufficient, the claimant had paused her grievance process by the terms of her email of 22 February. Further, the Tribunal concludes that the claimant had not intended to return to work, as opposed to stay on leave, by 17 April 2023 when the claimant completed the Athona forms, including setting out an employment start date of 29 May 2023**.** That start date was not a coincidence, it reflected the claimant's intention to cease employment before the expiry of half pay and take up the new employment arrangement.

240. In relation to the third implied duty, to provide and monitor for its employees, so far as reasonably practicable, a working environment which is reasonably suitable for the performance by them of their contractual duties, Dr Crabb discussed return-to-work arrangements both in the course of the investigation and following the outcome. The claimant stated that she was keen to hear any suggestions that they may have which would support her return to work. Dr Crabb and Ms Guy attempted to do some problem-solving about how they could practically help the claimant feel safe at work and support her return to the workplace. Dr Crabb explained that any arrangement need not be permanent and that, any adjustment should be subject to regular reviews. Viewed objectively the Tribunal does not accept that there was a breach of the third implied term. The respondent, prior to concluding its investigation,

had not formed a concluded view on the allegation against the fellow employee and had offered the minimise contact arrangement, which the claimant was broadly in agreement with, although she was absent before it was implemented. After concluding its investigation, the respondent, despite not upholding the allegation continued to engage with the claimant including on 1 February when the claimant stated she did not have any suggestions as to how she could be supported to return to work and Dr Crabb attempted to work through possible scenarios that would mean that the claimant would have no, or as little as possible contact with Dr Douds. Viewed objectively the Tribunal does not accept that the respondent acted without reasonable and proper cause and does not accept that this conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant, either individually or cumulatively.

241. Had the claimant not resigned, her pay would have been reduced to nil. In all circumstances, the reduction was not a breach of contract; the continued reduction in pay reflected the respondent's notification to the claimant on 22 December 2022 that her complaint had not been upheld and the claimant's continued absence from work thereafter after meeting with Dr Crabb in February 2023. As the claimant was aware there was no contractual entitlement to return to full pay absent a return to work. The claimant's subsequent employment provided higher pay than the claimant's full pay with the respondent; there was, as agreed, a pension differential.

242. In summary, the alleged breach or breaches of implied terms relied upon, viewed separately or in isolation, or cumulatively, did not amount to a fundamental breach (or breaches) of the contract of employment, nor did the respondent breach the implied term of mutual trust and confidence, the implied duty to address grievances or the implied duty to provide a suitable working environment.

243. Having regard to the totality of the evidence, the respondent did not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant.

244. ***The next question of whether the claimant "affirmed" the employment contract before resigning (that is acted in a manner that indicates the claimant remains bound by the terms of the contract) does not in all the circumstances arise.***

If the claimant had not affirmed did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation?

245. The claimant's resignation was not in response to Ms Hughes Jones' email of 24 April 2023 or alleged breaches of the implied terms. The claimant resolved to resign and take up alternative employment (at higher pay) employment before the expiry of the half pay having paused her grievance.

246. The claimant did not resign, either because of or in part, because of the asserted breaches implied terms

247. The dismissal was not unfair due to **s95** of ERA1996.

248. The dismissal was not unfair.

Remedies

249. In the circumstances, the Tribunal is not required to consider the issue of remedy.

250. Remedy (beyond) basic award is agreed to be limited to pension loss. On the evidence before the Tribunal, it is not persuaded that the claimant's decision to withdraw from the respondent pension scheme arose from any asserted breach on the part of the respondent. Loss arising was not a *consequence* of the dismissal. In all the circumstances had the complaints been upheld, the Tribunal would not have considered it just and equitable for any compensatory award sum to be awarded in relation to pension loss.

Conclusions

251. The claimant's complaint of constructive unfair dismissal does not succeed and is dismissed.

Employment Judge: R McPherson
Date of Judgment: 15 May 2024
Date sent to parties 21 May 2024