EMPLOYMENT TRIBUNALS

Claimant: MR NIZAM MAMODE

Respondent: GUY'S & ST THOMAS' NHS FOUNDATION TRUST

Heard at: **London South Employment Tribunal**

On: **22 – 26 April 2024**

Before: **Employment Judge Murdin**

Representation

Claimant: Mr Patel (Counsel)

Respondent: Mr Arnold (Counsel).

JUDGMENT

1. In relation to the complaint, the conclusion of the Tribunal is as follows:

    (i) The complaint of constructive unfair dismissal is well-founded and succeeds.

2. Page numbers cited below refer to the page numbers within the agreed and paginated trial bundle.

REASONS

The Complaint

3. By way of an ET1 dated 15th June 2002 at page 20, the Claimant brings a complaint for constructive unfair dismissal, relying on a breach of the implied term of trust and confidence. Further details of the Claim are set out in the Grounds of the Complaint at page 32.

4. The Respondent denies the Claim through an ET3 at page 42, with further details of that denial contained within the Grounds of Resistance dated 5th August 2022 beginning at page 48.

The Background

5. The Claimant was born on 1st June 1962, and was employed by the Respondent as a Consultant Transplant Surgeon from the 11th March 2002 to the 24th March 2022. From 1 June 2014, the Claimant was the Clinical Lead within the Respondent's Transplant Unit, encompassing both the adult and paediatric service.

6. The Respondent is an NHS Foundation Trust. It manages five hospitals in London, namely Guy's Hospital, St Thomas' Hospital, Royal Brompton Hospital, Harefield Hospital and Evelina London Children's Hospital. The Claimant was one of eleven transplant surgeons employed by the Respondent, all of whom carried out adult transplants and five of whom also carried out paediatric transplants. As one of those five, prior to May 2020, the Claimant carried out both adult and paediatric transplant surgeries, the latter being carried out at the Evelina London Children's Hospital (ECH).

7. From 2002 to May 2020, the Claimant also worked on an honorary basis with the Great Ormond Street Hospital (GOSH) providing transplant

services to GOSH. He enjoyed an international reputation for paediatric transplantation and had received referrals from across the UK and beyond.

8. On 1 November 2019, the Claimant raised safety concerns with the Medical Director, Dr Sanjiv Sharma, that led to a review of GOSH's Renal Transplant Service which was carried out between January and March 2020. This included a consultant (Dr Tullus) who had put a patient at risk.

9. Following that review, the Claimant's honorary contract was terminated on 22 May 2020 with immediate effect and he was referred to the GMC. It was said that the recent review of the service had found matters of concern relating to the Claimant's conduct. GOSH did not consider that he was an employee and therefore did not carry out any disciplinary proceedings, and detailed evidence was never presented to the Claimant regarding the allegations.

10. In May 2020, and as a result of that process, the Respondent decided to carry out an investigation, and to exclude the Claimant from ECH until the process was concluded. The investigation concluded that there was evidence of widespread bullying and intimidation by the Claimant.

11. The Claimant alleges that these allegations arose as a result of collusion, and stemmed from the review which had been carried out because of the concerns that he had raised. He cites as an example, an allegation of anti-Muslim racism that was made against him. He notes that Mr Drage and Mr Callaghan who are of white ethnicity, both accused him of anti-Muslim sentiments, yet he is from an ethnic minority with a Muslim background and went to a Mosque as a child.

12. Other allegations consisted of threatening behaviour towards other consultants and surgeons, derogatory personal comments and inappropriate criticisms to individuals in the team, not paying attention in meetings and checking social media, and displaying contempt to individuals in the team. All of these allegations remain denied.

13. On 12th June 2020, the Claimant received a letter from Matthew Bultitude (Clinical Director) that he would be restricted from practicing at ECH with immediate effect, and for a period of 14 days in the first instance. He was also informed that he should step down from his role as Clinical Lead with immediate effect, and for the foreseeable future pending the outcome of the investigation. The Claimant alleges that he was never given a reason for these determinations, and he continued working in Adult Services as a Consultant Transplant Surgeon.

14. On 16th June 2020, the Claimant was informed by Professor Frances Flinter that an investigation into the allegations against him was being conducted and the process would conclude by 17th July 2020.

15. On 26th June 2020, he was informed by Sarah Clarke (Director of the Cancer Services Strategic Business Unit) that his partial restriction from practising at the ECH had been extended for a further 14 days until 10th July 2020 as the investigation was ongoing.

16. On 2nd July 2020, an informal investigation meeting took place with Professor Frances Flinter, and on 10th July 2020, the Claimant was informed by Sarah Clarke that the investigation was still ongoing and he remained restricted from practising for another 4 weeks. The Respondent advised that they would review the situation on 7th August 2020.

17. On 16th July 2020, the investigation report concluded that there was evidence of the Claimant behaving inappropriately towards colleagues including raising his voice, swearing, displaying threatening, intimidating and upsetting behaviour, undermining and making derogatory comments about colleagues. The investigatory report also found that the Claimant's behaviours were longstanding, unpredictable and identified no mitigating factors for the Claimant's behaviour.

18. On 7th August 2020, the Claimant was informed by Sarah Clarke that the current restrictions to his practice had been further extended for a further 4 weeks and would be reviewed on or before the 4th September 2020; on 12th August 2020, a meeting occurred between Sarah Clarke, Mark Hudson, (Workforce Directorate) and the Claimant to discuss the outcome of the investigation. Ms Clarke informed the Claimant of her recommendation that the matter should be considered by a disciplinary panel.

19. On 18th August 2020, the Claimant received a letter from Sarah Clarke advising that the Respondent was satisfied that there was a case to answer in relation to his behaviour in all five areas. It was recommended that the matter be considered formally in line with the Respondent's Disciplinary Procedure.

20. On 18th September 2020, the Respondent suggested the following outcome:

    (i) acceptance of a first written warning to remain in place for 12 months without the need for a disciplinary hearing;
    (ii) the Respondent to support a structured and facilitated form of mediation;
    (iii) continued restriction of practice, in order to facilitate the best chance of a successful reintegration into the service.

21. The Claimant would not be able to return to practice until his Responsible Officer and Medical Director for ECH concluded that sufficient progress had been made in respect to mediation, and the Claimant would not be able to return to his role as Clinical Lead for the Transplant Service for the foreseeable future.

22. Whilst the Claimant was willing to accept a first written warning and full participation in mediation, he was not prepared to agree to an exclusion from the Paediatric Service for an indeterminate period of time or relinquish his role of Clinical Lead.

23. In particular, he was concerned that the investigation report had made reference to incidents and allegations that had not been put to the Claimant in either investigation interview and consequently he agreed to work on his communication skills. He was willing to step back from his Lead role on a temporary basis to allow for this and the mediation to take effect. This proposal was communicated to the Respondent on 1st October 2020.

24. On 7th October 2020, Mr Murphy received a reply from Sarah Clarke advising that the Respondent was not willing to compromise and that a disciplinary hearing would be necessary.

25. On 16th October 2020, the Claimant was informed by Sarah Clarke that his partial restrictions had been extended for a further 4 weeks and would be reviewed on 13th November 2020.

26. On 19th November 2020, the Claimant set out a further proposal, sending an email to the Respondent stating that he was willing to accept a first written warning and step down as Clinical Lead. He also agreed to the continued restriction from ECH provided that an immediate and intensive period of mediation was put in place and an immediate review of those restrictions be carried out once mediation had taken place.

27. On the same day, he received an invitation from Dr Priya Singh (Non-Executive Director) to a disciplinary hearing scheduled for 27th November 2020. That disciplinary hearing was then rescheduled to 18th December 2020 at the Claimant's request.

28. On 5th February 2021, the Claimant chased Dr Singh for an update. He remained suspended from ECH and felt that the process and delay was beginning to take its toll on his health. The Respondent avers that the delay was due to the ongoing operational pressures resulting from the Coronavirus pandemic.

29. The disciplinary hearing was re-scheduled in two parts: firstly on 10th March 2021, and then on 9th April 2021. It is alleged by the Claimant that the Respondent made alterations to the allegations.

30. On 19th April 2021, the Claimant was informed of the outcome of the hearing, which was a finding that his behaviour had constituted misconduct. Dr Singh recommended that concurrent work on individual and team behaviours, team dysfunction and remediation across the Transplant Service would be needed to support the Claimant's successful reintegration into paediatric transplant surgery, and that this would need to include structured and facilitated mediation to rebuild and restore the professional relationships which had been most significantly impacted.

31. Dr Singh stated that she could not recommend a specific date for the Claimant's return to paediatric transplant surgery but that she would expect to see significant progress within the next three months towards reintegration.

32. The Claimant was given a first written warning, which would remain on the Claimant's personal file for 12 months, and he remained temporarily excluded from ECH pending adequate progress in mediation.

33. On 30th April 2021, the Claimant wrote to Dr Simon Steddon to lodge an appeal. The Claimant accepted the first written warning but challenged the open-ended nature of the ongoing exclusions from ECH. He was willing to engage in all mediation, and he explained the impact that the process had had on his health.

34. In May 2021, as the Claimant's tenure as Clinical Lead had come to end, he applied to be re-considered. The Respondent did not consider that appropriate.

35. In June 2021, the Claimant took unpaid leave for one month, along with three weeks of annual leave. Throughout this time, he made it clear that he

would still be available for any mediation, and he met virtually with Mayvin, the external organisation conducting a review.

36. He did not receive a response until 20th July 2021, when it was confirmed that an appeal hearing would not take place. Furthermore, and despite the passage of time, no mediation had taken place.

37. The Respondent made clear that the continued restrictions were not a sanction in themselves and were not intended to punish or discipline. It was said that they were designed as necessary safeguards, and as such, the decision was not in itself a sanction, and therefore not capable of appeal.

38. Mayvin, an external group, had been hired to look at issues within the transplant unit, so they were asked if they could facilitate mediation. Initially, Mayvin confirmed that they could assist in this regard and they proceeded to arrange a facilitated meeting between the Claimant and one of his colleagues. Unfortunately, that meeting had to be cancelled and Mayvin subsequently informed the Respondent that the mediation process would be best managed separately from the work they were carrying out.

39. On 27th July 2021, through his union representative, the Claimant wrote to the Respondent challenging their assertion that he could not appeal on the basis that a restriction from practice was not an appealable offence. No response was received.

40. On 19th August 2021, the Claimant's union representative had a phone call with the Respondent where it was suggested that they would try and facilitate a return to work. The Claimant then wrote to Simon Steddon on the 26th October 2021, asking why he continued to be excluded, given that he had engaged in all mediation to the best of his ability. He also drew Mr Steddon's attention to the profound effect this ongoing exclusion was having on his mental health. The Claimant did not receive a reply.

41. In August 2021, the Claimant found himself unable to continue whilst in the middle of a busy outpatient clinic, due to extreme anxiety and depression. Following a brief attempt to return to work, he was signed off sick on 19th August 2021 and remained off until January 2022.

42. The Claimant alleges that his depression arose as a result of over 18 months of investigations, and unwarranted exclusion from his paediatric practice.

43. During the four and half months that he was absent from work, he received one email from Mr Bultitude enquiring about his return, and a single text from a manager, Sophie Goddard, asking how he was. The Respondent took the view that it was not appropriate to contact the Claimant about the mediation process at that time. The Respondent intended to appoint an external mediator to progress that process once the Claimant had returned to work. However, that never happened.

44. On 29th September 2021, and whilst off sick, the Claimant received an email from the Overpayment Team advising that he had been overpaid £17,338.45 for the period of December 2020 – August 2021. He was told that repayments would commence in October 2021 at a rate of £1,926.53. The Claimant disagreed that there had been an overpayment and, through his union, sent an explanation to the Respondent on 1st November 2021. Whilst Mr Bultitude agreed with his interpretation, the Claimant continued to receive debt collection letters, further impacting his health.

45. On 8th November 2021, the Claimant again sought an end to the exclusion from his paediatric practice, requesting that the Respondent should facilitate his return by no later than 1st December 2021.

46. On 24th November 2021, the Claimant submitted a grievance complaining about the treatment he had received, and on 16th December 2021, he received a letter from the Respondent setting out their position. The Respondent averred that mediation had moved at a slower pace than first

anticipated and given the Claimant's sickness absence, moving forward with mediation had continued to be difficult.

47. At that stage, the Respondent also advised that in addition to issues with the pace of mediation, there had been some new additional concerns raised in relation to his returning to ECH. The Claimant was never told the nature of these additional allegations.

48. On 24th December 2021, the Claimant emailed the Respondent advising of his resignation, alleging that the Respondent's conduct had irretrievably diminished his trust and confidence in it as an organisation.

49. The Claimant criticises the Respondent for never providing a formal reason for his exclusion from ECH, and for denying him an appeal.

50. A formal grievance meeting took place on 14 March 2022 with Elinor Jamieson (HR Consultant) Claire Hay (General Manager) and Scott Murphy via MS Teams. It is accepted by the Respondent that there was a delay in the Respondent identifying and appointing a manager to investigate the Claimant's grievance. They aver that this was due to the time of year (approaching Christmas and the New Year), the ongoing operational pressures resulting from the Coronavirus pandemic and the Covid vaccine programme.

51. On 24th March 2022, the Claimant's employment ended. ACAS Early Conciliation took place between 4th April 2022 and 15th May 2022. The Claimant lodged his Claim on 15th June 2022. It is accepted that the Claim has been brought within the statutory time limit.

52. On 7th June 2022, the Claimant received an outcome to his grievance . The Respondent found that:

    (i) there was a case to answer in respect of delays in dealing with the Claimant's grievance;

(ii) there was a case to answer in respect of how the Claimant's continued exclusion was managed following the disciplinary hearing;

(iii) there was no case to answer in respect of the Claimant's complaints about the application of the disciplinary policy, in particular the decision not to allow the Claimant to appeal against his continued exclusion.

The delays were described as unacceptable and the Claimant deserved an apology.

The Claim

53. The Claimant claims that the events summarised above amounted to a fundamental breach of his contract of employment, which left him with no other option than to resign. His case is that the events mentioned above formed part of a series of acts, the cumulative effect of which amounted to a fundamental breach of his contract of employment.

54. The Claimant contends that he resigned as a direct result of the Respondent's actions, and that he did not delay in resigning, thereby affirming the contract. Accordingly, the Claimant claims that he has been dismissed in accordance with s.95(1)(c) Employment Rights Act 1996, and that the dismissal is unfair in accordance with s.98 of the Employment Rights Act 1996.

The Response

55. The Respondent denies that the Claimant's resignation amounted to a dismissal within the meaning of section 95 of the Employment Rights Act 1996 ("the Act").

56. The Respondent denies that it breached the Claimant's contract of employment as alleged or at all. Alternatively, the Respondent denies that

any such breach was a fundamental breach of contract or constituted the last in a series of incidents which taken together, and cumulatively, amounted to a repudiatory breach of any express or implied term of the contract, including but not limited to the implied term of mutual trust and confidence.

57. In the later respect, the Respondent denies that it acted in a manner which was calculated to, or likely to destroy, or seriously damage, the relationship of trust and confidence between it and the Claimant.

58. Alternatively, the Respondent contends that the Claimant delayed too long in treating such breach as repudiating his contract and therefore, any such breach has been waived.

59. The Respondent denies that the grounds for constructive dismissal exist in this case and that there has been a dismissal. In the event that the Claimant is found to have been dismissed, the Respondent will contend that the Claimant was dismissed for a potentially fair reason pursuant to section 98(1)(b) of the Act, namely for some other substantial reason on account of an irretrievable breakdown in the relationship between the parties. Accordingly, the Respondent further submits that the dismissal was, in all the circumstances, fair and reasonable within the meaning of section 98(4) of the Act.

The Issues

Unfair Dismissal

60. Did the Claimant resign or was he (constructively) dismissed?

It is accepted that there was a term implied into the Claimant's contract of employment 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.

Did the Respondent conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust without reasonable and proper cause? The Claimant relies upon the following alleged breaches:

(i) Failed to carry out a full and proper investigation into the allegations regarding the Claimant's behaviour;
(ii) Required the Claimant to step down from his role as Clinical Lead;
(iii) Formally restricted the Claimant from practice;
(iv) On 19 April 2021, gave the Claimant a first written warning and excluded him from the Evelina Children's Hospital (ECH) for an indeterminate period;
(v) From around 30 April 2021, unreasonably denied the Claimant the opportunity to appeal the outcome of the disciplinary hearing, namely that he would be excluded from the ECH for an indeterminate period;
(vi) Excluded the Claimant from ECH and his paediatric practice for longer than necessary and without adequate explanation;
(vii) Failed to give the Claimant an opportunity to address the additional concerns raised in the Respondent's letter of 16 December 2021;
(viii) Failed to provide the Claimant with one-to-one mediation as agreed;
(ix) Failed to adhere to its grievance procedure, including in particular a failure to progress the Claimant's grievance of 24 November 2021 within a reasonable timescale.

61. If so, did the above, individually or cumulatively, amount to a fundamental breach of contract of employment, entitling the Claimant to resign?

62. Did the Claimant waive or affirm any of the alleged breach(es) of the implied term of trust and confidence?

63. Did the Claimant resign in response to the alleged breach(es) of the implied term of trust and confidence?

64. Insofar as the Tribunal finds that there has been a dismissal, did the Respondent dismiss the Claimant for the statutorily-fair reason of Some Other Substantial Reason, namely an irretrievable breakdown in the relationship between the parties?

65. If so, was the dismissal s.98(4) fair?

The Evidence

66. For the purposes of determination of the above issues, the parties rely on the agreed trial bundle, together with a Cast List, and Chronology. Both Counsel have helpfully filed written closing submissions, and the Respondent has also submitted written Legal Principles.

67. The Claimant gave evidence himself, as did the following witnesses on behalf of the Respondent:

(i) Mr Matthew Bultitude - Consultant Urological Surgeon and Clinical Director of Transplant, Renal and Urology;
(ii) Mr Simon Steddon - Chief Medical Officer;
(iii) Ms Sara Hanna - Medical Director of the Evelina London Clinical Group;
(iv) Ms Chloe Wild - Head of Portfolio and Lead for Professional Practice, Medical Director's Office;
(v) Ms Sarah Clarke - Chief Executive for the Cancer and Surgery Clinical Group;
(vi) Dr Priya Singh, who was at the relevant time, Non-Executive Director of Guy's & St Thomas NHS Foundation Trust.

68. I have read and considered all of the above documentation, and listened carefully to all of the above witnesses. All of the witnesses were doing their best to assist the Tribunal, and many of the facts are agreed. Where there were inconsistencies, they arose through the passage of time, and the failure of memory, rather than any attempt to mislead or deceive.

69. Mr Mamode gave lengthy evidence. He was an impressive witness, who was calm and consistent. He had a detailed recollection of events, and given the duration and complexity of the processes, as well as the time that had passed between those events and the Tribunal hearing, his memory was largely good. There were some inconsistencies, as set out by the Respondent in their written submissions. I am entirely satisfied however, that those inconsistencies arose due to the passage of time, and I have no doubt that Mr Mamode was an honest witness, at all times attempting to assist the Tribunal.

70. Much of the above also applies to the Respondent's witnesses. Indeed, the only criticism of the Respondent's witnesses made within the Claimant's submissions is directed at Dr Steddon. It was said that he was evasive during cross-examination, keen to avoid concessions, and sought to justify his conduct. I did find that he was at times defensive, and I do agree that he was keen to avoid concessions. Although there are few factual disputes between the witnesses, where they do exist, I preferred the evidence of Mr Mamode, who was more open to make concessions where necessary. Mr Mamode was a credible witness who gave persuasive evidence.

71. The credibility of the remaining Respondent witnesses was not challenged. In reality, that was due to the absence of many factual disputes within their evidence. As with the Claimant, where inconsistencies arose, I am entirely satisfied that those inconsistencies arose due to the passage of time, and I have no doubt that all of the remaining witnesses were at all times attempting to assist the Tribunal.

Submissions

72. Following the evidence, the parties made helpful oral submissions which the Tribunal has carefully considered.

73. On behalf of the Claimant, Mr Patel reminded the Tribunal that much of the factual evidence was agreed. Where there were disputes, he submitted that I should prefer the evidence of the Claimant. As set out above, he was critical of the credibility of Mr Steddon.

74. Mr Patel also stressed the lack of documentation from the Respondent, in particular invites to meetings, communications with HR, and the notes of meetings. He said that I should draw inferences from the Respondent's failure to provide this documentation, and the lack of any explanation for that failure.

75. He accepted that some of the investigatory failings were redressed at the disciplinary hearing, yet said that there were other failures that the Claimant was not given an opportunity to address. The restriction of the Claimant's paediatric practice was described by Mr Patel as nonsensical, and he was critical of the Respondent's decision to proceed with a disciplinary hearing rather than mediation, given the parties' positions at that time.

76. Mr Patel averred that the Respondent's delayed response to the appeal, and their failure to allow an appeal in respect of the restriction to the Claimant's practice were important aspects of their conduct. Furthermore, the raising of additional concerns without specifying those concerns, or giving the Claimant a chance to respond, only exacerbated the Claimant's distress. He says that the Respondent should have provided details of the additional allegations, investigated them, and provided those details to the Claimant.

77. He reminded the Tribunal that in the grievance outcome, the Respondent had accepted failings in respect of the mediation process. Mr Patel

submitted that it was clear from the contemporaneous correspondence that there was virtually no progress made in respect of mediation for several months. He said that the Respondent failed at every stage, and it should have been obvious that no progress was being made.

78. The failure to respond to the grievance is said to be the last straw, and this included the failure to set up a meeting. Mr Patel reminds the Tribunal that I can consider the allegations of breach cumulatively.

79. In response to the Respondent's allegations that the resignation letter does not include some of the events complained of within this litigation, Mr Patel submits that does not necessarily mean that the resignation did not occur as a consequence of those events. He says that the hurdle is low (it can be partly in response) and that there is no need for a resignation letter to set out any specific wording. He says that it is clear that the Claimant resigned as a consequence of the Respondent's conduct.

80. Mr Arnold, on behalf of the Respondent, was largely content to rely on his written submissions. However, he did submit in response to the Claimant's criticisms, that Dr Steddon was a credible witness, who was clear, compelling and thoughtful. He directed me to the criticisms of the Claimant's conduct contained in his written submissions.

81. Mr Arnold further submitted that the Respondent had no option but to maintain the Claimant's restriction in his practice. His behaviour suggested that witness interference was possible. He averred that the denial of the Claimant's appeal was reasonable, and he drew to my attention alleged inconsistencies in respect of the alleged last straw.

The Law

82. The correct approach to determining a constructive unfair dismissal was set out by the Court of Appeal in *Buckland v Bournemouth University Higher Education Committee [2010] IRLR 445, CA* in which their Lordships adopted the following from the EAT's decision and reasoning:

(i) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test should be applied;
(ii) If, applying the *Sharp* principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
(iii) It is open to the employer to show that such dismissal was for a potentially fair reason;
(iv) If he does so, it will then be for the employment tribunal to decide whether dismissal for that reason, both substantively and procedurally fell within the range of reasonable responses and was fair.

83. Furthermore, I remind myself of the authority of *RDF Media Group v Clements [2008] IRLR 207, HCQBD* in relation to the burden of proof, which the Respondent has helpfully drawn the Tribunal's attention, and in which Bernard Livesey QC sitting as a Deputy High Court Judge, opined as follows:

103. *The burden lies on the employee to prove the breach on a balance of probabilities. This means, where the employer claims that he had reasonable and proper cause for his conduct, that the employee must prove the absence of reasonable and proper cause. Although the matter does not seem to have been decided expressly, I would hold on the basis of first principles that whether there is reasonable and proper cause must also be determined objectively; and the subjective intentions of the employer, though admissible in evidence, are not determinative of the issue.*

104. *Whether there is "reasonable and proper cause" in relation to a representation of the sort that this case is concerned about may depend on whether the occasion on which the representation was made occurs is one on which it is reasonable for the employer to make representations about the employee. It would however be wrong, I think, to substitute 'occasion' for reasonable and proper cause; that is because there may be occasions where it is appropriate for the employer to make some representation but the representation which he in fact made went beyond what was reasonable and proper in the circumstances.*

105. *The test whether there is a breach or not is said to be a 'severe' one. In this regard it should be remembered that for an employee to become entitled to claim that he has been constructively dismissed on this ground, it is not enough to prove that the employer has done something which was in breach of contract or 'out of order' or that it has caused some damage to the relationship; there is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can fairly be regarded as repudiatory of the contract of employment, that is to say, so serious that the employee is entitled to regard himself as entitled to leave immediately without notice.*

84. As to whether the Respondent conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust without reasonable and proper cause, the Respondent further reminds me of the authority of *Leeds Dental Team Ltd. v Rose [2014] IRLR 8, EAT* in which it was said that:

The tribunal has to consider objectively whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee... The test does not require a tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and

confidence, then he is taken to have the objective intention spoken of; in pure contract cases in what we may call 'the old days' expressions were used such as, 'The conduct evinced an intention on the part of the defendant to bring the contract to an end', or 'fundamentally to break the contact', so that the other party could terminate it.

85. In *Meikle v Nottinghamshire County Council [2005] ICR 1*, LJ Keane summarised the position in respect of the employee's response to an alleged breach, stating that:

It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer.

86. I have reminded myself of the guidance given in *Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978* in respect of the 'Last Straw Doctrine' as follows:

In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) 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?
(2) Has he or she affirmed the contract since that act?

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

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

(5) Did the employee resign in response (or partly in response) to that breach?

87. *Omilaju v Waltham Forest London Borough Council [2005] 1 ICR 481, CA* gives further guidance on the same issue as follows:

19. *The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in the Woods case at p 671 f- g where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

20. *I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even*

blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.*

22. *Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.*

88. In respect of affirmation, Lord Denning, Master of the Rolls in *Western Excavation (ECC) Ltd. v Sharp [1978] IRLR 27* at paragraph 15 said as follows:

Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will

lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

89. I have also been assisted by the useful synopsis of the approach to determining this issue contained within the Claimant's skeleton argument at paragraph 3.

90. Applying those principles to the facts, I will deal with each alleged breach in turn.

Allegation 1

It is alleged that the Respondent failed to carry out a full and proper investigation into the allegations regarding the Claimant's behaviour.

91. The Claimant alleges that Professor Flinter failed to put specific allegations to Mr Mamode within the investigation, a complaint that was raised contemporaneously. This is a central feature of any disciplinary process, and would amount to a breach of the ACAS Code.

92. The Claimant accepts that Mr Mamode was given an opportunity to address this failing in the disciplinary hearing. However, whilst that mitigates the failing, it does not negate it, and it is possible that had these specifics been put to Mr Mamode, there would have been no progression to a disciplinary hearing.

93. Secondly, it is alleged that Professor Flinter's choice of interviewees was unbalanced. She failed to interview several individuals that the Claimant had suggested without explaining her reasoning, and largely limited her list of interviewees to those who had already been interviewed by GOSH. Although not deliberate, this is said to have resulted in a partial investigation.

94. Whilst the Respondent stresses the detailed and lengthy nature of the investigation, which I accept, I agree with the Claimant that the above failings occurred, and I find that the above omissions were sufficiently

serious to render the investigation flawed. In particular in reaching this conclusion, I rely on the evidence of the Claimant, both in respect of allegations not being put, and in relation to the failure to call certain witnesses.

95. I conclude therefore that the Respondent failed to carry out a full and proper investigation into the allegations regarding the Claimant's behaviour.

Allegation 2

The Respondent required the Claimant to step down from his role as Clinical Lead.

96. Mr Mamode was asked to step down from this role on or around 2nd June 2020. At that time, and whilst allegations had been raised against him, he had not yet been given any opportunity to answer them. Furthermore, and notwithstanding the fact that no investigatory and/or disciplinary process had yet taken place, this action by the Respondent was not described as a neutral action. The letter can be found beginning at p296.

97. The Respondent submits that the alleged behaviours were not compatible with the role of Clinical Lead. Whilst that may be the case, at the time of this action, they remained unproven allegations. Consequently, the removal of the position of Clinical Lead, without any acknowledgment that at this stage the allegations were yet to be investigated and/or determined, was inappropriate. Any act at this stage should have been expressly described as a neutral one, and it is clear from the above letter that it was not described as such.

98. I conclude therefore that this allegation is proven.

Allegation 3

Formally restricted the Claimant from practice.

99. This was perhaps the most contested of the Respondent's actions. It was an act that was taken at the meeting on the 2nd June 2020, and confirmed by letter on 12th June 2020 (p296). As with the removal of the position of Clinical Lead, it was not described as a neutral act.

100. Given the fact that the allegations had yet to be investigated and/or determined, it was wrong to restrict the Claimant from practice, without making it clear that such restriction was neutral pending the determination of the allegations.

101. Secondly, it was wrong to restrict the Claimant from practice without any explanation of that decision. It should have been obvious to the Respondent that restricting Mr Mamode from practising in the field of work that he most valued would greatly affect him, and a careful explanation should have been provided. No explanation was provided within the letter, and in particular, no explanation was provided as to why the Claimant was only excluded from his paediatric practice.

102. The Respondent avers that one reason for this action was to allow the investigation to continue unimpeded, without any witnesses feeling intimidated or fearful of giving evidence. However, no evidence has been produced to show that Mr Mamode had ever attempted to, or was ever likely to attempt to, interfere with witnesses. Furthermore, no such explanation is given in the letter of 12th June 2020.

103. A second reason given by Dr Steddon was to assure the safety and wellbeing of Mr Mamode's colleagues. However, there was nothing in the allegations raised by the GOSH review that was specific to paediatric practice. As Mr Mamode explained in unchallenged evidence, he had more contact with the paediatric transplant surgeons on the adult side than he

would have had with those same surgeons at Evelina. This practical reality appears not to have been considered by the Respondent.

104. Furthermore, less draconian alternatives were not considered. Dr Steddon's assertion that it was not appropriate for someone to work in isolation from the rest of the team, ignores the reality that Mr Mamode was continuing to work alongside other colleagues. In any event, it is noteworthy that no alternatives were even considered by the Respondent.

105. I conclude therefore that, for the reasons set out above, the Claimant has also proven this allegation.

Allegation 4

On 19 April 2021, gave the Claimant a first written warning and excluded him from the Evelina Children's Hospital (ECH) for an indeterminate period.

106. On 19th April 2021, and following the conclusion of the disciplinary process, Dr Singh wrote to the Claimant with the outcome. Having considered all of the evidence, she concluded that a written warning should be issued. By that time, a lengthy and detailed disciplinary process (which is largely uncriticised) had taken place, and to my mind, Dr Singh was entitled to reach the conclusion that she did.

107. I also note that, whilst the Claimant now criticises that determination, he was content to accept it at the time, and expressly stated as much in his email of 20th April 2021 at page 951.

108. For the above reasons, I do not conclude that Dr Singh's conclusion that the Claimant should be given a written warning can be fairly criticised.

109. The second aspect of alleged breach 4 amounts to the Claimant's continued exclusion from ECH. Dr Singh's outcome letter is careful in this regard – she imposes no sanction in respect of any ongoing restriction of practice. However, she makes the following recommendation:

"*Concurrent work on individual and team behaviours, team dysfunction and remediation across the service will be needed to support your successful reintegration into paediatric transplant surgery. This will need to include structured and facilitated mediation to rebuild and restore the professional relationships which have been most significantly impacted by recent issues*".

110. Thus, it seems clear that the ongoing restriction of practice at ECH did not form part the of the conclusions and/or sanctions of Dr Singh. Rather, and in an explicit attempt to facilitate the Claimant's re-introduction to ECH, Dr Singh made constructive recommendations.

111. Dr Singh played no role in the organisation and implementation of her recommendations, to which I will return later. However, her recommendations cannot realistically be criticised. They were designed to assist the Claimant's return to ECH, and I conclude therefore that this allegation is not proven.

Allegation 5

From around 30 April 2021, unreasonably denied the Claimant the opportunity to appeal the outcome of the disciplinary hearing, namely that he would be excluded from the ECH for an indeterminate period.

112. On 30th April 2021, the Claimant appealed Dr Singh's decision. On 20th July 2021, Mr Steddon replied. He explained that:

"*The decision to keep you working under restricted practice for the time being did not form part of the sanction that was given to you, by Dr Singh, as a result of the formal disciplinary process. These restrictions have been applied under the Medical Exclusion and Restriction of Practice Procedure and, as your Responsible Officer, I can keep those temporary restrictions in place, independent of the formal sanction. In line with the Disciplinary Policy and Procedure, an appeal can only be made in relation to the sanction that*

was dealt and, in view of that, I'm afraid you do not have right of appeal as to the continued restrictions. I have, however, noted the contents of your letter and in particular, the impact that this has had on you professionally and, in your view, the impact on the service more generally."

113. I have previously concluded that the ongoing restriction of practice at ECH did not form part of Dr Singh's sanction. It was the background against which Dr Singh made her 3 recommendations (p949), and although she expressed an expectation that she would see:

"*significant progress within the next 3 months towards reintegration*"

she reached no conclusions, and made no determinations, about the Claimant's ongoing exclusion from ECH. It formed the context of the disciplinary process, yet was not part of the outcome.

114. Consequently, the allegation that the Respondent unreasonably denied the Claimant the opportunity to appeal the outcome of the disciplinary hearing fails.

Allegation 6

Excluded the Claimant from ECH and his paediatric practice for longer than necessary and without adequate explanation.

115. There is however merit in the Claimant's criticism that the Respondent, having taken the decision to restrict the Claimant's practice on 2nd June 2020, excluded the Claimant from ECH for longer than necessary, and without adequate explanation.

116. Within the letter of 12th June 2020 (p296) which set out the Claimant's restriction from practice at ECH, there is no reason given for that restriction. It is explained that the restriction is in accordance with the Exclusion and Restriction of Practice Policy and Procedure for Medical and Dental Staff,

that it begins with immediate effect and that it lasts for an initial period of 14 days; however, no reason for the restriction itself is ever given.

117. Of course, that same letter confirms that an investigation will take place, and places the restriction of practice within the context of:

"*Whilst the investigation is being undertaken".*

Consequently, and whilst it may have been possible to infer a reason for the restriction from the investigatory context, no reason was specified.

118. Furthermore, the Exclusion Policy permits exclusion for a number of reasons: to assure the safety or wellbeing of patients or staff, or to assure that any investigation or evidence will not be impeded or interfered with by the practitioner. Consequently, it would have been straightforward to specify the reason for the exclusion.

119. It is, in my view, inappropriate to restrict a clinician's practice, without a clear explanation as to the reason for that restriction.

120. The second aspect of this allegation relates to the length of the exclusion, which is alleged to have been for longer than necessary. There are 2 central periods of delay. Firstly, the delay between the initial restriction of practice and the outcome of the disciplinary hearing (12th June 2020 – 19th April 2021), and secondly, the delay between that disciplinary outcome making its recommendation for mediation, and that mediation not taking place, or not taking place satisfactorily (19th April 2021 – 24th December 2021).

121. In relation to the initial alleged period of delay, the investigation report was completed by 16th July 2020. Thereafter, there was an extended period of negotiation between the parties prior to the disciplinary process commencing. The hearing was then delayed at the Claimant's request, before an unfortunate delay between January and March 2021. However, I remind myself that the Respondent was enduring an extraordinarily

challenging period at that time, with the Covid 19 epidemic imposing unprecedented challenges on its resources.

122. In those circumstances, the passage of time between the publication of the investigation report and the holding of the disciplinary hearing was not unreasonable, and I do not find this aspect of the allegation proven.

123. In respect of the second period of delay (19th April 2021 – 24th December 2021), and amongst other reasons, the Respondent relies on the fact that the Claimant became unwell by 11th August 2021, and by 15th September 2021, he had become too ill to attend mediation. It is logical that an employer, in the knowledge that an employee is off work with mental health issues, decides that it is prudent not to contact that employee during that period of absence. However, this does not account for the intervening period of delay between 20th April 2021 and 10th August 2021. That is particularly troubling given Dr Singh's explicit hope in her outcome letter that:

"*I would expect to see significant progress within the next 3 months towards reintegration."*

No substantive progress was made during those 3 months. That is despite Mr Mamode's efforts to comply with the recommendations, and to do all that he could to facilitate the mediation.

124. The Respondent proffers a brief explanation for this period of delay, but to my mind, no adequate explanation. Given the centrality of this recommendation by Dr Singh, the length of time already passed since the restriction on practice began, and the substantial effect that the Respondent knew the ongoing restriction was having on the Claimant's health, no adequate efforts were made to facilitate the recommended mediation by the Respondent.

125. I also note that the Respondent's own grievance outcome (p1237) concluded that there was a case to answer in regards to how the continued exclusion was managed following the disciplinary hearing. Ms Johnson found that:

"*there was a lack of clarity from the directorate and the Medical Director's office as to the role and responsibilities of Mayvin and a lack of clarity from the MDO's office and Directorate as to their own responsibilities…The investigation concluded that when it was established that Mayvin were unable to carry out the mediation, other means of mediation should have been sought. There was no evidence provided that the continued exclusion or progress with mediation was being regularly reviewed or who was responsible for overseeing it…there was a lack of leadership and confusion around the process which appears to have prevented mediation from progressing."*

126. Thus, and for all of the above reasons, I have concluded that the Respondent did exclude the Claimant from ECH and his paediatric practice without adequate explanation, and for longer than necessary following the disciplinary outcome. To that extent, this allegation is proven.

Allegation 7

Failed to give the Claimant an opportunity to address the additional concerns raised in the Respondent's letter of 16 December 2021.

127. If the Respondent were so minded to raise additional concerns about the conduct of the Respondent, they were obligated to provide details of those allegations, and to give the Claimant an opportunity to respond to them. To simply raise the spectre of further allegations, and thus the possibility of further delay, uncertainty and restriction, was inappropriate.

128. That error was exacerbated by the fact that a lengthy investigation and disciplinary process had already taken place, the Respondent was aware of the Claimant's long-standing desire to return to ECH, and they were further

aware of the deleterious effect that a combination of the process and the exclusion was having on the Claimant's mental health.

129. Dr Steddon's evidence (paragraph 60, p15 of his statement) was that the Trust felt obligated to inform the Claimant of these additional concerns, yet it had not yet determined whether to investigate, and there is no evidence of any investigation occurring. Given the Respondent's safeguarding obligations, the Claimant's resignation should not have precluded the continuance of any investigation.

130. It is submitted by the Claimant that the raising of these additional concerns was the final straw. The Respondent avers that such an allegation is inconsistent with the Claimant's assertion that he should have been given an opportunity to respond. I disagree with the Respondent. To my mind, the Respondent was obligated to raise any fresh concerns that arose. However, it was obligated to do so in accordance with its Disciplinary Policy & Procedure. Simply raising the spectre of further allegations, without informing the Claimant of their nature, and/or granting the Claimant the right to respond was inappropriate, and I find this allegation proven.

Allegation 8

Failed to provide the Claimant with one-to-one mediation as agreed.

131. I have set out my conclusions in regard to this allegation within paragraphs 120 – 126 above. For the reasons contained therein, I find that the Respondent failed to provide the Claimant with one-to-one mediation as agreed.

Allegation 9

Failed to adhere to its grievance procedure, including in particular a failure to progress the Claimant's grievance of 24 November 2021 within a reasonable timescale.

132. Mr Mamode submitted his grievance on 24 November 2021. The Grievance Policy (p176) sets out the following obligations on the Respondent at p192:

10.2.2 The manager will acknowledge receipt of your grievance as soon as possible and will invite you to a meeting to discuss your concerns within seven calendar days from the receipt of your grievance.

The Claimant alleges that neither of those twin obligations were met. In particular, no substantive response was given until 16th December 2021 (p1013) and no invite to a meeting was issued, a position that remained unchanged at the point of Mr Mamode's resignation on 24th December 2021.

133. I agree with the Claimant's submission that this was particularly objectionable given the fact that central elements within Mr Mamode's grievance were the previous lack of response to his correspondence, the fact of his ongoing exclusion, the delays and lack of progress within the process, and the deleterious effect that a combination of all of these factors was having on the Claimant's mental health (p1004).

134. The Respondent accepts that there was a breach of the Grievance Procedure by failing to hold a meeting. They do however stress that the grievance was acknowledged within the necessary timescale, and further aver that the failure to hold a meeting is not said to have caused the Claimant to resign.

135. Of course, the Respondent's own grievance outcome (p1235) concluded that there was a case to answer in this regard. It was not until the 16th December 2021 that the Medical Director responded to say that the grievance would be taken forward, and an investigator was not appointed

until 3rd March 2022 which was not in line with the timelines set out in the Trust's procedure. The Respondent recognised that the delays were unacceptable and that the Claimant deserved an apology.

136. I am in agreement with the conclusions of Ms Johnson in this regard, and conclude therefore that the Respondent failed to adhere to its grievance procedure, and I find this allegation proven. I note however, that any post-resignation breach cannot have contributed to the Claimant's resignation.

137. I therefore find that allegations 1, 2, 3, 6, 7, 8, 9 are proven. As a consequence, and for the reasons set out in relation to each individual allegation, I conclude that the Respondent conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust.

138. Whilst the Respondent seeks to explain each act, averring at all times, that it acted with reasonable and proper cause, I reject those explanations. In my view, and for the reasons that I have individually set out in respect of each separate allegation, the Respondent, in respect of the breaches that I have found proven, did not act with reasonable and proper cause.

Did the above breaches, individually or cumulatively, amount to a fundamental breach of contract of employment, entitling the Claimant to resign?

139. I remind myself of the guidance given in *Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978* and in *Omilaju v Waltham Forest London Borough Council [2005] 1 ICR 481, CA* in respect of the 'Last Straw Doctrine' set out above.

140. The Claimant alleges that the last straw was the raising of the existence of unidentified additional concerns in the Respondent's letter of 16 December 2021. This of course, occurred at the same time as the Respondent had failed to arrange a meeting in accordance with their grievance procedure.

141. I find as a fact that receipt of the letter of 16th December 2021 was indeed the last straw. As set out above, it was inappropriate to raise the spectre of additional concerns, without informing the Claimant of the nature of those concerns. This was particularly egregious in the context of the lengthy and ongoing restriction to the Claimant's practice, the Claimant's long-standing desire to return to ECH, and the deleterious effect, of which the Respondent was well aware, that a combination of the process and the exclusion was having on the Claimant's mental health.

142. Of the allegations that I have found to be proven, to my mind, each was of sufficient significance to amount individually to a repudiatory breach of contract.

143. If I am wrong about that, when taken cumulatively, the allegations 1, 2, 3, 6, 7, 8, 9 that I have found to be proven, amounted to a fundamental breach of contract of employment, which entitled the Claimant to resign.

Did the Claimant waive or affirm any of the proven breaches of the implied term of trust and confidence?

144. I remind myself that, as per *Kaur* above, the question of affirmation should be assessed only from the last straw in the series of acts relied upon. Given that I have concluded that the final breach occurred in the email dated 16th December 2021 (p1013), and the Claimant resigned on 24th December 2021, I determine that the Claimant did not waive or affirm any of the proven breaches. The Claimant reacted relatively promptly to the email of the 16th December, particularly given how significant resignation was to this Claimant, and the challenges he was enduring with his mental health.

Did the Claimant resign in response to the breaches of the implied term of trust and confidence that I have found to be proven?

145. The Claimant relies on his resignation letter (p1016 – p1018) which he says clearly sets out the reasons for that resignation. Those include his 'treatment' by the Trust over the last 18 months, his ongoing exclusion from ECH, the lack of any clear reason for that exclusion, the failure to respond to his grievance, the raising of further concerns, and the failed mediation process. It is consequently submitted that his resignation was at least in part due to a breach or breaches above. It is also averred that it was not suggested in cross-examination that there was any other reason for Mr Mamode resigning.

146. In response, the Respondent submits that the Claimant did not resign as a consequence of those breaches, but rather resigned for perceived breaches of the term of trust and confidence that were not true.

147. In particular, the Respondent avers as follows:

(i) a clear reason for his exclusion from ECH was provided;
(ii) the Claimant was at least partially responsible for the failed mediation;
(iii) the Claimant relies on a mistaken interpretation of Dr Singh's expression that she 'expected to see significant progress within the next 3 months towards reintegration';
(iv) The Claimant was not denied an appeal against his exclusion – rather, it did not form part of the disciplinary sanction;
(v) The Claimant's grievance was acknowledged the same day (24 November), he was then updated on 7 December 2021 and a substantive response provided on the way forward on 16 December 2021.

148. It is said by the Respondent therefore, that the Claimant's reasons for resigning amount to no more than his perceptions, and he resigned in response to those perceptions, rather than the alleged breaches.

149. I disagree with the Respondent. In respect of the factual disputes raised by the Respondent within their submissions, I repeat and rely upon the conclusions set out above at paragraphs 91 – 138. Whilst it is correct that the Claimant has conflated his ongoing exclusion from ECH with his disciplinary sanction, and consequently misunderstood the reasons for the denial of his appeal, the other reasons that he set out within his resignation letter relate to the breaches that I have found to be proven. In particular, allegations 3, 6, 7, 8, 9 are clearly referenced within the Claimant's letter of resignation.

150. I conclude therefore, that the Claimant resigned in response to the breaches of the implied term of trust and confidence that I have found to be proven.

Insofar as the Tribunal finds that there has been a dismissal, did the Respondent dismiss the Claimant for the statutorily-fair reason of Some Other Substantial Reason, namely an irretrievable breakdown in the relationship between the parties?

151. In circumstances where the Tribunal finds that there was a dismissal, the Respondent invites the Tribunal to conclude that it dismissed the Claimant for the statutorily-fair reason of Some Other Substantial Reason, namely an irretrievable breakdown in the relationship between the parties.

152. In particular, they stress that by the time of the Claimant's resignation, the Claimant had disengaged in mediation and the broken inter-personal relationships had not been repaired. They rely in particular on the evidence of Sara Hanna in that regard.

153. In considering this issue, I remind myself that the burden of proof is on the Respondent to prove that an irretrievable breakdown in the relationship

between the parties was the sole or principal reason for the dismissal. The Claimant avers that there is no basis for saying that an irretrievable breakdown in the relationship between the parties was the reason for dismissal, relying on the fact that both the outcome of the disciplinary process and the weight of the Respondent evidence was that any breakdown in relationships was retrievable, such that mediation needed to take place. Furthermore and alternatively, it is submitted that whilst Mr Mamode's alleged behaviour and the alleged concerns about him by other staff may have reflected a breakdown in relationships, this was clearly not the reason behind the dismissal.

154. It seems clear to me that the Respondent did not dismiss the Claimant for some other substantial reason namely an irretrievable breakdown in the relationship between the parties. The dismissal arose as a consequence of multiple breaches of the implied term of trust and confidence as set out above. Dr Singh, in her outcome letter dated 19th April 2021 (p946), was clearly of the view that the professional relationships could be repaired through mediation. According to Dr Singh, the Claimant and all of his colleagues expressed a fundamental wish for the mediation to work.

155. Whilst some time did pass between the issuing of Dr Singh's outcome letter and the Claimant's resignation letter, there is no evidence to suggest that relationships deteriorated further in that intervening period. I reject therefore the Respondent's submission that the Claimant was dismissed for some other substantial reason.

If so, was the dismissal s.98(4) fair?

156. Given my conclusions above, I do not need to consider this issue.

Conclusion

157. For the reasons set out above, I have concluded that the Claimant was unfairly constructively dismissed. Consequently, his claim is well-founded and succeeds.

Further case management

158. Issues 11-14 on the Case Management Order of EJ Self remain live issues, and I therefore make the following case management directions:

159. The claim be listed for a two-day remedy hearing. This hearing is to be listed via CVP on the next available date after 3rd September 2024.

160. The parties have permission to file and serve any additional documentation in respect of issues 11-14 by no later than 4pm on 12th July 2024.

161. The parties have permission to file and serve any additional witness evidence in respect of issues 11-14 by no later than 4pm 2nd August 2024.

162. The parties may agree to vary a date in any order, but any variation agreed may not be more than 14 days after the date set above unless the Tribunal's permission has been obtained, and any variation will not otherwise affect any hearing date.

Employment Judge Murdin
30th May 2024

Sent to the parties on:

Employment Judge **Murdin**
Dated: **30th** May **2024**

JUDGMENT SENT TO THE PARTIES ON
19th June 2024
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FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.