



EMPLOYMENT TRIBUNALS

Claimant: Miss R Tapomwa

Respondent: NUH Nottingham University Hospitals NHS Trust

Heard at: Nottingham

On: 17 and 18 June 2024

Before: Employment Judge Millns

Representations

For the claimant: In person

For the respondent: Ms Harty (counsel)

JUDGMENT

1. The judgment of the Tribunal is that the Claimant's claims of constructive unfair dismissal is not well-founded and is dismissed.
2. The Claimant's claim of breach of contract for failure to pay notice pay also fails and is dismissed.

REASONS

Introduction

1. The Claimant (Miss Tampowa) commenced early conciliation on 8 June 2023, which concluded on 14 July 2023. She presented this claim on 14 August 2023. She claims she was constructively dismissed (s98 ERA 1996) on 14 July 2023 and that the Respondent breached her contract by failing to pay notice pay. She alleges that the Respondent fundamentally breached the implied term of trust and confidence. The Respondent denies the claim.

The Issues

2. At the hearing's outset, the issues were discussed and agreed. I understood from paragraph 27 of the Claimant's witness statement that a letter was written by her legal representative to the Respondent dated 5 January 2024 which set out that the Claimant's claim of constructive unfair dismissal relied on the "last straw" doctrine. As this letter was not in the bundle, I requested a copy to be provided, which Ms Harty arranged. The letter stated that the Claimant's claim of constructive dismissal was one of a breach of the implied term of trust and confidence and added: *"We may add that our fundamental breach complained of was based on the cumulative effect of a series of acts which are documented, that started as early as January 2023. The last acts as detailed in the resignation letter is the "final straw" which justified our client's resignation."* As the Claimant clarified in evidence and her submissions, the alleged 'last straw' (as set out in her resignation letter) or last act, is the allegation at 3.2.6 below.

3. The issues for me to determine were agreed to be as follows:

3.1 Was the claimant dismissed?

3.2 Did the respondent do the following things:

3.2.1 On 19 January 2023 Kelly Millot reprimanded the Claimant in the presence of patients and members of staff;

3.2.2 Katherine Rooke reporting the incident of 19 January 2023 to Human Resources, despite not being present when the incident happened, via a file note on 13 February 2023 and stating the Claimant was the aggressor, which was false and malicious;

3.2.3 Within the file note dated 13 February 2023 the Claimant was threatened with the possibility of a future disciplinary process based on an event where the Claimant was innocent;

3.2.4 Failing to hear the Claimant's version of events before reporting to Human Resources;

3.2.5 On 22 February 2023 Mark Wong, Band 7, disclosed details of the Claimant's urinal tract infection to the Clinical Educator Reina, without the Claimant's consent.

3.2.6 On 9 March 2023 Katherine Rooke authored a second version of the report dated 13 February 2023 which caused further distress and again inaccurately portrayed the Claimant as the aggressor and made a repeat threat of disciplinary action without justification (the alleged last straw);

4. Did those matters at 3.2.1- - 3.2.6 individually or cumulatively breach the implied term of trust and confidence? The Tribunal will need to decide:

4.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

4.2 whether it had reasonable and proper cause for doing so.

5. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

6. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
7. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
8. If the claimant was dismissed, what was the reason for the breach of contract?
9. Was it a potentially fair reason?
10. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

The Evidence and the Hearing

11. The evidence and submissions took place over two full days at the end of which I reserved judgment, explaining that full written reasons for the decision would be provided. This is that decision. I asked the parties to provide dates of availability so that a provisional remedy hearing could be listed if needed.
12. The Claimant's witness statement (paras 36.1-37) stated that she wished to apply to amend her claim to include a complaint of discrimination. During the hearing the Claimant confirmed that she wished to apply to amend her claim to include a complaint of discrimination. Whilst her witness statement was not explicit, it was clear that the Claimant wanted to complain about disability discrimination on account of dyslexia. The Claimant's witness statement did not identify what types of complaints of discrimination she sought to make, and the specific factual allegations were not set out with any clarity.

13. I noted that witness statements were exchanged on 29 May 2024. On the same day the Claimant's solicitors came off the tribunal record as her representative. The first time the Respondent knew about the application to amend to include a complaint of discrimination was on 29 May 2024. No other application to amend had been made by the Claimant. I considered that the Claimant had only recently been without legal representation and explained that I was willing to allow a break during the hearing so that she could clarify with the required specificity the discrimination complaints she wanted to bring before hearing her application to amend. I warned the Claimant that if her application to amend was successful then her complaints of constructive dismissal and breach of contract could not go ahead today as the application involved a substantial change to the legal basis of her claims and the Respondent would need to respond to those claims and call appropriate evidence to deal with them. The Claimant withdrew her application to amend.

14. I was provided with a 219-page bundle of documents. I considered witness statements and heard oral evidence from the Claimant, Mrs Katherine Rook, Mr Mark Wong, and Ms Kelly Millot and each was cross examined. I heard oral submissions from both the Claimant and Ms Harty at the conclusion of the evidence. I considered all the documents in the bundle to which I was referred. The facts I have found to be material to my conclusions are set out below. If I do not mention a particular fact in this judgment, it does not mean I have not considered it. All my findings are made on the balance of probabilities.

Findings of fact

15. The Claimant was employed by the respondent as a nurse (band 5) from 9 March 2020 until she resigned without notice on 14 July 2023. The Claimant's nursing role was based on the Surgical Triage Unit (ward C31) at Queen's Medical Centre, Nottingham. At the time of the events described the ward sister (who was also one

of the three ward managers) was Mrs Katherine Rooke; the deputy sister, Ms Kelly Millott; and Mr Mark Wong and Ms Maria Borja were the two other ward managers.

16. The Claimant joined the ward at a difficult time because it was the beginning of the COVID-19 pandemic, and she was a newly qualified nurse. The Claimant had some health concerns which caused her to be absent from work during 2020 and she was supported during these absences by Mrs Rooke. The Claimant and Mrs Rooke continued to get on well following Mrs Rooke's return from maternity leave in May 2022. The Claimant generally worked well with her colleagues. The Claimant has dyslexia and as part of managing that condition needs to plan her work tasks carefully.
17. On 19 January 2023 the Claimant was involved in a disagreement with Ms Kelly Millott, who was the nurse-in-charge (NIC) that day. At the start of the shift the Claimant was allocated to work with and supervise a nursing student. The Claimant also had a health care assistant and nursing associate to whom she could also share and allocate tasks. The Claimant started the medication round with the student, allocating the student particular tasks. The Claimant needed to leave the ward urgently to hand deliver some blood samples and when she returned to the ward Ms Borja informed her that the student had been moved. As the Claimant had already planned the allocation of ward tasks, the student's removal disrupted those plans. Ms Borja had moved the student because the Claimant was not able to sign off the student's work (though the Claimant didn't know this at the time).
18. Whilst Ms Millot was standing at the nurses' station the Claimant asked her whether she would be getting a replacement to carry out the student's tasks. Ms Millot responded that the decision to remove the student was not hers but was made by Ms Borja. When the Claimant asked Ms Millot a second time about whether the student would be replaced, Ms Millot lost her temper, raising her voice saying, "*I don't fucking know...ask Maria if you have a problem with it*". The Claimant was upset by Ms Millot's abrupt response, though her use of swear words

was not surprising to the Claimant as she had heard Ms Millot speak in the same manner previously on the ward. The Claimant said to Ms Millot that she “...ought to show more respect and that she wasn’t the only one with problems.” Ms Millot then walked off to the ward office, stating that she was going to talk to the ward managers, Mr Wong and Ms Borja. After a moment the Claimant followed Ms Millot into the office because she was concerned that Ms Millot might give an incorrect account of their disagreement to their managers. The Claimant did not attend the office with the intention of carrying on the argument but wanted to make sure her version of events was heard.

19. When Miss Millot and the Claimant were in the ward office the disagreement continued, with Ms Millot continuing to raise her voice stating to the Claimant “we all know you don’t want to do any work.” Mr Wong was present. The Claimant stood her ground and raised her voice in response to Ms Millot. The ward PA interrupted the disagreement and said that shouting could be heard in the ward. The disagreement soon deescalated when Ms Millot left the office and both parties calmed down and went back to work.

20. Towards the end of the shift Ms Millot apologised to the Claimant and the Claimant apologised to Ms Millot; they hugged one another in an emotional discussion.

21. Following the disagreement Mr Wong had separate conversations with both the Claimant and Ms Millot about their behaviour and asked both to provide written reflections about their accounts which he would consider and investigate. Before those written reflections were provided it was decided that Mrs Rooke would take responsibility for managing the incident. That decision was taken because Mrs Rooke was a more experienced manager than Mr. Wong and had known both involved longer than him.

22. The Claimant did not raise any formal complaint about Ms Millot’s behaviour and made clear in evidence that her primary concerns related to how the Respondent

dealt with the disagreement rather than how Ms Millot behaved. The Claimant accepted in cross examination that the disagreement on 19 January 2023 was not serious enough to cause her to resign.

23. On 13 February 2023, during a meeting which had been arranged to discuss a flexible working request made by the Claimant, Mrs Rooke took the opportunity to also discuss the disagreement that had taken place on 19 January 2023. Mrs Rooke told the Claimant that the disagreement was not being dealt with by a formal HR process but that she thought there should be a written record of the conversations so that if there were patterns of behaviour developing, they could be recognised and dealt with in the future. Mrs Rooke called this document an 'informal file note.' The informal file note was a process she had used on many previous occasions as a way of informally managing staff and it reflected paragraph 6.2.4 of the Respondent's Conduct, Behaviour and Disciplinary Policy and Procedure which provided for informal management of minor misconduct. The informal file note was kept on the ward in a paper personal file and was not sent to HR. However, HR was aware of the disagreement on 19 January 2023 as Mrs Rooke had sought and received their approval to manage the incident informally before the meeting on 13 February 2023.

24. Following the meeting on 13 February 2023 Mrs Rooke produced the informal file note (page 92 of the bundle). As set out in the file note, the Claimant acknowledged during her conversation with Mrs Rooke that the disagreement was inappropriate, and escalation could have been avoided if she had behaved differently. It was to the Claimant's credit (and that of Ms Millot) that both accepted that they ought to have handled the situation differently and apologised to one another. In answer to my question the Claimant said that she accepted some fault on her part in the incident on 19 January 2023, though it was clear that she placed primary blame on Ms Millot.

25. In the same file note of 13 February 2023, under the heading '*Details of concern/issue*' it stated: "*Racheal was involved in an argument with another member of staff raising her voice on the ward and then following the member of staff into an office space and continuing the shouting argument. Whilst it was discussed at the time Racheal reflected on it thoroughly. HR advised to discuss again and document*"
26. Under the heading "*Possible consequences if no improvement*" of the same file note it stated: "*Racheal is aware that should she be involved in an incident of a similar nature again we may need to discuss with HR the need to progress to a formal disciplinary process.*"
27. On 9 February 2023 Mrs Rooke undertook a similar informal discussion with Ms Millot about the 19 January 2023 disagreement. The Claimant did not know about the conversation at the time.
28. On 14 February 2023 Mrs Rooke emailed the Claimant a copy of the informal file note. In the same e-mail, she reminded the Claimant of support mechanisms that were available, such as the Employee Assistance Programme and Staff Well-being page. On the same day, the Claimant visited Mrs Rooke in her office because she did not think that the file note was an accurate description of the incident. The Claimant made clear that she felt that the file note indicated she was being blamed as the 'aggressor' in the disagreement. The Claimant wanted the note to go into more detail about what had happened. In her witness statement the Claimant set out that she believed that the informal file note was written to portray her as the aggressor, and such was "*calculated to tarnish her good name and create the false impression that I did not have professional ethics.*" The Claimant was unable to provide any explanation as to why Mrs Rooke, with whom she had previously enjoyed a good relationship, would set about to target her in this way.

29. I accept that the informal file note did not give a full and correct account of what happened on 19 January 2021¹³ because it did not refer to Ms Millot's involvement as the person who first lost her temper. The simplicity of the explanation meant that the full context was lost, and one can understand why the Claimant felt frustrated that the wording of the file did not provide the full story. However, I do not accept that Mrs Rooke's file note was calculated to damage the Claimant's reputation. The lack of specificity about Ms Millot's involvement was simply reflective of the informality of the process and the fact that the file note was focused on examining the Claimant's part to play in the incident rather than, for example, a full investigation into a potential disciplinary matter.
30. During the same conversation on 14 February 2023 Mrs Rooke explained to the Claimant that the file note was not designed to be sent to HR and that it had not been sent to HR but rather served as a record of the conversation and the action taken. Nevertheless, to allay the Claimant's concerns, Mrs Rooke agreed to amend the filed note and provide greater detail about what had happened during the disagreement.
31. On 15th February 2023 the Claimant emailed Mrs Rooke to confirm the content of her discussion the previous day.
32. On 22 February 2023 Mr Wong held an attendance review meeting with the Claimant under the Respondent's Wellbeing and Attendance Management Policy because the Claimant's absences from work at the end of 2022 had triggered formal absence monitoring from 18 January 2023 – 18 April 2023. This meeting took place in the ward office when Clinical Educator, Reina, was also present. During that discussion Mr Wong referred to the Claimant having suffered a urinary tract infection as the reason for one of her absences. In evidence Mr Wong accepted that Reina may have overheard that conversation and that it was a mistake by him to talk about the Claimant's medical condition in front of another member of staff. The Claimant did not raise any complaint about this issue at that

time or later. The first reference to her complaint about this issue was in her resignation letter dated 14 July 2023.

33. Due to pressure of work and planned annual leave Mrs Rooke was unable to attend to amending the file note until 8th March 2023 (page 100 of the bundle). In the updated file note part of the incident was described as follows:

“Racheal was involved in an argument with another member of staff on 19/1/23:... ..The NIC spoke in a manner that Racheal did not feel was respectful and didn't answer the questions to her satisfaction.

She then questioned again.

- *The NIC has acknowledged that the manner in which she answered the questions was inappropriate, particularly as they were in a public space, so she then took herself to the office to calm down.*
- *Racheal followed her into the office and they proceeded to continue their discussion, however, it escalated into a loud argument.*
- *The incident ended with the Nic walking out. Shouting at Racheal. This incident was discussed with both individuals at the time, and Racheal reflected on it in the days following. However, following HR advice, I have met with Racheal again to discuss the incident, the learning and document these things.*

34. Under the heading ‘Possible consequences if no improvement’ the same phrase was repeated (as set out in the first file note) as follows:

“Racheal is aware that should she be involved in an incident of a similar nature again, we may need to discuss with HR the need to progress to a formally disciplinary process.”

35. On 9 March 2023 Mrs. Rooke sent a copy of the amended file note to the Claimant. In her evidence the Claimant was clear that receiving this amended file and reading its contents was the ‘last straw’ or last act which caused her to resign.

36. The Claimant initially continued to attend work as normal after 9 March 2023 (she worked approximately two shifts each week on a typical week). From 15 to 19 March the Claimant was on annual leave. On week commencing 20 March the Claimant returned to work as normal. From 27 to 31 March 2023 the Claimant was again on annual leave. On 31 March 2023 the Claimant contacted her Union for advice concerning the updated file note. On the 4 April 2023, the Claimant was signed off sick due to stress and anxiety and she remained off work until she resigned on 14 July 2023.
37. On 11 May 2023 the Claimant contacted the Freedom to Speak Up Guardians and they met on 25 May 2023. On 16 May 2023, the Claimant was invited to a Well-Being Meeting on 23 May 2023 to discuss her ongoing absence.
38. On 19 May 2023, the Claimant raised a grievance which related to how management responded to the incident on 19 January 2023, particularly the contents of Mrs. Rooke's informal file notes recording the disagreement. This was the first complaint made about the Respondent's file note, which was over two months following its receipt.
39. On 7 June 2023 in response to the Claimant's grievance there was an informal resolution meeting chaired by Hannah Malloy, (Matron for the ward). The Claimant attended with her union representative. At this meeting, the Claimant agreed for her grievance to be dealt with informally. The possibility of the Claimant being redeployed to another ward was raised and discussed, and the Claimant said she would take some time to think about it. The Claimant was also referred to occupational health.
40. On 30 June 2023, the Claimant attended an occupational health consultation. The occupational health report was sent to the Claimant, though she did not agree to it being released to her line manager and HR before she resigned from her role.

41. On 4 July 2023, the Claimant provided a further fit note by e-mail, signing her off for a further two weeks until 17 July 2023. In response, the Respondent explained that the well-being management process needed to be recommenced to discuss her absence from work due to ill health and support that might be required. The Claimant was told that she would continue to receive full pay until August 2023.

42. On the 11 July 2023 Hannah Molloy emailed the claimant and asked whether she would like a trial period (with a view to possible permanent redeployment) in the Endoscopy Treatment Centre as the Claimant had previously indicated she would benefit from a different work environment. The Claimant was asked to respond by 14 July 2023 so that the Respondent could facilitate a return to work from 17 July 20213 when her fit note expired.

43. On 14 July 2023, the Claimant submitted a letter of resignation without notice addressed to Hannah Molloy which stated as follows:

"I confirm that I am an employee of the NHS as a nurse stationed at QMC Hospital having been employed in March 2020.

I refer to the incident that occurred on the 19th January 2023 and the subsequent events touching on or incidental to that incident. That culminated in my written complaint dated 19 May 2023 addressed to Carolyn Howes the Human Resources Lead, Department of Corporate Affairs. Furthermore, I refer to the contents of the said complaint and wish to incorporate the same herein by reference to avoid repetition.

The management has also warned me that:

“Racheal is aware that should she be involved in an incident of a similar nature, again, we may need to discuss with HR the need to progress to a formal disciplinary process.”

This is a plain threat to institute disciplinary proceedings in the event that I get involved in similar incident. I take great exception to this threat as I have always maintained my innocence and I cannot have an unfounded threat hovering over my head when I have a clean record.

I have also been bullied, harassed by some senior staff, let alone having my health disclosed to third parties without my consent in flagrant violation of my right to privacy.

I do hereby register my displeasure at the conduct of the management and its failure to resolve the dispute in my favour. The situation I have been through has destroyed the mutual trust and confidence between me and the employer. It is now practically impossible to restore a normal employer-employee relationship. In the circumstances, I am entitled to terminate the employment contract without notice by reason of my employer's conduct.”

44. In cross-examination, the Claimant confirmed that she relied on the report's contents sent to her on 9 March 2023 as the last straw, in particular what she considered to be the plain ongoing threat of the Respondent instituting disciplinary proceedings against her.

45. When asked why she did not resign promptly on receipt of the report on 9 March 2023 the Claimant said she “still wanted to keep her job.” The Claimant accepted that she could have resigned sooner than 14 July 2023 but was hoping the issue would be resolved (i.e. that the threat of future disciplinary conduct would be removed). I note that the Claimant commenced early conciliation on 8 June 2023, several weeks before she resigned. However, I am satisfied that at least until 19

May 2023, the Claimant did not continue to work under protest and if he did, she did not disclose that protest to her employer.

46. I have set out each allegation which the Claimant relies upon in respect of cumulative breach of the implied term of trust and confidence and I make factual findings about each.

47. “3.2.1 On 19 January 2023 Kelly Millot reprimanded the Claimant in the presence of patients and members of staff”

48. Ms Millot did reprimand the Claimant by swearing and shouting at her when she was on the ward. The factual allegation is therefore made out.

49. “3.2.2 Katherine Rooke reporting the incident of 19 January 2023 to Human Resources, despite not being present when the incident happened, via a file note on 13 February 2023 and stating the Claimant was the aggressor, which was false and malicious”

50. Mrs Rooke did not report the incident of 19 January 2023 to HR via a file note on 13 February 2023. The file note was used as an informal management tool which was not sent to HR by Mrs Rooke and Mrs Rooke explained this to the Claimant. The file note did not state that the Claimant was the aggressor. Whilst the file note did not set out the full account, there was nothing false or malicious about the contents of the file note. The factual basis of this allegation is not made out.

51. 3.2.3 Within the file note dated 13 February 2023 the Claimant was threatened with the possibility of a future disciplinary process based on an event where the Claimant was innocent.

52. The Claimant was warned that if an incident occurred of a similar nature, the Respondent may need to discuss with HR the need to progress to a formal

disciplinary process. A warning is not the same as a threat because a threat indicates an intention to do something. However, I note that the allegation is framed as a threat of a possibility of future disciplinary action, which is akin to a warning, and on that basis the factual allegation is partially made out. However, the assertion that this threat/warning was made in circumstances where the Claimant was “innocent” in the incident is not made out. The Claimant accepted during her conversation with Mrs Rooke and in evidence that the disagreement with Ms Millot was inappropriate, and escalation could have been avoided if the Claimant had behaved differently. In the circumstances I do not accept that the Claimant can be described as “innocent” in the disagreement.

53. 3.2.4 Failing to hear the Claimant’s version of events before reporting to Human Resources

54. This factual allegation is not made out. Mrs Rooke did hear the Claimant’s version of events. Mrs Rooke consulted with HR that she intended to informally manage the incident but did not report the incident to them. The informal file note was not sent to HR.

55. 3.2.5 On 22 February 2023 Mark Wong, Band 7, disclosed details of the Claimant’s urinal tract infection to the Clinical Educator Reina, without the Claimant’s consent.

56. This factual allegation is made out. Mr Wong did disclose details of the Claimant’s condition in the presence of Clinical Educator Reina, without the Claimant’s consent.

57. 3.2.6 On 9 March 2023 Katherine Rooke authored a second version of the report dated 13 February 2023 which caused further distress and again inaccurately portrayed the Claimant as the aggressor and made a repeat threat of disciplinary action without justification (the alleged last straw);

58. It is correct that Mrs Rooke authored a second version of the report dated 13 February 2023. I accept that the report caused the Claimant distress. However, this report did not portray the Claimant as the aggressor. If anything, Ms Millot as NIC, came off worse in the description of the incident. For the same reasons set out in respect of allegation 3.2.23 the allegation that the second version of the report made a repeat threat of disciplinary action without justification is not made out. A warning by the Respondent of disciplinary action if the same conduct was repeated was justified.

The law

59. An unfair dismissal claim can be pursued only if an employee has been dismissed as defined by Section 95 of the Employment Rights Act 1996 (ERA). Section 95(1)(c) provides that an employee is dismissed by his employer 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.”*

60. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

61. If there has been a breach of contract, the breach must be fundamental. This requires considering whether the conduct is: *“a significant breach going to the root of the contract of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.”* Western Excavating (ECC) Ltd v Sharp 1998 ICR 221, CA.

Implied term of trust and confidence

62. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606 the House of Lords considered the scope of that implied term, and the Court approved a formulation which imposed 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.*”
63. In cases where a breach of the implied term is alleged, the Tribunal's role is not the same as the range of reasonable responses test. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Not every action by an employer which can properly give rise to a complaint by an employee amount to a breach of trust and confidence. The formulation approved in Malik recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust.
64. An example that has been given by the Employment Appeal Tribunal (EAT) to illustrate the reasonable and proper cause element of the test is that in any employer who proposes to discipline an employee for misconduct is likely to be doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. However, if the employer had reasonable and proper cause for taking the disciplinary action, the employer cannot be said to be in breach of the implied term of trust and confidence - Hilton v Shiner Ltd Builders Merchants 2001 IRLR 727, EAT.
65. The second element of the test is whether the conduct was calculated or likely to destroy or seriously damage trust and confidence. This requires the Tribunal to consider the circumstances objectively, from the perspective of a reasonable person in the claimant's position Tullett Prebon plc v BGC Brokers LLP 2011 IRLR

420, CA. The test is met where the employer's intention is to destroy or seriously damaged trust and confidence, or where the employer's conduct was likely to have that effect.

66. A breach of the implied term of trust and confidence can be caused by one act, by the cumulative effect of a number of acts or a course of conduct. A last straw incident which triggered the resignation must contribute something to the breach of trust and confidence itself - Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA. There is no need for there to be proximity in time or in nature between the last straw and previous acts - Logan v Commissioners of Customs and Excise 2004 ICR 1, CA.

67. A breach of the implied term of trust and confidence is by its very nature repudiatory – Morrow v Safeway Stores plc 2002 IRLR, EAT.

Objective assessment

68. Whether a breach of a term is a fundamental breach is a question of fact and degree. The effect on the employee is relevant. The employer's subjective intention is not a key part of the test. It may be relevant, but the intention must be judged objectively - Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT.

Remedy of breach

69. Once there has been a repudiatory breach, it cannot be remedied – Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 EWCA.

Role in resignation

70. The breach must have caused the resignation, but it need not be the only cause. The test is whether the employee resigned in response to the conduct which constituted the breach. This is a question of fact for the Tribunal - Wright v N Ayrshire Council [2014] ICR 77 EAT.

71. Constructive dismissal is made out if the employee resigned at least partly in response to the employer's fundamental breach of contract - Logan V Celyn House Ltd EAT 0069/12. The crucial question is whether the repudiatory breach played a part in the dismissal, i.e. whether it was one of the factors relied on by the employee when resigning Abby cars (West Hornden) Ltd v Ford EAT 0427/07.

Affirmation

72. A person must make up her mind soon after the conduct of which she complains about occurred (Buckland) although given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there has really been an affirmation. In Buckland for example, the fact that the claimant was a lecturer who had responsibilities to students which he believed he had to honour until the end of term was itself a factor that pointed towards the conclusion his continued employment was not affirmed by a delay while he discharged those responsibilities. Mere delay by itself did not constitute an affirmation of the contract, but if the delay went on for too long it could be very persuasive evidence of an affirmation - WE Cox Toner (International) Ltd v Crook [1981] ICR 823 EAT. 200.

73. It is only affirmation after last act that matters because previous breaches can be taken into account even if after those previous breaches the employee affirmed the contract affirmed - Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1 EWCA.

74. If the employee waits too long after becoming aware of the breach of contract before resigning, s/he may be taken to have affirmed the contract. The question is whether the employee has shown an intention to continue in employment, rather than an intention to resign. This will depend on the particular circumstances of the case. Factors relevant to this question include the employee's conduct, as well as the length of time which has passed since the breach.

75. In addition to affirmation by delaying, the employee may affirm the contract by taking action which is consistent with employment continuing, irrespective of the timeframe, for example, considering alternative roles, accepting a promotion or a pay rise.

76. The general principle is that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance, or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, even once, then they will have waived their right to accept the repudiation.

77. Engaging an employer's grievance procedure does not necessarily affirm the employment contract – Kaur v Leeds Teaching Hospitals [2018] E WCA Civ 978. In Brooks v Leisure Employment Services Ltd [2023] EAT 137, the EAT said:

"Kaur is authority for the proposition that the exercise of a contractual grievance or appeal procedure in an attempt to give an employer an opportunity to resolve the issues that give rise to the breach of contract is not likely to be treated as an unequivocal affirmation of the contract. Use of a contractual grievance procedure will generally be no more than 'continuing to work and draw pay for a limited period of time' as referred to in W E Cox Toner while giving the employer an opportunity to put matters right, so generally will not amount to affirmation."

78. Last straw cases, by their very definition, involve a case where the employee has not resigned in response to earlier acts (or omissions) of the employer, and so arguably waived the right to accept a breach arising from those acts. Nevertheless, the courts have generally rejected the argument that employees lose the right to rely on those earlier acts or omissions as part of a last straw case – Kaur.

79. Where there is a continuing cumulative breach of the implied term, the employee is entitled to rely on the totality of the employer's acts even if she has previously affirmed the contract. The effect of the last straw is to revive the employee's rights to resign.

80. In a case where a number of breaches of contract are relied on by the claimant, the Tribunal may be assisted by the step-by-step approach of Lord Justice Underhill in Kaur:

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

80.2 Has the employee affirmed the contract since the act? If so, there cannot be a constructive dismissal in respect of that act or earlier acts.

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

80.4 If not, was it nevertheless a part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence? If it was, there is no need for any separate consideration of a possible previous affirmation.

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

Conclusions

81. Taking into account the guidance set out in Kaur I note that the most recent act on the part of the Respondent which the Claimant says caused or triggered her resignation was on 9 March 2023 when the Claimant received a copy second version of Mrs Rooke's report dated 13 February 2023. Therefore, the date of the last event is 9 March 2023. It does not matter at this point if it is a breach of the implied term or not.

82. Next, following Kaur, I consider whether the Claimant affirmed the contract since that act. If so, there cannot be a constructive dismissal in respect of that act or earlier acts.

83. Based on my findings of fact I conclude that the Claimant affirmed her contract of employment after this event. My reasons are as follows:

84. The Claimant did not resign until 14 July 2023, some five months after receipt of the report on 9 March 2023. I keep in mind that mere delay by itself does not of itself constitute affirmation though what happens during the period of delay is relevant (Bashir v Brillo Manufacturing Company [1979] IRLR 295). It is therefore important to consider the context of the delay i.e. what happened during that 5-month period to consider whether affirmation was unequivocal.

85. During the first month of the 5-month period until 5 April 2024, the Claimant continued to work as normal. The Claimant commenced a period of sickness absence after that. That she continued to work and be paid for one month and thereafter continued to receive sick pay for four months is consistent with the existence of a contract, and thus affirming it. However, I must consider the more flexible approach to affirmation in employment cases.

86. The Claimant did not make clear her objection to Respondent's conduct throughout the period from 9 March 2023 – 11 May 2023. The first complaint to come in the direction of the Respondent (though not directly to it) was via its Freedom to Speak up Guardian on 11 May 2023, followed by the grievance on 19 May 2023. The 19 May 2023 was more than two months after the last act. Before 19 May 2023, the Claimant had all relevant information available about how the Respondent recorded the incident on the file note. She knew how she had been treated. She had also received union advice on 31 March 2023, and I have no evidence to suggest that the advice given was not competent advice about what her options

were. Whilst I note that the Claimant fell off work sick on 4 April 2023 there is no justification prior to that point for the Claimant choosing not to resign or to delay making up her mind.

87. In addition, even following her period of sickness absence, the Claimant was actively involved in attending meetings, including agreeing that her grievance could be dealt with informally. The Claimant also attended an occupational health referral organised by the Respondent with a view to facilitating her return to work and entered discussions about possible deployment to another department. In my view those factors also lead me to the conclusion that the Claimant's behaviour was consistent with the continued existence of her employment contract, not an employee working under protest, and that she affirmed her contract by her actions after 9 March 2023.

88. In the circumstances, applying Kaur, the claim must fail at this stage. As the claim fails at this stage, I do not need to determine the other questions identified in Kaur.

89. The claim is therefore dismissed.

Employment Judge Millns

12 July 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

...01 August 2024.....

FOR THE TRIBUNAL OFFICE

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