



Case Number: 2301307/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss S Rahman

and

Respondent

St Georges University Hospitals
NHS Foundation Trust

Held at London South on 5th and 6th January 2017

Representation

Claimant:

Mr K Sonaike, counsel

Respondent:

Mr C Edwards, counsel

Employment Judge J Pritchard

RESERVED JUDGMENT

1. The Claimant's application to amend her claim is refused.
2. The Claimant's claim for unfair dismissal is well founded and accordingly succeeds.
3. The Respondent breached the Claimant's contract of employment by failing to give notice or by making a payment in lieu.
4. The Claimant's claim for holiday pay is dismissed upon withdrawal.

REASONS

5. By way of an ET1 Claim Form presented on 12th July 2016, the Claimant claimed constructive unfair dismissal, breach of contract (notice monies), and ticked the box claiming holiday pay. The Respondent resisted the claims.
6. The Tribunal heard evidence from the Claimant on her own behalf and from the Respondent's witnesses: Mr John-Jo Campbell (Head of Information Technology at all relevant times) and Mr Andrew Thomas (Acting Deputy Head of Information) hereinafter referred to as Andy Thomas. The Tribunal was provided with a bundle of documents to which the parties variously referred. The Tribunal was also provided with a number of additional documents on the first day of the hearing: Change Management Policy; Grievance Procedure; Stress Management Policy; Dignity at Work Policy; and an organisation chart which had been prepared by the Claimant after the termination of her employment but in advance of the grievance hearing which took place after her employment had ended. Mr Edwards also helpfully provided the Tribunal with his skeleton argument, short chronology and cast list. During the course of the hearing, further documents were introduced with the agreement of the parties: an organisation chart which

had been prepared by John-Jo Campbell illustrating proposals for a re-structured department; and copies of contracts of employment made between the Claimant and the Respondent at various times.

7. There was insufficient time for the Tribunal to deliberate and deliver judgment within the allocated hearing time. Judgment was therefore reserved. In advance of the Tribunal's deliberation counsel for the parties provided comprehensive written submissions. Within his submissions, counsel for the Claimant made applications to amend the Claimant's claim as more fully described below.

The issues

8. The issues were discussed with the parties at the commencement of the hearing and agreed as follows:

Constructive unfair dismissal

8.1. Whether on the balance of probabilities, the Claimant is able to show:

- (i) that there was a fundamental breach of contract on the part of the Respondent or a course of conduct on the Respondent's part, objectively viewed, that cumulatively amounted to a fundamental breach entitling her to resign, whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach. If the Claimant is relying on a course of conduct then she will have to show that the final act added something to the breach even if relatively insignificant;
- (ii) that the breach caused her, at least in part, to resign;
- (iii) that she did not delay too long before resigning, thus affirming the contract and losing her right to claim constructive dismissal.

8.2. The Respondent conceded that if the Claimant established that she had been constructively dismissed, then the dismissal would be unfair.

8.3. If the Tribunal were to conclude that the Claimant had been constructively and unfairly dismissed, what remedy is she entitled to? The parties were told that in the event of a finding in favour of the Claimant, a further hearing would take place to consider the question of remedy. However, any evidence relevant to Polkey or contribution should be adduced at this hearing.

Breach of contract

8.4. Did the Respondent breach the Claimant's contract of employment by failing to pay notice pay. If so, what is her entitlement to damages?

Holiday pay

8.5. The Claimant did not wish to pursue her holiday pay claim and it was agreed that this claim should be dismissed upon withdrawal.

9. The Claimant's case was that the Respondent had breached the implied term of trust and confidence.

10. As for the conduct relied upon, in addition to the conduct of Andy Thomas, the Claimant wished to rely upon alleged breaches of a number of policies and

procedures: the Sickness Absence Policy and Procedure; Guidance Notes on Temporary Assignment to a Higher Band (described by the Claimant as the Acting Up Procedure); the Change Management Policy; the Stress Management Policy; and the Dignity at Work Policy.

11. The Tribunal expressed concern that this appeared to be an expansion of the Claimant's pleaded case and with which the Respondent might therefore be unprepared to deal. The Tribunal drew the parties' attention to the dicta of Mr Justice Langstaff in Chandhok v Tirkey UKEAT/0190/14, in particular paragraph 18.
12. On behalf of the Respondent, Mr Edwards said that he had not understood the Claimant to be complaining of policy breaches other than those alluded to in paragraph 6 of her Statement of Claim. In particular, he did not understand that the Claimant would be seeking to rely upon breaches of policies other than the Sickness Absence Management Policy (referred to by the Claimant as the Return to Work Policy) although he accepted that the Guidance Notes on Temporary Assignment to a Higher Band were relevant to the issues in the case. Mr Sonaike's reply that the policies were intertwined.
13. The Tribunal determined that it would admit the documents and hear any evidence about alleged policy breaches which the parties wished to put forward but that both parties were at liberty to address issues relating to sufficiency of pleading in submissions, by reference to Chandhok if they thought fit.
14. At the commencement of the second day of the hearing Mr Sonaike informed the Tribunal that having now received copies of the contracts of employment which had just been disclosed by the Respondent, the Claimant would in addition seek to show an express breach of contract on the basis that the Respondent's policies were expressly incorporated in the contract of employment. The Respondent's position was that this had not been pleaded and in any event the policies did not have contractual force.
15. Mr Sonaike did not make an application to amend the Claimant's claim at any stage during the course of the hearing.

The scope of the pleaded claim

16. The conduct complained of by the Claimant is set out at paragraphs 6, 7, and 8 of her Statement of Claim. It can be distilled and described as follows:
 - 16.1. The manner in which the Respondent applied the Return to Work Policy and its failure to adhere to it;
 - 16.2. The Respondent delaying the Claimant's return to work despite the fact that Occupational Health deemed her fit to return on a phased basis;
 - 16.3. The Respondent changing the Claimant's role which excluded her from the Information Team and routine team meetings which diminished her responsibilities and affected her seniority;
 - 16.4. The Respondent requiring the Claimant to move offices;
 - 16.5. The Respondent unfairly denying the Claimant an opportunity to apply for the position of Interim Deputy Head of Information;

- 16.6. The Respondent informing the Claimant that her grievance would take a number of weeks to be dealt with but other senior colleagues told her it would inevitably take months (the Tribunal accepts that it would be appropriate to have regard to the Respondent's grievance policy in this regard); and
 - 16.7. The conduct of Andy Thomas including his behaviour in respect of some or all of the matters set out above.
17. The Tribunal concludes that the Respondent could not possibly have known that the Claimant would be seeking to complain of matters other than those described above and which she only sought to introduce at the commencement of the first day of the hearing and, indeed, during the course of the hearing itself. The Tribunal does not accept the Claimant's submission that the further policies and procedures upon which she seeks to rely are implicitly referenced in her ET1 (save for the grievance procedure which is relevant by reason of the complaint set out at paragraph 16.6 above). The Tribunal notes that the Claimant was legally represented both at the time her claim was presented and at the hearing itself. If the Claimant wished to rely on further matters and policy breaches, she had every opportunity to do so by requesting copies of the policies from the Respondent (and an application to the Tribunal for disclosure in the absence of voluntary disclosure) and making the appropriate application to amend her claim.
18. In the Tribunal's view, in the absence of a successful application to amend the claim (the Claimant's application included in counsel's submissions is considered below), it would be unjust for the Claimant to be permitted to advance matters relating to the Respondent's conduct without the Respondent having full opportunity to consider them and provide a considered response.

The Claimant's application to amend the claim

19. Although not clearly detailed with proposed amending text, it appears that the Claimant now seeks to amend her claim in the following ways:
- 19.1. To rely on breaches of the further policies referred to; and
 - 19.2. To rely on breach of express terms of contract by reason of breaches of the policies.
20. In deciding whether to exercise its discretion to grant leave to amend, a Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. In Selkent Bus Co v Moore 1996 ICR 836, the Employment Appeal Tribunal stated that relevant circumstances include:
- 20.1. The nature of the amendment, i.e. whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which changed the basis of the existing claim.
 - 20.2. The applicability of statutory time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for

the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions. Where the amendment is simply changing the basis of, or re-labelling the existing claim, it does not matter whether the amendment was brought within the time limit. See for example: London Borough of Hammersmith and Fulham v Jesuthasan 1998 ICR 640 CA.

- 20.3. The timing and manner of the application. Although the Tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it, it is relevant to consider why the application was not made earlier. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly where the new facts alleged must have been within the knowledge of the Claimant at the time the claim was presented.
21. The main question is not whether the Claimant's conduct is reprehensible but whether justice overall to both parties, balancing the hardship to each, requires that the amendment be granted.
22. Whilst the Tribunal accepts that time limits are not relevant to its consideration of the application, it is clear that the Claimant seeks to make significant additions to the basis of her existing claim. The Tribunal has been provided with no explanation as to why the application is being made at such a late stage; to the extent that the Claimant might be suggesting that the Respondent failed to disclose relevant documents until the first day of the hearing, or during the hearing itself, the Tribunal heard no evidence or submissions in that regard. In any event, it was open to the Claimant to make an application to amend at the commencement of the hearing or at any time during the hearing. The application is now being made at the latest possible stage. In the Tribunal's judgment, the balance of injustice and hardship falls in the Respondent's favour. The application is refused.
23. Accordingly, the Tribunal will consider those complaints described in paragraph 16 above only.

Relevant findings of fact

24. The Claimant commenced employment with the Respondent on 17 February 1997. From the outset, her duties were mainly concerned with Service Level Agreement Monitoring (SLAM). SLAM is a process which not only allows the Respondent to report its internal NHS activity income for budgetary purposes but also facilitates the billing of NHS activity to commissioners. The annual budget was or is in the region of £650 million.
25. During her employment, the Respondent had placed the Claimant in a number of temporary acting-up positions whereby she undertook the duties of an absent post-holder at a higher grade to that which she held. The Respondent clearly considered the Claimant to be an able individual.

26. By 2010, through various promotions, the Claimant had advanced to Band 8A Principal Information Analyst (which she describes as Information Deputy Team Leader). The Claimant's job description (confusingly having the job title Deputy Team Leader (Technical)) included responsibility for the supervision of the day-to-day work of Analysts (by 2014/2015 it appears that the Claimant had one staff member reporting directly to her). The organisational chart at Appendix 1 to the job description shows that the Claimant's position was subordinate only to the Information Development Manager and the Head of Information. It is clear that the Claimant was a senior member of the Information Team.
27. Although the Claimant's job description makes no reference to SLAM, that was her primary focus and she had developed a particular expertise in relation to its processes. Indeed, SLAM and other finance related matters comprised 100% of her duties. The Claimant was part of the Trust National Tariff Technical Group and a member of the review panel at the monthly budget/performance review meetings. She was frequently consulted by the clinical services for support and implementation of any clinical procedures. For the bi-monthly SLAM process, the Claimant was responsible for the coordination, collation and processing.
28. In 2012, Andy Thomas commenced employment with the Respondent as a Band 7 Community Data Warehouse Manager. At some time in 2013/2014, Andy Thomas was promoted to Band 8A Technical Sub-team Manager. In this role Andy Thomas had responsibility for migration of a number of the SLAM processes and the Claimant found it difficult to work with him. Her perception was that Andy Thomas was trying to encroach on her areas of responsibility relating to SLAM and in about May 2015 the Claimant raised a grievance about him. In evidence, Andy Thomas suggested that the reason for the difficult relationship was that they were competitive peers.
29. In about May/June 2015, the Head of Information, Tom Dewar, sought to take away one aspect of the Claimant's duties relating to SLAM, that relating to its redevelopment. Upon the Claimant objecting to the reduction in her role and making it clear that she was considering resigning because of it, the Claimant's SLAM redevelopment duties were not taken from her. The Claimant was told that the Respondent's recruitment process had been initiated to fill vacant posts within her team. This would provide her with additional support. Accordingly, the Claimant did not resign.
30. An informal complaint was made about the Claimant by a number of employees including the employee reporting to the Claimant.
31. As far as the Tribunal is able to ascertain and insofar as relevant the organisation of the team, before the Claimant's sick leave referred to below, can be described as follows: Tom Dewar was Grade 8C Head of Information and the Claimant reported directly to him. There were two Grade 8B Deputy Head of Information positions, one held by Rob Simpson, the other a vacant post. There were then a number of Grade 8A positions, one of which was held by the Claimant with two staff positions (one vacant) reporting directly to her. One of the other Grade 8A positions was held by Andy Thomas.

32. In June 2015 the Claimant suffered an injury on holiday when she was struck on the head by the boot of a car. Although she initially returned to work, she continued to suffer from persistent headaches and her health deteriorated. The Claimant became anxious and concerned that she might have suffered a serious injury. The Claimant commenced long-term sick leave on 21 July 2015, being initially signed off by her GP with sinusitis and then with headache.
33. Scans and x-rays showed that the Claimant had not suffered a serious injury. The opinion of the Claimant's GP was that the Claimant was suffering from prolonged and sustained levels of stress; work was identified as a key factor. The Claimant started on anti-anxiety medication on 1 September 2015.
34. During the Claimant's absence, Tom Dewar handed in his resignation and would be leaving at the end of October 2015.
35. The Respondent's Guidance Notes on Temporary Assignment to a Higher Band (Acting Up) provide, amongst other things:

3 *Guidelines for Acting up*

The following steps outline the process for acting up employees to a higher pay band.

Identify the Potential Group

Consideration needs to be given to the group of staff that could act up. Initially this will mean highlighting immediate deputy/ies who are most likely to be suitably qualified for acting up. Pinpointing the immediate deputy may mean identifying one employee, but at lower pay bands it will highlight a group of staff.

In identifying the potential group, the staff will need to be both in the same field of work and be close in terms of the level of post, ideally the next level down.

Identify who is interested

Whilst the manager will make the final decision as to who acts up, staff will need to be encouraged to express an interest, or otherwise, in acting up. This is best facilitated initially through normal staff team meetings or in a manner that brings the opportunity to the attention of all appropriate staff including staff on annual or sick leave. If more than 1 person expresses an interest in acting up then it may be appropriate to hold informal interviews.

36. In August 2015, Andy Thomas was appointed to act up as Deputy Head of Information to work alongside Rob Simpson, both of whom would report to John-Jo Campbell until a replacement was found for Tom Dewar. John-Jo Campbell, who was responsible for appointing Andy Thomas to the acting-up position, did not follow the guidelines for acting-up contained in the Guidance Notes on Temporary Assignment to a Higher Band (Acting Up).
37. Andy Thomas undertook a great majority of the Claimant's SLAM duties during her sickness absence with others in the team assisting. He also undertook line management responsibilities for the employee who had hitherto reported to the Claimant.

38. Because Tom Dewar had a good working relationship with the Claimant, it was agreed that he would retain line management of the Claimant (who was on sick leave) until he left the Respondent's employment.
39. The Claimant was keen to return to work and she met with Tom Dewar on 19 October 2015. At that meeting, Tom Dewar informed the Claimant that he had handed in his resignation and that Andy Thomas had been appointed to the acting-up role of Deputy Head of Information to work alongside Rob Simpson. Since Tom Dewar's management responsibilities had been transferred to Andy Thomas, the Claimant would be reporting to Andy Thomas in future.
40. Amongst other things, the Respondent's Sickness Absence Management Policy and Procedure provides as follows:

Long term sickness: *Long term sickness is defined as any period of sickness longer than four weeks*

17.4 Procedure for Long Term Sickness

Any employee returning to work after four weeks or more sickness absence as a result of an accident at work or where illness may have occupational implications must be referred to Occupational Health.

In cases where the reason for absence is known and does not have occupational relevance the manager will seek advice from the Occupational Health department as to whether or not a referral would be appropriate. The Consultant Occupational Health Physician will decide whether the employee should have a health interview with the Occupational Health Nurse Advisor or needs to see a doctor.

It is important that contact is maintained during any period of long term sickness, and meetings may be arranged at any point throughout the period of absence but normally after four weeks and at a minimum before the employee commences half pay and before the employee commences no pay.

When an employee is absent from work on a long term basis and the date for a return to work is not known, the employee will be referred to Occupational Health as early as possible to determine the prognosis in connection with the absence. A copy of the referral will be sent to the employee.

The manager should contact the employee to arrange a long term sickness review meeting to ascertain when a return to work date can be expected. The employee will be given 7 calendar days' notice of the date of the meeting and advised of his/her right to be accompanied.

The purpose of the meeting will be to establish the employee's current health situation, a possible date for return to work and any assistance that might reasonably be provided. The outcome of this discussion will determine the next stage in the process as the options may range from an early return to work to early retirement.

In the event that the employee is too ill to attend such a meeting, the manager may consider visiting the home of the employee if the employee agrees to this.

Alternatively, if it is agreed the employee is too ill to attend a meeting the employee may provide a written statement to their manager which will be considered at the meeting.

41. The Claimant's GP was keen that the Claimant see occupational health before returning to work. On 22 October 2015, the Claimant contacted Rob Simpson to find out if the return to work arrangements had been initiated and whether a referral had been made to occupational health. Because no such arrangements had been initiated the Claimant sought to self-refer to occupational health; however, she was informed that the referral must be made by a manager.
42. Andy Thomas formally took on management responsibility for the Claimant from Monday 2 November 2015 and the Claimant asked Andy Thomas to make an occupational health referral. On 2 November 2015 the Claimant was signed off until 28 November 2015 as not fit for work suffering from depression. On 12 November 2015, Andy Thomas completed an occupational health referral form.
43. By email dated 13 November 2015, Andy Thomas informed the Claimant that he was keen that they should build a working relationship and work constructively together.
44. By email dated 23 November 2015, the Claimant complained to Jo Leslie of the Respondent's human resources department that, amongst other things, there had been a team restructure in her absence and that Andy Thomas had been given the interim deputy head post despite the position not being advertised or other staff offered the opportunity to apply. She said she could not return to work in an environment that caused her illness and if no assistance was provided she would have no choice but to look for new employment. Jo Leslie replied that she was not aware of any restructuring of the team but that was not to say that team structures had not changed.
45. On 2 December 2015 the Claimant's GP provided a statement of fitness for work showing that the Claimant continued to suffer from depression but that she was fit for a phased return.
46. The Claimant had an occupational health assessment on Friday 4 December 2015. Dr Small reported that the Claimant was fit to return to work the following week working 50% of her contracted hours split over 3 days for 2 weeks. This would enable the Claimant to have rest days at home which would be important in terms of her long term recovery. Dr Small also requested that a Management Stress Risk Assessment be undertaken as soon as the Claimant returned to work.
47. Andy Thomas informed the Claimant that it would not be practical for her to return to work the following week. Instead, he met with the Claimant on Wednesday 9 December 2015 in a café in the Respondent's grounds and informed her that he had assumed the Claimant's responsibilities for SLAM and that he now managed the staff member who had previously reported to the Claimant together with a new member of staff who had been recruited to work in the Claimant's team. Instead of returning to her previous role dealing with SLAM, the Claimant would instead undertake a data quality role. Further, Andy Thomas informed the Claimant that in future she would be situated in and working from

his own office. Given that Andy Thomas had emailed the team the previous day to inform them that the Claimant would be seated in his office and undertaking work he assigned to her, the Tribunal is unable to accept that this was anything other than a fait accompli. As to the overall content of the meeting, the Tribunal accepts that the Claimant's notes of the meeting which she typed up immediately after the meeting are likely to be a reasonably accurate summary of what was said.

48. A further meeting took place on 11 December 2015 between the Claimant, Andy Thomas and Paulette Greenidge of the Respondent's human resources department to carry out the Stress Management Risk Assessment. The Claimant was accompanied by a friend, Andy Irvine. The Tribunal accepts that Mr Irvine's notes, which are set out in a style which suggests a near verbatim record, are likely to be an accurate account of what was said. As the Claimant did not have the necessary documents to hand, the assessment was not completed. At this meeting the Claimant raised a number of complaints: that the return to work policy had not been followed; that she had to chase to be referred to occupational health; that Andy Thomas had changed her role; that Andy Thomas had changed her line management which she did not accept; and that Andy Thomas was now going to her meetings.
49. With regard to the Claimant returning a different job, Andy Irvine's notes of the meeting record Ms Greenidge as saying "No change as should be back to existing role. Need consultation for any change". At an interview as part of the Claimant's grievance investigation which took place after the end of her employment, Andy Thomas conceded that Ms Greenidge had advised him not to change the Claimant's role. Following discussion between Andy Thomas and John-Jo Campbell, it was decided that the Claimant's role would be in data quality as planned.
50. Andy Thomas sent a number of emails to the Claimant setting out her duties and the days he expected her to work.
51. Having taken some annual leave and worked from home, the Claimant returned to the workplace on Friday 18 December 2015. She emailed Paulette Lindsay-Greenidge of human resources on the same day as follows:

Dear Paulette

I am forwarding an email I received a few days ago from Andy Thomas, whilst I was on leave and to my personal email address. Following our meeting on 11 December, I am surprised that I am still being asked not only to undertake duties that are out with my usual area but also to relocate to Andy's office. I am not being allowed to return to my own work role and having to move desk when my own work area is free seems completely unnecessary and controlling. As I mentioned in our Friday meeting, my understanding of a phased return is that I am supported into resuming my existing role in my usual work environment. I don't feel this to be the case.

Today is my first day back in the office after five months sick leave. I have been giving Andy's email a lot of thought and it is causing me great concern at a time when I am already feeling vulnerable and apprehensive. I feel

demoted and undermined. There is no sympathy or understanding of the illness I have suffered in the last few months.

... I am planning to see my GP as regrettably I have started to feel unwell again in the last couple of days

Could I please request a meeting with you at your earliest convenience.

52. On the same day, John-Jo Campbell commenced a return to work meeting with the Claimant. Mr Campbell talked through a proposed new team structure with the Claimant which was planned to take place in March 2016. The way in which Andy Thomas had been appointed to his acting up position was discussed as was the Claimant's wish to return to SLAM duties. By email later that day, Andy Thomas informed the Claimant that there would be no change to the data quality duties he had planned for her.
53. By email to the Claimant early the following morning, Saturday 19 December 2015, Andy Thomas wrote about interaction he had had with the Claimant the previous day about a computer, that he felt the Claimant had spoken to him in accusing tone, and that she should show patience while waiting to be assisted by a member of the IT staff. Shortly thereafter Andy Thomas sent an email to Dr Small in advance of a further occupational health appointment the Claimant would be having with Dr Small. Amongst other things, Andy Thomas asked Dr Small whether an assessment of "cognitive dissonance" or "cognitive bias" might be appropriate.
54. Andy Thomas was on annual leave from 19 December 2015 to 4 January 2016.
55. John-Jo Campbell resumed the return to work meeting on Monday 21 December 2015 during which the Claimant complained about Andy Thomas's email sent to her at the weekend which had caused her distress. Given the difficult relationship between the Claimant and Andy Thomas, and what the Claimant described as Andy Thomas's intimidation, Mr Campbell suggested that the Claimant report directly to himself instead of Andy Thomas and that she should not move into Andy Thomas's office. The Claimant again raised her concerns as to the way in which Andy Thomas had been appointed. The Claimant felt that her current work position was not tenable and would consider leaving. She was also considering raising a formal grievance.
56. On 22 December 2015, Dr Small reported to John-Jo Campbell as follows:

Dear John-Jo

Re: Susie Rahman

Susie attended for medical review this morning. I understand that Susie will be reporting to you rather than Andy Thomas who is on leave until 4th January 2016. I believe you have met with Susie on 2 occasions to conduct her return to work interview.

I believe that for a number of management reasons, Susie did not actually commence her phased return to work until Friday 18th December 2015. This is perhaps disappointing however hopefully her work plan has been clarified.

I believe that Andy informed Susie that her job role was to be altered although she was unaware of this until he arranged an informal meeting on 9th December.

The phased return to work outlined in my initial report to Andy was based on Susie returning to her substantive role at her workstation with her colleagues. Susie stated that Andy suggested that she worked either from home or in his office on data quality issues.

Susie will complete her 2 weeks of undertaking 50% of her contracted hours over 3 short days before increasing to 75% during week 3. All being well, Susie can then resume full time.

This has been an unsettling reintroduction into the workplace and Susie continues to have input from Staff Support Counselling Service. I have arranged to see Susie again on Thursday 14 January 2016 at 12.00.

57. Although John-Jo Campbell considered what Dr Small said about the Claimant returning to her original job, he discounted it and decided to leave the SLAM team in place as they had been since July 2015 during the Claimant's absence. In evidence he said that he had taken the view that the Claimant should not undertake such duties until she returned full time.
58. Upon Andy Thomas returning to work on 4 January 2016 he emailed the team informing them that the Claimant would continue to focus on data quality issues and that members of the team who had picked up work streams in the Claimant's absence would continue to do so with no changes to those responsibilities proposed. Andy Thomas was informed of the change to the Claimant's line management and thereafter he had very limited contact with the Claimant.
59. On 7 January 2016 the Claimant took sick leave. Thereafter she continued to work on a four day a week basis in accordance with the return to work arrangements. She worked from an office on the second floor of the building, not in Andy Thomas's office as he had originally instructed. On 11 January 2016, as part of his handing over line management of the Claimant to John-Jo Campbell, Andy Thomas emailed John-Jo Campbell to inform him of the arrangements he had put in place for the Claimant.
60. On 14 January 2016, Dr Small reported to John-Jo Campbell that upon review the Claimant felt demoralised and undermined and that she should continue working 4 days a week.
61. The Claimant took annual leave during the last week of January 2016 and the first week of February 2016.
62. By letter dated 2 February 2016, the Claimant raised a formal grievance in which she complained that the Return to Work Policy had not been adhered to, the manner in which the Return to Work Policy had been applied constituted a fundamental breach of contract, that she had been unfairly denied the opportunity to apply for the position of Interim Deputy Head of Information, and improper conduct by Andy Thomas, including that he had taken advantage of her leave to encroach on her areas of responsibility and used the opportunity to further his own career. The Claimant complained that she had been excluded

from her usual role in the Information Team, no longer had an office in the department and had been excluded from routine meetings; that Andy Thomas now attended meetings which were previously her responsibility. She stated that the situation was making it very difficult to return to work to resume her existing role. She expressed the hope that her grievance would be investigated expeditiously.

63. The Respondent's grievance procedure provides, amongst other things:

On receipt of a written grievance, the HR Department, on behalf of the manager, will arrange a hearing as soon as possible after agreeing the date with the employee.... The employee will be given reasonable notice of the arrangements for the hearing. As far as is reasonably practicable, the hearing will take place within 21 days calendar days of receipt of the grievance.

The outcome of the hearing will be confirmed in writing within 7 calendar days of the hearing...

64. The Claimant did not see the grievance policy until after she resigned.

65. Jo Leslie of the Respondent's human resources department informed the Claimant that the grievance process might take a number of weeks to complete due to appointing a case investigator and then giving interviewees notice to attend interviews. The Claimant wished to resign and the Respondent agreed that the Claimant's grievance would be considered after her employment had ended.

66. The Claimant subsequently met with John-Jo Campbell and it was agreed that the Claimant should be permitted to waive the requirement that she give 3 months notice to end her employment.

67. By letter dated 19 February 2016, the Claimant resigned and requested that 29 February 2016 should be her last working day. She stated that she had no choice but to resign because of recent events.

Applicable law

68. Section 95(1)(c) of the Employment Rights Act 1996 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.

69. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

69.1. that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (note that the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer

- intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.
- 69.2. that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI); .and
- 69.3. that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
70. All contracts of employment contain an implied term that an 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: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.
71. Although there is nothing to prevent an employer trying to make amends to prevent a breach of contract, a fundamental breach cannot be cured; see Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908 CA.
72. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.
73. In submissions, Mr Sonaike drew the Tribunal's attention to the cases of:
- 73.1. Land Securities Trillium Limited v Thornley [2005] UKEAT/0603/04 in which the Employment Appeal Tribunal upheld the tribunal's decision that the claimant had been constructively dismissed when the whole emphasis of her job had changed to that of a management role which were at a remove from the hands-on architectural work which she had previously undertaken; and
- 73.2. Visa International Service Association v Paul [2003] UKEAT/97/02 in which the Employment Appeal Tribunal upheld the tribunal's decision that the claimant had been constructively dismissed when the respondent failed to notify her of a job opportunity while she was on maternity leave.

74. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment. A claim for notice pay is a claim for breach of contract.

Conclusion and further relevant findings of fact

75. The Tribunal is mindful of the ruling in Consignia and, as submitted by the Respondent, to prove dismissal within the meaning of section 95(1)(c) is not easily done. Much of which the Claimant complains falls short of a fundamental breach of contract and are "lesser blows" which she could be expected to absorb.

75.1. The Tribunal is unable to accept that the Respondent's failure to follow its Return to Work Policy, to the extent that there was a failure, amounted to a fundamental breach of contract.

75.2. Given that the Claimant remained signed off as unfit for work until 2 December 2015, when her GP confirmed that she was fit for a phased return, the Tribunal takes the view that it is difficult to criticise the Respondent for Andy Thomas's failure to refer the Claimant to occupational health until 12 November 2015 after he took over her line management on 2 November 2015.

75.3. Nor does the Tribunal criticise the Respondent for placing Andy Thomas in the position of Interim Deputy Head of Information during the Claimant's absence and requiring him and others to carry out SLAM duties. It is clear that the SLAM process was required to be carried out a senior level; business continuity was vital for the Respondent. Although the Acting-Up guidance might be best practice, in the Tribunal's view deviation from it will give rise to a breach of contract. In particular, given that the document is expressed as guidance, the Claimant could have had no legitimate expectation that it would inevitably be followed. In any event, since the Claimant was off sick at the time and would not be able to carry out the function of Deputy Head of Information in any event, the Tribunal is unable to conclude that the Claimant was denied the opportunity to apply for the position. There was no breach of the implied term.

75.4. It is difficult to understand why the Claimant's grievance might have taken longer than the time limits set out in the Respondent's grievance policy (by way of an observation only, the Tribunal notes that the Claimant's grievance was not concluded until November 2016). However, the wording of the policy itself might be read as requiring a number of weeks to complete and Jo Leslie's comments cannot, without more, lead to a finding of improper conduct on the Respondent's part.

76. The change to the Claimant's role upon her return to work, however, was no such a "lesser blow". When carrying out her SLAM role, the Claimant was clearly

in a senior position. She had responsibility for other/s reporting to her. She attended meetings at a senior level. Her responsibilities related to significant expenditure. She was working within her area of particular expertise. This changed significantly upon her return to work when she was instructed to carry out a data quality role. Although her Band and salary remained the same, the Tribunal accepts the Claimant's evidence that she was now in a lesser role more suited to a member of the IT Department. Although in cross examination Andy Thomas denied he had said during the investigation into the Claimant's grievance that he was aware that his instructions were not targeted at her level of band, on balance the Tribunal finds they were indeed not targeted at the Claimant's level (and concludes that the verbatim style notes of the investigation notes are likely to be accurate). The Claimant no longer had others reporting to her, she no longer attended meetings at such a senior level, and no longer worked with the same people. The instruction to carry out the data quality role was given without any meaningful consultation. Despite the Claimant raising objections to it, the decision was a fait accompli and was maintained despite the advice of the Respondent's human resources manager and appeared to ignore what Dr Small had to say about the basis of her initial report. The Claimant's role was diminished and her seniority adversely affected. It is clear that the Claimant was expected to remain in the data quality role until at least March 2016 when the departmental restructure was proposed; as John-Jo Campbell said in evidence, he had no idea if the Claimant would ever return to her previous role.

77. The Tribunal is unable to discern any credible evidence that there was a reasonable and proper cause for the Respondent to place the Claimant in such a lesser role. John-Jo Campbell sought to suggest that the stress of the SLAM role made it necessary for the Claimant to be placed in a less stressful role. The Tribunal is unable to accept that suggestion which flies in the face Dr Small's advice. Indeed it is clear from the evidence that not allowing the Claimant to return to work in her role itself caused stress on her part. The Tribunal does not accept the Respondent's submission that the Claimant's own note of the meeting of 18 November 2015 recognised that she could not undertake SLAM work until she was fully back to work – the note records the Claimant's suggestion that she pick up on SLAM issues. There was no credible evidence before the Tribunal as to why the Claimant could not be permitted return to SLAM duties with adjustments and phased return suggested by Dr Small and the Claimant's GP.
78. The Tribunal concludes that the Respondent without reasonable a proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.
79. The Tribunal fails to understand how, as he suggested, Andy Thomas might have been able to provide better support for the Claimant upon her return to work by having her work in his office as opposed to the Claimant working elsewhere. Given the Claimant's status, experience and seniority, it would have been demeaning for her have to work in Andy Thomas's office where new starters would usually sit. The Tribunal can discern no reasonable and proper cause for it. Although this instruction was reversed by John-Jo Campbell, the damage had been done. The Tribunal finds that the instruction itself was sufficient to amount to a breach of the implied term and was not capable of being cured; Buckland.

80. Although the Claimant did not immediately resign, she objected more or less throughout the remaining period of her employment to the Respondent's conduct. She did not waive the breach and affirm the contract. The Claimant clearly resigned in response to the breach.
81. Having reached its conclusions above, it is not necessary for the Tribunal to consider further issues relevant to the case.
82. The Claimant was constructively and unfairly dismissed.
83. The evidence adduced does not lead a conclusion that deductions should be made from compensation by reason of contributory fault on the Claimant's part or under the Polkey principle. Indeed, the Respondent did not pursue any arguments in this regard.
84. The Respondent waived its right to demand that the Claimant must give 3 months' notice upon her resignation. In fact, she was not required to give any notice because she was entitled to terminate her contract without notice) by reason of the Respondent's conduct. There was no evidence before the Tribunal that the Claimant waived her right that the Respondent must give her notice upon her dismissal. Nor was there any evidence to support an argument that the Respondent was justified in dismissing the Claimant without notice. The Tribunal concludes that the Respondent thereby breached the Claimant's contract of employment.
85. In accordance with Rule 3 of the Employment Tribunal Rule of Procedure 2013, the parties are encouraged to use the services of ACAS or other mediation as a way of resolving the question of remedy and it is hoped that the parties will apply their minds to settlement without further costs being expended on either side.
86. This case will nevertheless be listed for a remedy hearing with a half day time estimate.
87. For the avoidance of doubt, at any remedy hearing the Claimant can expect to be awarded costs in respect of any Tribunal fees she has paid.

Employment Judge Pritchard
3 February 2017