



EMPLOYMENT TRIBUNALS

Claimant: Dr S E Middleton

Respondent: York Teaching Hospital NHS Foundation Trust

Heard at: Leeds by CVP video link on: 24, 25, 26, 27, 28 May and 1, 2, 3, 4 and 7 June 2021

Before: Employment Judge Shepherd

Appearances:

For the claimant: Mr Healy, counsel

For the respondent: Ms Souter, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim that the claimant was unfairly dismissed pursuant to section 94–98 of the Employment Rights Act 1996 is well found and succeeds.
2. The claim that the claimant was unfairly dismissed by reason of making a protected disclosure pursuant to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

ORDERS

The parties must, within seven days of the date this Judgment and reasons are sent to them, provide details of unavailability for the period of 1 August 2021 to 31 October 2021 for a one-day remedy hearing together with suggested case management orders leading to that hearing.

REASONS

1. The claimant was represented by Mr. Healy and the respondent was represented by Ms. Souter.

2. The Tribunal heard evidence from:

Stella Elaine Middleton, the claimant;
Ruth Dixon, Lead Consultant Psychologist (Staff Well-being);
Sandra Quinn (formerly Sandra Tucker–Quinn, referred to as Sandra Quinn throughout), Resuscitation and Clinical Skills Lead;
Andrew Bertram, Finance Director;
Karen O'Connell, Operational Lead for Occupational Health Well-being Service;
Elizabeth (Liz) Anderson, Clinical Psychologist, Head of Psychological Medicine, Professional Lead for Psychology;
Polly McMeekin, Director of Workforce and Organisational Development;
Helen Hey, Deputy Chief Nurse;
Steve Kitching, Head of Corporate Finance and Resource Management.

3. I had sight of a bundle of documents which consisted of 1371 pages, together with a supplemental bundle of documents which, together with documents added during the course of this hearing, was numbered up to page 312. I considered those documents to which I was referred by parties.

The issues

4. The parties agreed that the list of issues identified at a Preliminary Hearing before Employment Judge Wade were the issues for the Tribunal to determine as follows:

This case involves the behaviour and motivations of those in psychotherapy/wellbeing teams at the Respondent trust.

The Claimant alleges disagreement about a particular treatment intervention (RAFT/TRiM), a protected disclosure about that and actions with regard to pay and contract change.

The Claimant's resignation followed.
The complaints brought are of:

- i. Constructive dismissal;
- ii. Protected disclosure dismissal.

The making of a disclosure on 22nd October 2018 is not in dispute.

- 4.1. Did the respondent engage in the conduct relied upon by the claimant in her list of allegations?
- 4.2. Did any conduct amount to breaches of her express terms of employment (relating to pay, grade or occupation)?
- 4.3. What was the reason/cause for the proven conduct?
- 4.4. Was any proven conduct without reasonable and proper cause?
- 4.5. Was any proven conduct influenced by C having made protected disclosures on 22nd October 2018?
- 4.6. Was any proven conduct likely to destroy or seriously damage trust and confidence (singly or taken together)?
- 4.7. If C establishes breaches of express terms or the implied term of trust and confidence, did she resign at least in part in response to that conduct?
- 4.8. Did she affirm any breaches?
- 4.9. If C establishes a constructive dismissal, analysing any reasons for the totality of repudiatory breaches, can it be said that the principal reason, the main and effective cause for the conduct was the 22nd October 2018 disclosure?

5. Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that I made from which I drew my conclusions.

Where I heard evidence on matters for which I make no finding, or do not make a finding to the same level of detail as the evidence presented, that reflects the extent to which I consider that the particular matter assists in determining the issues. Some of my findings are also set out in my conclusions, to avoid unnecessary repetition and some of the conclusions are set out within the findings of fact. I have anonymised the identity of those mentioned who did not appear before the Tribunal or provide a witness statement.

- 5.1. The claimant was employed by the respondent from 3 May 2006. She was employed as the Psychological Wellbeing Lead (Occupational Health). She was initially employed on a part time basis and this was changed to a full-time contract in around January 2016.

5.2. The claimant's job was evaluated by the respondent's job matching panel employed in accordance with Agenda for Change in 2015. It was banded at 8a. Following an appeal, the job was banded at 8b. The claimant's job description included a section which stated:

"To lead the psychological service to ensure it meets the needs of the organisation planning and organising a broad range of programs, adjusting plans or strategies to fit with the changing pressures and requirements within the Trust."

5.3. The claimant was the only clinical psychologist in the Occupational Health and Wellbeing Service. Her line manager was a nurse, Karen O'Connell, Operational Lead.

5.4. The claimant created and chaired the Mental Health Working Group and was a member of the Health and Wellbeing Steering Group. The claimant had developed the Occupational Health and Wellbeing Service and her job description included a requirement to propose and implement policies and strategies.

5.5. Sandra Quinn, a nurse and Resuscitation and Clinical Skills Lead, became interested in developing TRiM. This was a programme developed by the military with regard to Trauma Risk Management. The claimant invited Sandra Quinn to attend a Mental Health and Wellbeing Group meeting on 7 September 2017. The claimant and the Mental Health Working Group agreed that this was something worth pursuing and that Sandra Quinn should apply for funding in order to set up a pilot project. The claimant was aware that "debriefing" following trauma was regarded as a controversial area. She encouraged Sandra Quinn to keep herself and the Mental Health Working Group updated with developments in order that she could continue to provide oversight and guidance if the project were to go ahead.

5.6. In November 2017 Sandra Quinn produced a paper on TRiM and on 18 March 2018 presented that paper to the Mental Health and Wellbeing Group.

5.7. On 25 July 2018 the claimant emailed Sandra Quinn and asked her to update the claimant on the progress of the TRiM project.

5.8. On 26 July 2018 the Assistant Head of Workforce, forwarded an email to the claimant which had been sent by Polly McMeekin, Acting Director of Workforce and Organisational Development, this indicated that she had had a positive meeting with Sandra Quinn and that it would be helpful for her to give information to the LNC (Local Negotiating Committee) and JNCC (Joint Negotiating and Consultative Committee) in order to keep the unions on board. The claimant replied indicating that it had been put on the Health and Wellbeing Group agenda and it should be considered how it would be 'dovetailed with the existing guidance/procedures'. The claimant also

mentioned that there had been some caution raised in previous research and they needed to be clear about contra-indications etc.

5.9. On 24 August 2018 Polly McMeekin forwarded an email to the claimant which had been sent to a number of managers in which it was indicated that it was to make them aware of the support that could be offered to staff following any critical incident/traumatic event. It described the new debriefing service, now entitled RAFT, which was being put in place by the Resuscitation Team.

5.10. On 28 August 2018 the claimant sent an email to Polly McMeekin expressing surprise that the project appeared to have been approved and rolled out prior to the meeting that had been arranged on 12 October and asking whether she had “missed something”.

5.11. On 4 September 2018 the claimant sent an email to The Assistant Head of Workforce indicating that the Health and Wellbeing Group had not been given the opportunity to consider the proposal.

5.12. In September 2018 an article appeared in the in “Staff Wellbeing” magazine indicating that RAFT had been approved as led by Sandra Quinn and was set to launch the following year.

5.13. On 19 September 2018 the claimant sent an email to Sandra Quinn congratulating her for getting the RAFT project off the ground and asking for documentation such as a project plan, timeline, project evaluation, strategy, list of stakeholders and roles and risk evaluation for the project. She also indicated that she was keen to keep the Mental Health Working Group up to date with developments.

5.14. Sandra Quinn sent an email to the claimant on 25 September 2018 indicating that, from her attendances at the Health and Wellbeing Steering Group, she thought that she had commenced the approvals process and indicated that she would appreciate the claimant’s continued advice, expertise and support.

5.15. On 25 September 2018 the claimant sent an email via her administrator indicating that she would not be attending meetings that had been arranged between herself and Sandra Quinn on 3 October and the group meeting on 12 October 2018. She said that her reason was that the RAFT project had not yet been through the proper approvals process. She stated that the Health and Wellbeing Steering Group was the proper process for interventions that have their main target as staff Health and Wellbeing and, as such, it had not yet been scrutinised by the relevant group which includes a mental health professional and occupational health specialists:

“My advice would be to put this project on hold and ensure it is progressed through the relevant approval/scrutiny process prior to then a) piloting with objective evaluation and b) potentially ruling out. Until that happens I won’t be able to further involve myself with it.”

5.16. On 1 October 2018 the claimant sent an email to various people indicating that there had been a misunderstanding. Sandra Quinn had been to speak to the Mental Health Working Group, but she had not attended the Health and Wellbeing Steering Group, and her project had never been discussed there.

5.17. On 12 October 2018 Polly McMeekin sent an email to the claimant indicating that she had met Sandra Quinn together with the Assistant Head of Workforce. It was indicated that the purpose of the meeting was to allay the claimant's concerns and they were disappointed that she was unable to attend.

5.18. On 15 October 2018 the claimant sent an email to Polly McMeekin attaching an email she had sent via her administrator and stating that, as she had explained in the attached email, she realized she could not continue to involve herself in a project that had not yet been properly scrutinized and about which she had some concerns.

5.19. On 19 October 2018 Polly McMeekin sent the claimant a copy of an email to Sandra Quinn indicating that she had spoken to another NHS Trust who were using a similar model and they had the support of clinical psychologists.

5.20. On 19 October 2018 the claimant sent an email to Polly McMeekin and Sandra Quinn indicating that she had just returned from a conference at Nottingham University. It was indicated that there had been some conversation around the NICE guidelines for PTSD and it had been acknowledged there was some controversy around this and that some Trusts and police forces had decided to avoid the approach due to this.

5.21. On 22 October 2018 the claimant sent an email to Polly McMeekin in which she indicated that she wished to raise some concerns about the premature approval of the RAFT project stating amongst other things,

"I do not think the argument that other Trusts/organisations are doing something similar would be a robust defence and we certainly wouldn't want to be accused of behaving like sheep. I personally wouldn't want to defend ignoring NICE guidelines on the basis that someone in another Trust had said it was fine to do so. From what you say in your email below, I believe you have been given misleading information about the NICE guidelines and as a clinician I would urge that the Trust do not dismiss the NICE guidance without checking the facts first...

I have copied in Lisa in her role of Freedom to Speak Up Guardian because I have been trying to raise these concerns about the RAFT project and so far I have not received any assurance that my viewpoint has been properly and objectively considered and responded to appropriately."

5.22. In her written statement to the Tribunal Polly McMeekin stated that she was disappointed that the claimant felt that way, but she accepted that her email seemed well-meaning and her concerns genuine. She said that she respected the claimant's skills and knowledge and was in no doubt that her concerns needed to be followed up. It was accepted by the respondent that the claimant's email was a protected disclosure.

5.23. On 22 October 2018 Polly McMeekin sent an email to Elizabeth Anderson, Consultant Clinical Psychologist and Head of Psychological Medicine seeking her advice with regard to the claimant's issues of concern.

5.24. On 23 October 2018 the claimant sent an email to Karen O'Connell, Operational Lead for the Occupational Health and Wellbeing Services and the claimant's line manager, together with the Freedom to Speak Up Guardian, stating that:

"I am finding this totally humiliating – that my opinion on this is not viewed by Polly as good enough and she is turning to 5 other Trust Psychologists (who are lucky enough to be graded as consultants), who I have ongoing professional relationships and (with at least some of them – history) to check out if my opinion is valid. So they now will all know that my opinion is being questioned and that I've raised a concern. It raises a question for me as to why my professional opinion hasn't been valued and seen as sufficient and credible in this instance. Horrible."

5.25. Elizabeth Anderson responded to Polly McMeekin's request for advice on 26 October 2018. She acknowledged the huge Emergency Department knowledge and experience of Sandra Quinn and the professional opinion of the claimant who had correctly specified the research literature in relation to the contra-indications of formal debriefing but she had also taking advice from independent psychology trauma experts elsewhere in the UK and their view was that "RAFT, son of TRIM, is different to Critical Incident Debriefing". Polly McMeekin suggested to Sandra Quinn that she should get in touch with Liz Anderson directly in order to implement her suggestions.

5.26. On 30 October 2018 Sandra Quinn gave a presentation to the Health and Wellbeing Steering Group in respect of RAFT. It was indicated in the notes that a better understanding of the evaluation impact of the pilot scheme was needed. Concerns were noted that the RAFT model had been given the go-ahead prior to the Steering Group meeting.

5.27. On 7 November 2018 Elizabeth Anderson sent an email indicating that it had been identified that Dr JB, Principal Clinical Psychologist would provide the psychological oversight for RAFT rollout.

5.28. The claimant raised the issue of her professional banding not being increased in a 1-2-1 meeting with Karen O'Connell on 13 November 2018. Karen O'Connell indicated to the claimant that it was not possible to upgrade

the claimant's post. It was also proposed that the claimant and her team would be managed by the Psychological Medicine team under Elizabeth Anderson, an issue that had arisen previously in 2016.

5.29. On 13 November 2018 a staff member raised an issue with regard to a waiting list he was on in respect of a psychological assessment appointment. The claimant was unhappy that Polly McMeekin had gone to the claimant's manager, Karen O'Connell without asking the claimant for an explanation first.

5.30. On 26 November 2018 Polly McMeekin sent an email to the claimant and others with regard to stress, anxiety and depression being the highest reason for sickness absence and stating "as this is going in the wrong direction I think we may need to review our plans." The claimant sent an email to Polly McMeekin and others with regard to her thoughts in respect of a strategic framework. Polly McMeekin replied indicating that "you both identify that we're not quick at picking up on the MH issues when people first go off sick"

5.31. A team of psychologists delivered a clinical enablement service through a contract with Scarborough and Ryedale Clinical Commissioning Group (CCG). A decision was made by the CCG to give notice to close that service. The respondent was concerned about the cost of possible redundancies. The person for whom alternative employment would be most difficult to find was Ruth Dixon, Consultant Psychologist.

5.32. Polly McMeekin gave a presentation about staff absence at a board of directors meeting on 28 November 2018. Andrew Bertram, the respondent's Finance Director was present and considered whether, rather than making Ruth Dixon redundant, it would be possible to create a role for her to help with the effort to reduce sickness absence rates and save the cost of redundancy. Andrew Bertram asked Polly McMeekin whether they could create a role for Ruth Dixon. The idea was explored further, and Andrew Bertram spoke to Liz Anderson. The proposal was shared with the other directors and approved. Andrew Bertram said that it had not occurred to him which department the role would sit in but assumed it would be connected with Liz Anderson's psychological medicine department.

5.33. Ruth Dixon was offered the post of Lead Consultant Psychologist in Occupational Health. The post was offered on the last day of Ruth Dixon's redundancy consultation and she said that she was informed that she could either accept this post or resign and lose her redundancy package which was at the maximum level in view of the length of service with the NHS.

5.34. At this time there was a structural change proposed which would mean that the claimant would report to a senior psychologist rather than Karen O'Connell who is from a nursing background. Under the new structure the claimant and Ruth Dixon would both report to Liz Adamson in Psychological Medicine.

5.35. On 5 December 2018 Ruth Dixon emailed Polly McMeekin in which she stated:

“I understood that Dr Elaine Middleton was Lead for psychological wellbeing for Occupational Health, and that she has held this role for a number of years. I am enormously concerned that this post looks like it would directly manage Elaine’s. As I understand that she has not yet been consulted, it clearly is unfair practice to move ahead until she has been given a voice. As I said, I think I would be very unhappy if my leadership role was undermined, and it will be hard to interpret this as less than undermining. Please can I talk with you again once you have spoken with Elaine? I would also need to speak with her/her team if this role was to be proposed formally.”

5.36. On 12 December 2018 Polly McMeekin sent an email to Karen O’Connell and the Assistant Head of Workforce stating:

“This isn’t ideal. The Ruth situation is essentially confirmed and the JD is a formality. We do have a catch 22 in that Ruth is understandably reluctant to take the job without first discussing this with Elaine. The service from the pain team went in October and we cannot have someone floating in a non-job so would need to transfer her into a new role asap. Therefore not telling Elaine that in effect she is no longer the most senior psychologist working on staff wellbeing seems disingenuous. I think we owe it to Elaine to let her know asap and give her time to digest this before she speaks to Ruth.”

5.37. On 13 December 2018 Ruth Dixon sent an email to the HR Business Partner who was involved in the redeployment, setting out that she was not happy about this post. It was not her choice, and she was deeply concerned about the current Service Lead, the claimant.

5.38. On 19 December 2018 the claimant met with Karen O’Connell and the Consultant Occupational Physician. The claimant sent an email sometime later in which she said she summarised her understanding of the meeting and stated:

“You both informed me that following consultation between yourselves, Liz Anderson and Polly McMeekin, the reporting structure of the Psychological Wellbeing Service within Occupational Health was being changed such that Liz Anderson, Head of the Psychological Medicine Department, is to become professional lead for the Psychological Wellbeing Service.

You also informed me that the Psychological Wellbeing team lead role has been offered to another psychologist – Ruth Dixon – who has been given notice of redundancy. This role has been banded as an 8c despite my own Psychological Wellbeing Lead post that I have performed since 2014 having been banded as 8b. You told me she is distressed about being put in this situation as she is aware

that she is effectively being offered my role. I expressed to you that under Agenda for Change it is the post that is banded, not the person.

You expressed to me that you did not agree with this change and that you had explained to Polly my performance in my role as Lead for Psychological Wellbeing has been 'exemplary'. However, you had been told by Polly McMeekin that her decision was to go ahead with this change and she had instructed you to inform me of this.

I expressed my unhappiness that I have not been consulted about this prior to the decision being made and I also expressed to you how detrimental this change was to me. You did not explain to me what my role would be if and when Lead post was accepted and taken up by Ruth Dixon but you did accept that I was likely to be put in the position of having to teach Ruth Dixon how to do my job. You also accepted this was an extremely stressful and detrimental situation for me to be placed in. You witnessed me in a good deal of distress during this meeting.”

5.39. On 21 December 2018 the claimant asked Polly McMeekin to supply her with the role title and job description of the post being offered to Ruth Dixon.

5.40. On 22 December 2018 Polly McMeekin sent an email to the claimant indicating:

“I don't anticipate significant change to your job role. As your terms and conditions will remain the same there is no requirement for formal consultation...”

5.41. On 22 December 2018 Ruth Dixon emailed the claimant indicating that the post was proposed to her at the eleventh hour in her at risk period and that “this seems to be your role”. She also stated that she had no wish to undermine the claimant.

5.42. On 31 January 2021 the claimant sent an email to Polly McMeekin indicating that she would need to take this to a formal grievance stage.

5.43. Ruth Dixon was of on sick leave from January to early July 2018 with work-related stress as a result of the concerns regarding the role she had been offered and its impact on the claimant and Ruth Dixon.

5.44. The claimant was off sick from 10 January 2019 for three weeks with work-related stress.

5.45. On 15 January 2019 the Acting Deputy Director of Workforce wrote to the claimant indicating that the decision to create a Consultant Psychologist (Occupational Health) role was a decision to be made by the Corporate Directors. It was stated that the claimant had been given assurance that there was no intention to change her role or title. The claimant would

continue to report to Karen O'Connell. Her professional accountability would be a dotted line to Psychological Health and it was proposed this would be with an alternative Consultant Psychiatrist to Liz Anderson. It was also explained that the approach to Polly McMeekin and Liz Anderson had come from Andy Bertram, Finance Director. It was he who had initiated the proposal.

5.46. The claimant replied indicating that the functions assigned to the 8c Consultant Psychologist's role had been performed by the claimant for years and her complaint was that key aspects of the lead role had been given to another psychologist and this was a variation of her contract by reason of custom and practice.

5.47. On 16 January 2019 the claimant sent an email to the Chief Executive's office raising an official grievance. Amongst other things, the claimant indicated that the creation of the new post contained significant elements of her role. There had been no consultation. She believed having two "leads" in the same small sub-team with one below the other would mean that the lower graded post would now be "lead" in name only. The lower graded 8b had 12½ years' experience working in an Occupational Health role whilst the consultant post-holder had no such experience. The situation was unacceptable to the claimant. The claimant did suggest that her post could be re-banded and that they could essentially job share. She also indicated that she would be prepared to drop some hours to compensate for the additional pay. The claimant also indicated that she would like the opportunity to have mediation sessions with Polly McMeekin.

5.48. The claimant attended a grievance hearing with Steve Kitching, Head of Corporate Finance and Resource Management and the Head of Employee Relations and Engagement. The claimant's grievance was rejected. In the outcome letter dated 13 March 2019, it was stated:

"I do not believe there has been a variation to your contract of employment. We heard that there would be no change to your duties and responsibilities, your terms and conditions or your reporting structure. Where there had been some overlap e.g. the management of EAP it has been decided that this would be removed from the 8c job description and (the Acting Deputy Director of Workforce) was happy to talk through any other comments yourself and Ruth had to try and come to a resolution.

I do feel, and the management side did also acknowledge, that ideally there would have been more time available to communicate with both yourself and Ruth about how the two roles would work together but this was not a variation to contract."

5.49. The claimant appealed and a grievance appeal hearing took place on 20 May 2019. The grievance appeal panel was chaired by Helen Hey, Deputy Chief Nurse.

5.50. On 7 June 2019 Helen Hey wrote to the claimant indicating that the appeal was not upheld. It was stated:

“There has been no variation to your contract. The principle concern being Management structure that had already been revised prior to the Grievance Hearing, i.e. your management is retained by Karen O’Connell.

The is no change to your title, job description, pay band, role or base. Your perception that someone working to similar descriptor erodes your autonomy, authority and status is not founded.”

5.51. A grievance was raised by Ruth Dixon also in which she indicated that she was concerned that she had been offered a post in Occupational Health. She stated that she had no occupational Health experience and the post seemed to be that already held by the claimant.

5.52. Ruth Dixon’s grievance was not upheld. She appealed but her appeal was also not upheld.

5.53. Ruth Dixon return to work in July 2019 following her period of sickness absence due to work-related stress. There remained ongoing concerns. There were discussions about the position. Ruth Dixon said that the claimant and her were clear that it was not a professionally tenable situation for them both. Providing clinical service that had confused lines of accountability.

5.54. The claimant had a number of email exchanges with the respondent’s Head of Employee Relations and engagement and the on 24 August 2019 the claimant sent an email stating that “it is not acceptable for me to be paid less for doing work of equal value to other psychologists in Trust” and indicating that unless the respondent’s management provided a commitment to repairing the situation by the end of August she intended to resign.

5.55. On 28 August 2019 Ruth Dixon emailed Karen O’Connell, Liz Anderson, the Deputy Chief Operating Officer and the Assistant Head of Workforce. In that email she stated:

“... As you’re aware, the issue has been that both Elaine’s JD and the 8c one place the post-holder in the role of Lead/manager for the clinical service. Professional guidelines are clear that there must be a defined ‘ladder’ of responsibility, and I am, of course, concerned not to work against BPS guidelines.”

5.56. The Assistant Head of Workforce replied to Ruth Dixon indicating that the 8c role is a ‘strategic management role’ and referred to the claimant’s role in terms of being operationally responsible to maintain and manage the OH patient lists. The claimant took this to mean that she would be defined as the ‘day-to-day donkey work person managing the waiting list’, whilst Ruth Dixon’s role was defined as ‘strategic lead with some additional

clinical duties'. She said that there was an expectation that the claimant would not and should not mind her status and autonomy being removed and all her years of carrying the full professional accountability and leadership were being ignored.

5.57. On 30 August 2019 the claimant provided a letter terminating her contract from 27 September 2019.

5.58. I consider that it is appropriate to set out the substance of the claimant's letter of resignation as follows:

I have been left with no choice but to resign my post as Psychological Wellbeing Lead in Occupational Health as a result of actions taken by this Trust in recent months. I consider myself to have been constructively dismissed. I have been working for months to resolve the issue by engaging in conversation with Human Resources and following due process, but this has not achieved a satisfactory outcome. I asked them to reconsider the Trust's position this week and explained I would need to resign if I received no response by the end of this working week. I have received no response, hence I am sending you this resignation letter.

As you are new to post, you may be unaware of the circumstances I am referring to. In brief, in December 2018 my role providing leadership of the Trust's staff psychological wellbeing agenda was offered to (and accepted by) another psychologist at a higher grade when a "Lead Consultant Psychologist (Occupational Health)" job was created for her. I understand the Director of Finance requested that a role be created for Ruth Dixon within the Trust towards the end of her redundancy notice period in order to save the Trust the cost of her redundancy. I was informed (as were my team) that I would be managed by this psychologist who, in turn reported to a manager in a different department and directorate to mine. The creation of this specific job was approved by the Executive Board at the recommendation of Polly McMeakin, Director of Workforce. This came as a great shock to me as it was presented to me as a 'fait accompli' and there was no consultation or discussion with me about changes to a service that I had professionally led for 13 years. The manner and fact of this occurring meant that my contract was varied without consultation, I found I was being discriminated against, and I was not treated with the dignity and respect that any NHS employee has a right to expect. I believe the manner and fact of this job's creation was also punitive towards me following my raising of a concern (in the public interest) with the Freedom to Speak Up Guardian and Polly McMeakin about Polly's decision to prematurely approve the "RAFT" programme. This was followed in quick succession by a further, separate event that caused me to give feedback (in an email) to Polly that she was treating me unfairly (when she – very

unusually- sent a critical email to my manager about the operation of my service without first asking for my perspective). A very few weeks later, the variation to my contract without consultation occurred.

My subsequent grievance (and appeal) that I submitted to Mike Proctor, former Chief Executive, was not upheld and failed to resolve the issue to my satisfaction. I have serious concerns about the handling and compromised objectivity of this grievance particularly in relation to vested interests. Polly McMeakin was promoted while the grievance was ongoing. It seems that executive managers in this Trust may not be robustly held to account and this may allow for a situation in which an executive manager may bully, discriminate against and punish staff who challenge them. This is an issue of public concern. As Psychological Wellbeing Lead, I feel I must flag up this concern to you.

The Trust's actions have consequently caused me considerable distress and detriment. I therefore have no choice but to resign and seek redress by following due process externally. Before these events, I was a very engaged employee and had no intention of leaving. I have added an appendix that summarises some of the key issues in relation to what has occurred and why I am being forced to resign. I appreciate that you may have been unaware of this scenario prior to receiving my letter and would therefore be prepared to speak to you if you feel that you wish to intervene prior to me contacting ACAS. If so, I would be grateful if you could let me know in the next week (I am currently out of the country, but will be back in the UK on 3rd September 2019)."

- 5.59. On 4 October 2019 the Deputy Chief Operating Officer said an email to Elizabeth Anderson and a psychologist who I understand to be in Child Health. The claimant did not have sight of this email at the time of her resignation, but it does provide some evidence of the position of the Occupational Health Psychologists:

"We have recently agreed that the Occupational Health psychologists will transition to the line management and professional leadership of the Psychological medicine team with Liz; they will continue to deliver their clinical service in OH and be active members of the OH team. This has been fully supported by Polly McMeekin as Director of Workforce."

- 5.60. On 27 November 2019 claimant presented a claim to the Employment Tribunal after following the ACAS Early Conciliation. She claimed unfair dismissal and automatic unfair dismissal by reason of making a protected disclosure.

The law

Constructive dismissal

6. Section 95(1)(c) of the Employment Rights Act defines constructive dismissal as arising when “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer’s conduct”. The conduct must amount to a breach of an express or implied term of the contract of employment which is of sufficient gravity to entitle the employee to terminate the contract in response to the breach. In this case, the breach of contract relied upon by the claimant is a breach or breaches of the implied term of trust and confidence. That is expanded upon in a well-known passage from the judgment of the EAT in **Woods v WM Car Services (Peterborough) Limited [1981] IRLR page 347:-**

“It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation of the contract since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it”.

7. Next, there is the significance of what is colloquially called a final straw. This was considered in the Court of Appeal judgment in **London Borough of Waltham Forest v Omilaju [2005] IRLR page 35:-**

“In order to result in a breach of the implied term of trust and confidence, a final straw, not itself a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. 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 so long as it is not utterly trivial. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. However, 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 the employer. The test of whether the employee’s trust and confidence has been undermined is objective”.

8. Further clarification of the objective nature of the test is provided in the Court of Appeal judgment in **Bournemouth University Higher Education Corporation v Buckland [2010] IRLR page 45:-**

“The conduct of an employer who is said to have committed a repudiatory breach of the contract of employment is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one of the tools in the employment tribunal’s factual analysis in deciding whether there has been a fundamental breach but it cannot be a legal requirement”.

9. There is also an issue surrounding the circumstances of the treatment of the claimant’s grievance by the respondent. As the EAT put it in **WA Goold (Pearmak) Limited v McConnell & Another [1995] IRLR page 516:-**

“There is a fundamental implied term in a contract of employment that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have”.

10. A further helpful passage concerning treatment of grievances to be found in the judgment of Judge Richardson in the EAT in **Blackburn v LD Stores Limited [2013] IRLR page 846 paragraph 25:-**

“In our judgment failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to a contributory breach of the implied term of trust and confidence. Where such an allegation is made, the tribunal’s task is to assess what occurred against the **Malik** test”.

11. In **Meikle v Nottinghamshire County Council [2005] ICR page 1**, Keane LJ said:-

“The Appeal Tribunal pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It is suggested that the test to be applied was whether the breach or breaches were the ‘effective cause’ of the resignation. I see the attractions of that approach but there are dangers in getting drawn too far

in questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by repudiation by one party which is accepted by the other ... 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 circumstances of the repudiation. It follows that, in the present, it was enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer”.

12. The test was put in slightly different terms in an EAT case, **Wright v North Ayrshire Council UKEATS 0017/13 (27 June 2013)**, in which Langstaff P endorsed a test first propounded by Elias P in **Abbey Cars West Horndon Limited v Ford UKEAT 0472/07:-**

“The crucial question is whether the repudiatory breach played a part in the dismissal ... it follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon”.

13. It is to be noted that the proper conduct of a grievance process is not capable of curing an earlier breach of the term of trust and confidence (if it has occurred), even if it upholds the grievance in the claimant's favour. Still less does the fact that the claimant has chosen to go down the grievance route before resigning, of itself amount to an affirmation of the contract? This is confirmed by a passage in the judgment in the Court of Appeal in the **Buckland** case, see in particular at paragraph 44 in the judgment of Lord Justice Sedley:-

“Albeit with some reluctance, I accept that if we were to introduce into employment law the doctrine that a fundamental breach, if curable and if cured, takes away the innocent party's option of acceptance, it could only be on grounds that were capable of extension to other contracts, and for reasons I have given I do not consider that we would be justified in doing this. This does not mean however that tribunals in fact cannot take a reasonably robust approach to affirmation: -

‘A wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amendments”.

Claim for Automatic Unfair Dismissal Section 103A 1996 Act

14. Section 103A

“An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure”.

15. The burden of proof lies with the respondent to establish the reason for dismissal. If the reason is established, it will normally be for the employee who argues that the real reason for dismissal was an automatically unfair reason to establish some evidence to require that matter to be investigated. Once that has been done the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

16. The primary issue in the case was whether or not the claimant was constructively dismissed, the burden of proving which lay upon the claimant and on the balance of probabilities. If the claimant established that she had been dismissed, it was open to the respondent to prove a reason for dismissal falling within section 98 of the Employment Rights Act, namely either conduct, capability, redundancy or some other substantial reason. Again, the burden of proving such a reason lay upon the employer. The Tribunal then had to decide, with a neutral burden of proof, whether the dismissal was fair or unfair, applying section 98(4) of the Act. If the respondent did not establish such a reason for dismissal, the Tribunal has to find the dismissal unfair, but compensation issues may arise

17. It is to be noted that in the event, the respondent has not led any evidence to prove any reason for dismissal as specified in section 98 of the Employment Rights Act.

18. I had the benefit of detailed written and oral submissions provided by Mr. Healy on behalf of the claimant and MS Souter of the respondent. These were helpful. They are not set out in detail but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

19. It is accepted by the respondent that the claimant made a protected disclosure on 22 October 2018.

20. There were issues with the RAFT initiative. The respondent failed to involve the claimant sufficiently. She was the professional lead clinical psychologist and Karen O’Connell agreed that the claimant should be centrally involved. She was not and the project went ahead without any significant input from the claimant, although Karen O’Connell also said that Occupational Health and Wellbeing were there to advise the Trust and it was for the Trust to take or leave that advice.

21. The claimant had indicated that she was not going to attend the meetings that had been arranged in her email of 25 September 2018. She indicated that,

unless the project was put on hold and progress through the relevant approval/scrutiny process, she would not be able to further involve herself with it.

22. Sandra Quinn had attended the Health and Wellbeing Steering Group after that date and the claimant did correspond with Sandra Quinn after that date. However, she was no longer involved as having psychological oversight of RAFT.

23. Polly McMeekin was very keen to support the RAFT initiative and the claimant was seen as removing herself from providing support for that. Polly McMeekin was determined to push the RAFT initiative through and to leave it with Sandra Quinn. The claimant's concerns which have been acknowledged to be genuine were not allowed to hold it up. I accept that Polly Meekin was frustrated by the claimant's attitude to the RAFT initiative. She wished to move it forward as soon as possible. The claimant had indicated that she would not be able to involve herself further and the initiative moved forward without the claimant's oversight.

24. The claimant made a protected disclosure and Polly McMeekin was advised to seek the opinion of Liz Anderson, who then discussed the concerns with other senior psychologists within the respondent Trust. The recommendations were broadly similar to those of the claimant's set out in her disclosure. I am satisfied that the claimant's concerns were taken seriously. Liz Adamson took a reasonable decision to discuss the matter with the psychological Senior Leadership Team as they all happened to be in on the day in question. Having heard all the evidence, I do not consider this to be undermining or bullying the claimant or damaging the relationship of mutual trust and confidence. Polly McMeekin wanted to move things forward as quickly as possible and didn't want to wait for consideration by committees that met at relatively long intervals. Her motivation was a keenness for the initiative to move forward and I am satisfied that it was not because of the claimant's disclosure.

25. I am not satisfied that the respondent's treatment of the RAFT initiative or the treatment of the claimant in respect of that was, individually or collectively, a breach of the implied term of mutual trust and confidence.

26. I have considered the issue with regard to the clinical referral in respect of a member of staff which Polly McMeekin raised following having been contacted by the employee. He had approached her asking for funding for private counselling. I am not satisfied that this was related to the protected disclosure or issues around RAFT. It was appropriate for Polly McMeekin to raise it after she had been approached by the member of staff and the issue was dealt with relatively quickly.

27. The main allegation of a repudiatory breach of contract was the appointment of Ruth Dixon to an 8c Lead consultant role. This role that had been created for Ruth Dixon included significant parts of the role the claimant had carried out for a number of years. It was a consultant role on a grade above that of the claimant. Karen O'Connell, the Head of Occupational Health and Wellbeing agreed that the respondent was effectively giving the claimant's job to Ruth Dixon. It was also her belief that having two Leads in such a small team was untenable and a little ridiculous.

28. Polly McMeekin indicated, in the email of 12 December 2018, that they owed it to the claimant to let her know that she was no longer the most senior psychologist in Occupational Health. The Job Description for the Lead Consultant Psychologist role provided an organisational chart which showed the claimant as Principal Clinical Psychologist below the Consultant Psychologist.

29. I do not accept the respondent's submission that the claimant was fixated on her title, status and standing, or that she was dogmatic and inflexible. Her position was undermined. A large part of her leadership role was given to somebody else in the same team on a higher band.

30. A new job description was created for Ruth Dixon in an 8c consultant's role and it involved a substantial amount of the leadership role carried out by claimant previously. The job description included increased reliance on the strategic management aspect of the position. The claimant had carried out all that was required in this regard in the past. The job description for the claimant that had been used for comparison purposes was not the correct job description as it had not included a significant addition, which had been made at the time the role was banded at 8b in 2015, in respect of leadership and strategy.

31. The new consultant lead role for Ruth Dixon was created following Andrew Bertram's attendance at the presentation by Polly McMeekin to the board of directors when it was indicated that further resources were needed with regard to staff absences and mental health issues among staff. The motivation for the creation of a consultant role was financial, to avoid the costs of Ruth Dixon's redundancy. He assumed that the role be linked to Liz Anderson's psychological medicine department. The role had been created as an 8c role in order to accommodate Ruth Dixon and little thought given to the claimant's position. Karen O'Connell and Ruth Dixon were of the view that the role as the 8c lead consultant was essentially the same as the claimant had been performing for a number of years.

32. It was wholly inappropriate to appoint Polly McMeekin's deputy to investigate the grievance in which she was implicated, and to appoint Steve Kitching to chair the grievance hearing, which included issues involving Andrew Bertram, who was his line manager.

33. The grievance outcome and the appeal outcome both took a very restricted view of the respective roles of the claimant and Ruth Dixon. Both were of the view that, because Ruth Dixon's role was at band 8c and they had different lines of reporting, the jobs were not the same or did not overlap. I am satisfied that both the 8c Lead Consultant role and the claimant's 8b role were within the same team. There was failure to consult with the claimant about the significant changes within the team she led. It was submitted by Ms. Souter that the claimant was fixated on title, status and standing. If that was the case, the imposition of a lead role above her, and the way in which it was done, led to the claimant's focus on these issues.

34. That undermined the claimant's position and I am satisfied that it was repudiatory breach of the implied term of mutual trust and confidence contract. It

was submitted by Mr. Healy that the appointment of a new 'Lead' within the team amounted to an express breach of the claimant's contract of employment in that references to duties and post in her job description had been incorporated into her contract and could only be amended by the respondent in discussion with the post-holder. I am not satisfied that it was a breach of an express term. It was also included within the terms and conditions that the respondent reserved the right to amend job descriptions. However, it was a breach of the implied term of mutual trust and confidence.

35. It is notable that the relevant leadership key duties used for banding the claimant's role at 8b, were not included within the claimant's job description that had been used for comparison purposes with the 8c Lead Consultant role. There was some criticism of the claimant for not agreeing to the suggestion of making a submission to the panel for her role to be rebanded. The claimant indicated that she did not wish to go through the banding process as any rebanding by the matching panel could lead, not only to a higher band, but also a lower band for her role, and she did not wish to take that risk. In view of the fact that her role had been diminished it was reasonable for her to take that view.

36. Ruth Dixon said that she would have accepted the role on an 8b band with salary protection for two years, although she said that she would have to accept this as suitable alternative employment to avoid losing her redundancy payment. However, she would have commenced looking for another job.

37. The repudiatory breach was the reason for the claimant's resignation. The claimant had been offered another job at the time she resigned. She had continued to oppose the change of her role. Ruth Dixon only returned to work in the claimant's team in July 2019. Discussions continued with regard to the claimant and Ruth Dixon's roles. The claimant had continued to object to the position until it became clear that the respondent would not alter its position with regard to her role and I am satisfied that she did not affirm the contract.

38. I am not satisfied that the repudiatory breach of contract was by reason, or principal reason of the claimant's protected disclosure. The reason was that the respondent focused on the redeployment of Ruth Dixon and created a consultant role at band 8c. There was a rhadamanthine persistence in the view that the claimant's terms and conditions had not changed, and, in those circumstances, there was no variation to her position. This was not the case; I am satisfied that her position was undermined by the creation of a role at a higher level which would carry out the leadership and strategic roles that the claimant had for a number of years before. It was submitted by Mr. Healy that the claimant was, effectively, 'bumped' out of her existing role by the appointment of Ruth Dixon. The news that she was no longer to be the Lead of the team she had built up, nor responsible for the strategy had a significant adverse effect on the claimant.

39. I have considered whether the claimant's resignation and constructive dismissal arose by reason, or the principal reason, of the protected disclosure. On the balance of probabilities, I find that it did not. The motivation of the respondent was financial and to avoid the redundancy costs of Ruth Dixon. The respondent was of the view that it was expedient to provide extra resources in respect of the Occupational Health and Wellbeing team in view of the concerns

over mental health absences among staff. There was a focus on that issue, and I do not find that this was a conspiracy with Polly McMeekin pulling the strings. However, the imposition of the new consultant role and the way in which it was dealt with, led to the claimant having her first significant period of sickness in a number of years, Ruth Dixon being off for around six months, two grievances and Tribunal proceedings at, I anticipate, much more cost to the public purse than the amount that the respondent sought to avoid paying by way of redundancy costs.

40. Polly McMeekin was frustrated by the claimant's caution with regard to the All RAFT initiative but that issue had been dealt with, and the rationale for the creation of the Lead consultant role and the consequent undermining of the claimant, was to provide extra resources to the Occupational Health and Wellbeing team. I am satisfied that the principal reason was not the protected disclosure.

41. In all the circumstances, I find that the claimant was unfairly dismissed pursuant to section 94–98 of the Employment Rights Act 1996. The claim of automatic unfair dismissal pursuant to section 103A by reason of making a protected disclosure is not well-founded and is dismissed.

42. A remedy hearing is now required unless the parties can reach agreement. The parties' representatives should provide dates of their unavailability for the period from August to the end of October. I have suggested a one-day hearing, but I would appreciate the parties' comments and suggested case management orders leading to the remedy hearing.

Employment Judge Shepherd

14 June 2021