



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Rosemary Nicely

v

Whittington Health NHS Trust

Heard at: Cambridge Employment Tribunal

On: 14th, 15th, 16th June 2021

Before: Employment Judge King

Appearances

For the Claimant: Mr Otchie (counsel)

For the Respondent: Miss Hirsch (counsel)

This has been a remote hearing which has not been objected to by the parties. The claimant did make an application for a postponement for medical reasons and this was part of the reason as set out below. The form of remote hearing was (V) video having been conducted by CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant's claim for unfairly dismissal fails and is dismissed.
2. The claimant's claim for breach of contract in the sum of £106 was conceded so the respondent shall pay the claimant this sum (if it has not already done so).

REASONS

1. This is the reserved judgment of the Tribunal in the above matter. The case was listed for a 3 day hearing commencing on 14th June 2021. The Tribunal reserved its judgment due to time constraints. Due to a listing error members were listed to sit also. The discrimination issues did not survive the preliminary hearing and as such this type of case would ordinarily be heard by a Judge sitting alone. The members were therefore released at the outset and I heard this case alone. The parties raised no issue with this course of action.

2. The claimant was represented by Mr Otchie (Counsel). The respondent was represented by Miss Hirsch (Counsel). I heard evidence from the claimant. We heard evidence from a number of witnesses on behalf of the respondent. These were Denise Dunleavy (at the relevant time Radiology Sister), Gloria Gasson (Radiographic Assistant), Mustafa Hassan (at the relevant time Senior Radiographer) Cheryl Hill (Imaging Manager), Kavina Patel (Radiographer/Sonographer), Maxine Phillips (Sister), Binaye Rashed (Radiographer), Adrian Trindade (Imaging Operations Manager).
3. In addition to a witness statement bundle containing the above statements, the claimant and respondent exchanged documents in advance and prepared an agreed bundle of documents which ran from pages to 1 to 286 (electronic pagination) to which I have had regard.
4. At the outset of the hearing the claimant made an application for a postponement. The claimant had suffered with a high blood pressure since having received the COVID vaccination and the claimant gave details of her symptoms which are not repeated here due to their personal nature. The stress of the litigation had increased her blood pressure and this was why she was making a late application. In addition, she was not sophisticated in the use of technology and wanted an in person hearing as she would be more comfortable. We discussed potential pain and the impact this could have on her evidence and what adjustments could be made. In addition, there was an application in respect of archived emails.
5. I refused the application for a postponement giving reasons to the parties in the hearing but in summary for the purposes of this judgment the claimant's health did not indicate she was unable to participate in the tribunal process. Adjustments were made so that she had additional breaks and she was assisted with the technology by being at her solicitor's office and using their facilities. She also had a companion to assist her find documents but not assist with her actual evidence. I concluded that a CVP hearing was preferable and appropriate as the claimant was already in attendance at her solicitor's office and could give evidence from there. I permitted additional breaks. Litigation is stressful and there was no indication that the claimant's health would improve over a passage of time. The Tribunal is also experiencing delays caused by the pandemic.
6. Concerning the application for additional documentation, the case was presented as a matter of oral complaints which the respondent denied and on the claimant's evidence the complaint was that this was made this orally and that is what the tribunal would decide. There are no documents that would assist the tribunal in this regard. I concluded it was in accordance with the overriding objective that the matter proceed as the case was an old case due to previous postponements due to unavailability of judges, the claimant's health and the impact of the pandemic meaning that issues were historical and any re listing would likely be into 2022. At the end of the case, the claimant agreed that continuing with the case had been the best course of action. Counsel's submissions confirmed at the

outset that the claimant laboured through a very fair and effective hearing and in their view presented a robust case for constructive unfair dismissal.

7. The case had previously had a preliminary hearing on 12th September 2018 at which it was determined that harassment complaints were out of time and it was not just and equitable to extend time.
8. At the same preliminary hearing case management orders were made and the list of issues was agreed as set out below. This agreed list of issues was further amended at the final hearing as set out below.
9. I had at the conclusion of the case, helpful submissions from both counsel to which I had regard and which were of assistance to the Tribunal.

The issues

10. As set out above, a list of issues was agreed at the preliminary hearing which is set out below. This was amended during the hearing to confirm that the claimant relied on the failure to respond to her complaints made to Denise on 5/25 September 2017 as part of her claim and critically that this was a last straw case and the act that the claimant relied upon was act at 11(j) below.

Constructive Unfair Dismissal

11. **Did the respondent commit a repudiatory breach of the claimant's contract of employment, the term alleged have been breached being the implied term as to mutual trust and confidence? The facts said to give rise to that breach of contract are as follows (the first 8 being fully particularised on the schedule to the claim form but are set out in summary here for ease):**
 - a. **On 2nd May 2017 when the claimant walked in to the changing room her colleagues Binaye and Kavina stopped talking. They were laughing at her and Kavina said "you know you are not welcome here" and laughed;**
 - b. **On 8th June 2017 when the claimant entered the changing rooms Binaye was laughing with others and then said "she does not speak proper English". They were imitating her Jamaican English accent.**
 - c. **In July 2017 the claimant was talking in the changing rooms and said to her colleague "your ear looks nice". Then Binaye came over to her and said "it is not a wig I'm wearing, this is my natural hair";**
 - d. **On 27th July 2017 there was an incident over preparation of the trolley and Maxine told the claimant she had made a mistake while preparing the trolley. The claimant replied "I won't take the blame because I didn't prepare the trolley" and the claimant was told to go home;**

- e. In August 2017 the claimant filled out a complaint form online explaining that certain staff were harassing her. They replied to confirm they would look into it but never did;
 - f. On 5th of September 2017 the claimant went to the sister's office to tell her that the claimant was not happy with the way she was being treated. In this discussion the claimant was told she would look into it;
 - g. In September 2017 the claimant was told by Maxine that there had been a meeting about her college course form and that she had told Adrian that she didn't see the claimant signing the form. The claimant asserts this is not true as she was with her when she signed the form and she showed it to Maxine. Maxine then said "I didn't think you were going to be able to get into the college";
 - h. On 2nd of October 2017 the claimant came into work and noticed she was moved from her work area and had been assigned to stocking the cupboards. This is a part of every nurses' job but is not normally published specifically on the rota;
 - i. The way in which the respondent handled complaints by the claimant in respect of certain of these matters. In this regard the claimant present relies upon complaints made to Denise Dunleavy on 5th and 25th September 2017.
 - j. On 27th October 2017 the claimant had not heard further about her complaints and went to speak to Mr Trinidad and Ms Hill shortly after 1:00 PM after she finished work but they were not in the office. She waited until 2:00 PM but when they did not return she went home and resigned;
12. In the event that the tribunal concludes that there was a breach of contract consequent upon one or more of those matters, was any such breach of contract waived and the contract affirmed?
13. As regards any breach of contract not waived, was that breach (or, if more than one, those breaches) the reason for the claimant resigning without notice;
14. What is the appropriate remedy, should the claimant's claim succeed. It is noted that the claimant is presently considering seeking re engagement should her claim succeed.

Breach of contract

15. Was the respondent in breach of contract by failing to pay the claimant's notice monies. It is agreed between the parties that should the claim for constructive unfair dismissal succeed, then the respondent will necessarily be found to have been in a fundamental breach of contract.

16. **Did the respondent act in breach of contract (alternatively make unlawful deduction from wages falling within s13 of the Employment Rights Act 1996) by deducting a sum from the claimant's final payment. There is no dispute that a deduction of a sum of approximately £106 was made. The issue is whether the respondent was entitled to make such a deduction. The respondent's case is that it was, because the claimant had been overpaid as a result of her resignation coming too late for a payroll payment to be adjusted to take account of days that she would not have worked.**
17. The respondent conceded on the second day of the hearing that it had breached the claimant's contract (alternatively made an awful deduction from wages under section 13 Employment Rights Act 1996) in respect of the sum of £106. This was conceded given the value of the claim in contrast to the time it would take to hear evidence and make submissions on this point which seemed a sensible approach for the respondent to take in the circumstances. Accordingly, judgment can be given to the claimant in respect of this element of her claim.

The law
Unfair Dismissal

18. Dismissal under Section 95 of the Employment Rights Act 1996 is in dispute as this is a constructive unfair dismissal case. S95 states as follows:
- (1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—*
 - (a) *the contract under which he is employed is terminated by the employer (whether with or without notice),*
 - (b) *he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*
 - (c) *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.*
 - (2) *An employee shall be taken to be dismissed by his employer for the purposes of this Part if—*
 - (a) *the employer gives notice to the employee to terminate his contract of employment, and*
 - (b) *at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;**and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.*

19. Under Section 94 of the Employment Rights Act (ERA) 1996;

- (1) *An employee has the right not to be unfairly dismissed by his employer.*

20. Section 98 of the ERA states that

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
- (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it –*
- (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
- (b) *relates to the conduct of the employee,*
- (c) *is that the employee was redundant, or*
- (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
- (3) *In subsection (2)(a)—*
- (a) *“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
- (b) *“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
- (4) *[In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —*
- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) *shall be determined in accordance with equity and the substantial merits of the case.*

Case law

21. Both counsel made reference to the case of *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* to which I have had regard.
22. There are also a number of cases referred to in *Kaur* or to which I have had regard as established cases in the area of constructive unfair dismissal, namely:

Western Excavating (ECC) Ltd v Sharp [1978] ICR 221
Wright v North Ayrshire Council [2014] ICR 77
Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ1493, [2005] IRLR 35
Malik and another v Bank of Credit & Commerce International SA (in compulsory liquidation) [1998] AC
Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121

Findings of fact

23. The respondent is an NHS trust. The claimant was employed by the respondent as a Health Care Assistant Band 3 in the Ward, Clinic and Imaging Department from 18th April 2007 until her resignation on 27th October 2017. For the purposes of this claim, the claimant's initial period of employment went without incident and it is noted that she had nearly ten years employment with the respondent before her resignation.
24. The first incident the claimant complains about is said to have occurred on 2nd May 2017. The Tribunal notes that there is nothing significant about this date as the witnesses all commenced employment sometime before then and many had long service. Later in her email complaint (post resignation as set out below) the claimant made reference to issues since 2009 but these are not issues before the Tribunal.
25. Taking each of the incidents, the claimant complains about in turn. Firstly, the claimant alleges that 2nd May 2017 when the claimant walked into the changing room her colleagues Binaye and Kavina stopped talking. They were laughing at her and Kavina said "you know you are not welcome here" and laughed. The respondent denied this event. The claimant said that she reported this incident to at the time to Denise Dunleavy but nothing was done. The claimant provided no further detail in her witness statement in respect of this incident than was already set out in the particulars of claim and the schedule of incidents on which she relied. This was common for all the incidents but the claimant did give oral evidence under cross examination on these matters.
26. Denise Dunleavy set out in her written statement that the claimant did not complain to her on 2nd May 2017 and the comments attributed to her expressing concern and that she was not aware of the extent of the harassment and that said she would investigate it and address it, did not happen. Her evidence was that the claimant never said anything to her about any bullying, harassment or other incidents involving members of staff. Denise Dunleavy was the claimant's line manager so the claimant had 1-2-1 meetings and team meetings with her but not once did she declare any harassment or bullying with her. Denise Dunleavy's evidence was that the only time she had such discussion with the claimant was after her resignation when Ms Dunleavy came back from retirement and was a bank nurse and the claimant was in the hospital in December 2017/January 2018 for a meeting with Cheryl Hill and Adrian Trinidad.

Denise Dunleavy also gave evidence that she was surprised to hear that some of the claimant's complaints were about Maxine Phillips as she thought they got on well and that when she retired they both organised her leaving do together. It was a small team but she was never aware of any problems.

27. I heard evidence from Kavina Patel who the claimant attributed the comment to on this particular day. Kavina Patel provided documentary evidence that she was not present at the hospital and was working off site at another Trust site that day. Further, that she did not recall seeing the claimant in the locker room which is a public space with approximately 20 lockers. She denied having laughed at or made fun of the claimant or bullied or harassed her at all. She denied that she was friends with Binaye Rashed and that she would not have any need to have a conversation with her other than on a non professional basis.
28. I found the evidence from Binaye Rashed less impressive on these matters. Her evidence was not consistent with someone concerned by the allegations but rather bemused by the situation. Her evidence stood out in this regard in contrast to the other respondent's witnesses who had genuine concerns. She dismissed the allegations but whilst there are discrepancies in the claimant's account and evidence, I preferred the claimant's evidence that something had occurred within the workplace to make her unhappy but not in its entirety as she alleged given the passage of time. In particular it is for the claimant to prove on the balance of probabilities that the incident occurred as she has relied on.
29. On this allegation, I do not find that on the balance of probabilities the incident happened. It cannot have occurred on the date in question given the clear documentary evidence and yet this is one of the incidents in which the claimant was in her ET1 and emails both certain of and consistent on the date. Kavina Patel was not at the hospital on this day and as such it cannot have occurred as the claimant says it did. On the balance of probabilities this did not occur.
30. The second allegation the claimant makes is that on 8th of June 2017 when the claimant entered the changing rooms Binaye was laughing with others and then said "she does not speak proper English". They were imitating her Jamaican English accent. The claimant says she raised this with Maxine Phillips afterwards and she did nothing about it.
31. Maxine Phillips gave evidence that the claimant did not make a complaint of bullying harassment or discrimination to her. The claimant did not raise an issue with Binaye, Kavina or her at any point. Her evidence was that she would have general conversations with the claimant and they would sometimes have lunch together like she did others in the team and sometimes they would tell her if they were generally dissatisfied with things at work. The claimant's complaints never went further than this as they were friends. Indeed, the claimant's evidence was that Maxine Phillips was like a sister to her. I accept Maxine Phillips evidence that the claimant

had at various times sounded out with her friend about grumbles at work but the nature of the complaints were not that she was being bullied or harassed at work and not specific as to the incidents that are now alleged. On the balance of probabilities I prefer Maxine Phillips evidence she was clearly distressed by the allegations against her and the claimant after she left employment seemed to name Maxine as the main perpetrator as set out below and this is something she had since recoiled from.

32. Turning to whether these matters occurred on 8th June 2017 as a matter of fact rather than the complaint, I find that the claimant did overhear comments Binaye made. I prefer the claimant's evidence on this point over Binaye's evidence as she was the more credible witness. The claimant took these comments to be about her but this is her assumption having overheard them but she cannot be certain as to whether they were directed at her. No evidence the claimant gave convinced me that this was anything other than her overhearing a conversation which had clearly been underway before she entered the changing rooms and thus she assumed it was a reference to her but it could have been to anyone within the respondent. I accept that something was said but not that it was directed at the claimant. The claimant has an accent but is capable of making herself understood in English. It is her first language.
33. The next allegation the claimant relies on is the incident in July 2017 when the claimant was talking in the changing rooms and said to her colleague "your ear looks nice". Then Binaye came over to her and said "it is not a wig I'm wearing, this is my natural hair". The claimant's evidence was that she wears a wig. It was submitted that the reference to "ear" was to "hair" but this was not the pleaded case but I can see how the claimant's solicitor would have made this error in the pleadings. It clearly makes sense as a reference to hair in the context of the discussion and the claimant's accent. On the balance of probabilities, I prefer the claimant's evidence and that Binaye did make this statement to her. The wording of the response from Binaye is unchanged and in a direct conflict between the two witnesses I prefer the evidence of the claimant. In contrast to the incident above it is clear this comment was directed at the claimant as a wig wearer. It is difficult to see who else this could have been a reference to and Binaye made the comment to the claimant directly.
34. The next allegation was that on 27th July 2017 there was an incident over preparation of the trolley and Maxine told the claimant she had made a mistake while preparing the trolley. The claimant replied "I won't take the blame because I didn't prepare the trolley" and the claimant was told to go home. Maxine Phillips gave evidence about this allegation. She did not recall this incident or any incident with the claimant and setting up a trolley. Also on the day in question Maxine Phillips provided documentary evidence that she was on annual leave on this date. Again, this is a clear date the claimant was able to recall and has been consistent on. There was no other evidence to support the claimant having left early on that day. On the balance of probabilities I do not accept this incident occurred and even if I did, then the respondent is entitled to point out errors for

which the claimant as the senior member of staff supervising any junior colleague she was responsible for as the respondent's counsel submitted. This would not amount to bullying or harassment merely usual employee management.

35. The next allegation the claimant makes is in respect August 2017 in that the claimant filled out a complaint form online explaining that certain staff were harassing her. She believes that she had a reply confirming that these matters would be looked into. It is clear from the evidence that this was an online staff survey filled out anonymously and that this was not a complaint.
36. I heard evidence from the respondent's witnesses Ms Hill and Mr Trinidad about the staff surveys. I accept the claimant's evidence that she wrote some comments about her issues in the free text box but accept the respondent's evidence that this was anonymous and not fed back to them via the survey results as it was around staff satisfaction. Given this the email around the response the claimant believed she received cannot have been anything other than an acknowledgement of receipt of the survey. We had additional evidence and disclosure was sought by the Tribunal on some of these issues. Mr Trinidad was a credible witness and I accept his evidence on what the claimant could have completed and how anything she did or didn't type into that form would not have been fed back to the line managers as it was anonymous and there was no mechanism for the third party managing the survey to do so. He accepted that it was possible to type free text in the survey but just that it would not be reflected in the results he would see.
37. Further, this was not a complaint mechanism and the claimant knew that there was a grievance process and how to raise a complaint. The claimant gave oral evidence that she was aware there was a HR department and a grievance procedure to follow. She was aware of the grievance procedure and accepted that at no point before she resigned had she raised a grievance with the respondent. She knew the grievance procedure was contained in the handbook. She also accepted that she had not spoken to Ms Hill and Mr Trinidad about such issues and that when she did post-resignation they took it seriously.
38. The next allegation is that on 5th September 2017 the claimant went to the sister's office to tell her that the claimant was not happy with the way she was being treated. In this discussion the claimant was told she would look into it. Denise Dunleavy's evidence of this conversation (she was the sister in question) was also that it did not take place. Her evidence was that that the claimant did not raise any issue of bullying and harassment with her or any incident involving other members of the team. I accept that evidence for the reasons given above and on the balance of probabilities no complaint was made in the way alleged.
39. Denise Dunleavy gave evidence that she was subsequently surprised about the claimant's allegations as she felt that she would have noticed if

anything was wrong in the department. Maxine Phillips gave evidence that she considered the claimant as a friend and it was from time to time the claimant would grumble about work to her in her capacity as a friend she never said anything which would indicate that there was bullying harassment or incidents involving named members of the team. I accept that evidence. It was clear that the claimant and Maxine Phillips were friends and had a good working relationship until these allegations were raised.

40. The next allegation the claimant makes is that in September 2017 the claimant was told by Maxine that there had been a meeting about her college course form and that she had told Adrian that she didn't see the claimant signing the form. The claimant asserted this is not true as she was with her when she signed the form and she showed it to Maxine. Maxine then said "I didn't think you were going to be able to get into the college";
41. Denise Dunleavy gave evidence about the course and that she encouraged the claimant to apply for it towards the end of 2016. Denise Dunleavy said that she asked the claimant to email details of the course to her but that she did not do so and so she was unaware that she had submitted her application to London South Bank University. She was told after the claimant had submitted the application that she had given the paperwork to Mr Trinidad and that he had signed it. Mr Trinidad spoke to Denise Dunleavy about the course but Denise Dunleavy could not provide any additional information as the claimant had not sent it to her.
42. Maxine Phillips also gave evidence on the nursing associate course. This was that the claimant told her that she had applied for the course but she had never seen any of the claimant's application forms for the course. Maxine Phillips recalled the claimant telling her that she had a place for the course on clearance with the university but in order to start the claimant had some papers that need to be signed by a manager and at the time Ms Hill and Denise Dunleavy who would have signed such papers were not around so Maxine advised claimant to go to see Mr Trinidad.
43. Maxine denies having had a meeting with Mr Trinidad but does recall overhearing a conversation that took place between him and Denise Dunleavy in the office. Another department had contacted him with regard to authorising the course and he asked Denise Dunleavy about this but she was unaware that the claimant had applied for the course. Maxine Phillips was not involved in that decision or discussion.
44. The claimant appears to have become muddled over the process for applying for the course and became concerned that the correct process had not been followed. It was not clear why she was so worried about being accused of fraud as nobody had accused her of any form of dishonesty or signing off a form in someone else's name. It was simply that the respondent through various employees needed to know more about the course and following due process.

45. I do not accept that the comments by Maxine Phillips could have been bullying the claimant. Both Maxine and Denise were the ones who supported the claimant's application for the course in the first place so it makes no sense that they would seek to sabotage that. On this point I prefer the evidence of Maxine Phillips and Denise Dunleavy about the forms and what they knew. The claimant got herself in a middle.
46. Later in September 2017 the claimant told Denise Dunleavy that she was not going to do the course because it was too much hassle and she had taken her name off it. The claimant confirmed this in an email on 25th September 2017. Denise Dunleavy's evidence was that this was the only time the claimant expressed unhappiness about work but she did not raise any allegations of harassment with her. The claimant's oral evidence was that there was an issue raised with the form not being signed off and she was concerned that she would be accused of fraud as she had got permission and as far as she was concerned she had done nothing wrong. As set out above I do not accept that there was anything untoward in a request for information or to try to determine who had authorised the course. I do not accept the allegation in respect of Maxine Phillips.
47. The next allegation was that on 2nd October 2017 the claimant came into work and noticed she was moved from her work area and had been assigned to stocking the cupboards. This is a part of every nurses' job but is not normally published specifically on the rota. Maxine Phillips evidence was that she did put the claimant on rota on one occasion to stores because they had a new staff nurse in the department. When she did the rotas everybody had to be assigned to an area and they had more staff than areas so she allocated the claimant to stores. This was a one off event due to staffing issues and the role of stores would be to stock up all of the rooms to ensure they had everything that was needed. In any event part of the claimant's role throughout the day was this task and it was something all staff had to undertake. I therefore find that this happened as a matter of fact.
48. The claimant relied on the way in which the respondent handled complaints by the claimant in respect of certain of these matters. The claimant relied on the complaints to Denise on 5th and 25th September 2017 and also made reference to having made a complaint to Mustafa Hassan. I have set out above that I do not accept that the claimant complained to Denise Dunleavy in September 2017 or that she completed an online complaint form. She completed a staff survey but this is very different from making a complaint for the reasons set out above.
49. Turning now to the allegation that she also complained to Mustafa Hassan who was at best a colleague and had no line management responsibility for the claimant, the claimant was muddled as to the name of the person to whom she had spoken to about her complaints. This is odd as clearly she must have known them well enough to have felt she could talk to them as she now asserts.

50. I heard evidenced from Mustafa Hassan who was a senior radiographer in the imaging department at the relevant time. He saw the claimant once or twice a week and had a good working relationship with her. His evidence was that the claimant had never raised any complaint of harassment discrimination or bullying with him. His evidence was that he did recall an incident where she did come to him upset about a course she had applied for. He believed it was a month or two before she left the respondent but could not give a precise date. The claimant told him that Maxine had caused her to miss deadline for the course. I therefore do not find that any such complaint as now alleged was made to Mustafa Hassan who was a credible witness. After he gave his evidence it was suggested that it was not this Mustafa but another employee with a similar name but he left the trust sometime historically and unless working a rare bank shift would not have crossed paths with the claimant.
51. I accept that. I conclude that if the claimant had spoken to him about such matters she must have known him well enough to know his name. I therefore do not accept the suggestion that it was a different person to the witness I heard from. I accept this witnesses evidence that this is all the claimant discussed with him.
52. On 27th October 2017 the claimant had not heard further about her complaints and went to speak to Mr Trinidad and Miss Hill shortly after 1:00 PM after she finished work but they were not in the office. She waited until 2:00 PM but when they did not return she went home. This is the last act the claimant relies on in the series of acts/omissions and is the last straw. I accept her evidence that she did try to speak to them on this occasion (it being the first time she had attempted to do so) but that she as not successful. The claimant had no appointment to speak to either of them and neither had failed to turn up they were unaware the claimant was trying to speak to them.
53. On 30th October 2017 the claimant emailed Maxine Phillips to advise her that she was not returning to work and that *"I have been thinking about for a long time and the things that are making me sad and I have never complain but it too much for me and I am not happy like I used to be when at work I don't wanted to be in a work place where I am sad or uncomfortable."* She further said that *"thank you for all the times I had there I will ms (sic) the team"*. This was sent around the time of her resignation to one of the people she subsequently accused of bullying her. The claimant had resigned with immediate effect.
54. Cheryl Hill's evidence was that the first time she was aware of any issues in respect to the claimant was when she received her email dated 30th October 2017. Ms Hill gave compelling evidence of her own experience of bullying within the workplace (not at the respondent) and that she had tried to foster a culture where staff could feel free to speak up and in particular was an advocate for such issues as her door was always open. I accept that evidence and that once the issues were raised with Ms Hill she was

keen to resolve them having been on the receiving end of bullying herself historically in previous employment.

55. The claimant accepted in oral evidence that when she took the matter to Ms Hill and Mr Trinidad they took it very seriously. They clearly did have concerns about the matter and what the claimant was telling them. However, by this time the claimant had left, it was too late and she did not want to make it formal.
56. The claimant sought to rely on a newspaper article around bullying within the respondent. This was not specific to the radiology department and does not refer to the individuals involved in this case. The respondent's witnesses confirmed that this was not their personal experience of working for the respondent. This was just a news article so I attached little weight to its contents it is in this particular case. Bullying can occur in any work place.
57. I find given all the above that the claimant only complained in a capacity as a friend to Maxine Phillips about her unhappiness at work not that she raised specific allegations of bullying and harassment. I find that the claimant did not raise a grievance nor she did not raise a formal complaint at any stage about her alleged treatment. The completion of the staff survey with some comments in the free textbox is not enough to bring this the respondent's attention. It is clear from the email evidence at the time that she did not complain to these individuals as now alleged so I do not find that the respondent failed in its handling of her complaints as alleged.
58. When Ms Hill received the email from the claimant giving her resignation she was surprised and asked for an exit interview and asked whether the claimant would consider working her notice. The claimant confirmed she would come to see Ms Hill that Friday 3rd November 2017 and was told that she was free at 9:00 AM and the claimant replied to say that she would be there. In fact, the claimant failed to attend until after 10 AM when Ms Hill was in another meeting so the claimant met with Mr Trinidad instead who was fortunately free at the time.
59. Mr Trinidad gave clear and compelling evidence about that meeting and that he asked the claimant why she left. The focus of the claimant's issues at that time were around Maxine Phillips not treating her fairly. In that meeting the claimant said that she felt Maxine and a couple other members of staff had been laughing at her in the changing rooms. It is marked that they claimant does not make this allegation about the locker incidents of Maxine Phillips now. In her oral evidence she now says that the main person bullying her was Binaye rather than Maxine.
60. The claimant also raised in the meeting with Mr Trinidad that Maxine Phillips had been questioning her professional competence and raised one example of the incident about the trolley. Mr Trinidad was concerned by the type of issues the claimant was raising. The claimant told Mr Trinidad that Maxine Phillips had been like a sister to her and she did not want to

take this further and the claimant reiterated she did not wish to do so. In this discussion she also implicated Binaye and another person who she did not name in the changing rooms. Mr Trinidad was a compelling witness and I prefer his recollection this meeting.

61. Following that meeting, Mr Trinidad came to see Ms Hill to discuss the issues raised by the claimant as these worried him. The claimant advised him that she did not want the issues to go further but Mr Trinidad was sufficiently concerned that he took advice and raised the matters with Ms Hill. I accept his evidence of this point. The claimant denied she had said she did not want to make it formal but on balance I prefer the evidence of Mr Trinidad in this regard. It was not as if he made that statement and then did nothing as he was sufficiently concerned to escalate the matter anyway and I prefer his evidence that this was what was said at that time. The claimant did not at that stage wish for the matter to go further.
62. Following that advice, the claimant was emailed on 6th November 2017 highlighting that the respondent had a zero tolerance to the sort of behaviour she had raised and that she had options if she wanted to take the matter further and a copy of the respondents bullying and harassment policy was provided. This email was sent by Ms Hill to the claimant copying in Mr Trinidad and confirmed at a roughly contemporaneous time that the claimant had not wanted to share this and escalate matters. The claimant did not reply to correct this if indeed she saw it as incorrect at the time. Further Mr Trinidad emailed HR following that meeting (6th November 2017) repeating this information and I prefer the contemporaneous evidence and the respondent's witnesses on this point.
63. The claimant replied on 8th November 2017 apologising for not having come to see Miss Hill or Mr Trinidad before this. She expressed that she felt that it was a very honest meeting with Mr Trinidad and that the claimant said she had not complained but felt she could not go on anymore. Ms Hill relied on 16th November 2017 informing the claimant that she could have a meeting to make it formal if she wished to do so and that she had that option.
64. Around this time the claimant was told that she had been overpaid in terms of salary. She was told she owed £106.55 and was written to by the respondents in December 2017 with a final reminder for payment. This matter was then passed onto a debt collection agency. Part of the claimant's complaint in early 2018 was around this overpayment and the way this had been pursued by the respondent. In actual fact based on the evidence of Ms Hill, it appears that this was an error and that in fact the claimant did not owe the Trust money.
65. On the second day of the tribunal hearing the respondent conceded the deduction from wages/breach of contract claim in the sum of £106.00 on the basis that they were not satisfied there had been a deduction but that the costs of arguing this particular point exceeded the value of the claim and it was conceded on this basis. The claimant also telephoned Mr

Trinidad about money and she raised that she had been wrongly dismissed. Mr Trinidad explained she resigned with immediate effect and would not be paid for a period beyond this date.

66. The claimant did not reply to 16th November 2017 email until January 2018. On 3rd January 2018 the claimant replied asking for a meeting. The claimant alluded to the fact she had tried to see her but Ms Hill was on sickness absence and that she wanted a meeting. She raised concerns about the Trust's correspondence over pay. The claimant was invited to a meeting on 15th January 2018 at noon to take the matter further.
67. The claimant attended the meeting but did not give a clear and succinct chronology of issues to allow the matter to be investigated. The claimant was asked to go away and provide a written account of issues after the meeting. The claimant also raised concerns about payments made to her following her resignation.
68. The claimant did not submit the further information requested immediately so Ms Hill followed this up with the claimant on 5th February 2018. The claimant sent the information requested on 9th February 2018 which set out matters she was unhappy about since 2009 and that she had been stressed and sad since 2016.
69. Ms Hill replied by email on 13th February 2018 raising questions about the additional details of the events she was complaining about and the claimant was told she would be invited to a further investigation meeting to go through the details once they had been provided. The claimant was asked for example to provide the name of the member of staff, the comments and if there were any witnesses to the event in July 2017 the claimant described in the locker room. The claimant never provided those details requested and the matter was never investigated further by the trust for this reason.
70. The claimant submitted her claim on 20th February 2018 following a period of ACAS early conciliation between 17th January 2018 and 25th January 2018. Her claims for harassment were dismissed at an earlier preliminary hearing as set out above.

Conclusions

Constructive Unfair Dismissal

71. In order to determine whether the claimant has been dismissed pursuant to section 95(1) Employment Rights Act 1996 ("ERA 1996") one must first look at the acts the claimant relies on as constituting a breach of the implied term of mutual trust and confidence and determine whether as a matter of fact the Tribunal finds that they occurred. This is particularly important where the facts are disputed as in this case. In summary form, the Tribunal has found the following in relation to the acts relied on accruing or not occurring:

- 71.1 *On 2nd May 2017 when the claimant walked into the changing room her colleagues Binaye and Kavina stopped talking. They were laughing at her and Kavina said “you know you are not welcome here” and laughed. I have found as set out above this did not occur on the balance of probabilities.*
- 71.2 *On 8th June 2017 when the claimant entered the changing rooms Binaye was laughing with others and then said “she does not speak proper English”. They were imitating her Jamaican English accent. I have found as a fact the claimant did overhear Binaye make these remarks but that there was no evidence it was about the claimant.*
- 71.3 *In July 2017 the claimant was talking in the changing rooms and said to her colleague “your ear looks nice”. Then Binaye came over to her and said “it is not a wig I’m wearing, this is my natural hair”; I have found as a matter of fact this did occur on the balance of probabilities.*
- 71.4 *On 27th July 2017 there was an incident over preparation of the trolley and Maxine told the claimant she had made a mistake while preparing the trolley. The claimant replied “I won’t take the blame because I didn’t prepare the trolley” and the claimant was told to go home; I have found as a matter of fact that this did not happen.*
- 71.5 *In August 2017 the claimant filled out a complaint form online explaining that certain staff were harassing her. They replied to confirm they would look into it but never did; I have found as a matter of fact that the claimant made reference to certain staff harassing her in the staff survey but not that this was a complaint or that it was acknowledged.*
- 71.6 *On 5th September 2017 the claimant went to the sister’s office to tell her that the claimant was not happy with the way she was being treated. In this discussion the claimant was told she would look into it; I have found as a fact that this did not occur on the balance of probabilities.*
- 71.7 *In September 2017 the claimant was told by Maxine that there had been a meeting about her college course form and that she had told Adrian that she didn’t see the claimant signing the form. The claimant asserts this is not true as she was with her when she signed the form and she showed it to Maxine. Maxine then said “I didn’t think you were going to be able to get into the college”; I have not found that this occurred as the claimant asserts but that there was a discussion over the college course but not with Maxine.*
- 71.8 *On 2nd October 2017 the claimant came into work and noticed she was moved from her work area and had been assigned to stocking the cupboards. This is a part of every nurses’ job but is not normally published specifically on the rota; I have found as a fact that the claimant was assigned to the stores in this occasion.*
- 71.9 *The way in which the respondent handled complaints by the claimant in respect of certain of these matters. In this regard the claimant present relies upon complaints made to Denise Dunleavy on 5th and 25th September 2017. I have not found as a fact that the claimant made complaints about these matters as alleged.*
- 71.10 *On 27th October 2017 the claimant had not heard further about her complaints and went to speak to Mr Trinidad and Ms Hill shortly after*

1:00 PM after she finished work but they were not in the office. She waited until 2:00 PM but when they did not return she went home and resigned; I have found as a matter of fact this occurred.

Did the respondent commit a repudiatory breach of the claimant's contract of employment, the term alleged have been breached being the implied term as to mutual trust and confidence?

72. Before considering this issue, I have reminded myself of a number of legal principles in this regard as follows.
73. Firstly, in accordance with *Western Excavating v Sharp* the test of whether or not there has been a repudiatory breach is an objective one, whether or not the employer intended to breach the contract is irrelevant. Further, if an employer behaves in a manner which amounts to repudiatory breach of an employee's contract, there is no need to assess the employer's behaviour by reference to a range of reasonable responses test when deciding whether there has been a breach in accordance with the Court of Appeal case of *Buckland v Bournemouth University Higher Education Corporation*.
74. Since this is a case about a breach of the implied term of trust and confidence the tribunal has had regard to a number points of trite law in this area. The general principle was set out in *Malik and another v Bank of Credit & Commerce International SA (in compulsory liquidation) as "The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee"* if the employers conduct is likely to destroy trust and confidence, the employee does not also have to show that the employer intended (or calculated) to destroy it.
75. Further, in accordance with the case of *Morrow v Safeway Stores Plc* a breach of the implied term will inevitably lead to the conclusion that there has been a repudiatory breach of contract. To establish breach, it is not enough for the employee to show that the employer's actions have destroyed or seriously damaged trust and confidence or calculated or likely to do so. The employer must have had no reasonable proper cause for the actions in question. The burden is on the employee to prove that the employer had no reasonable and proper cause for said actions.
76. The claimant's case was put on the basis that the last act of not being able to see Ms Hill and Mr Trinidad on 27th October 2017 was the last straw.
77. I have in mind the cases of *Kaur v Leeds Teaching Hospitals NHS Trust* and *Omilaju* and the questions I must determine in this case. The final straw must not be utterly trivial. The act does not have to be of the same character as earlier acts complained of. It is not necessary to characterise the final straw as unreasonable or blameworthy conduct in isolation, thought in some cases it is likely to be so. 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 their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

78. The final straw in this case was the failure of the claimant to speak to Ms Hill or Ms Trinidad on 27th October 2017 and it was said that this was contrary to their open door policy. I have in mind in particular the guidance in *Kaur* which set out at paragraph 55 of the judgment the questions the Tribunal needs to ask itself. Here the most recent act or omission on the part of the employer which the employee says caused, or triggered, her resignation was the unavailability of her managers as set out in the list of issues.
79. The next issue in paragraph 55 of *Kaur* is whether she has affirmed the contract since that act/omission? Given that she left work that day and resigned with immediate effect it cannot be said that the claimant affirmed the contract after that act/omission. The claimant has not affirmed the contract.
80. The next issue in paragraph 55 of *Kaur* is if not, was that act/omission by itself a repudiatory breach of contract. Here the claimant's case is in some difficulty. Considering paragraph 40 of *Kaur* which quotes passages from the judgment of *Omilaju*. The final act does not have to be the same character as the earlier acts. It must contribute something to that breach although what it adds may be relatively insignificant. The final straw does not need to be unreasonable or blameworthy conduct. The last straw must contribute however slightly to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality.
81. To establish a breach of the implied term of trust and confidence, it is not enough for the claimant to show that the respondent's actions have destroyed or seriously destroyed trust and confidence or were calculated or likely to do so. The respondent must have had no reasonable or proper cause for the action in question. The claimant has the burden of proving that the employer had no reasonable proper cause.
82. Here, the claimant seeks to attribute the respondent's failure to be available when she dropped in to see them as an action sufficient to be a breach of the implied term of trust and confidence. The claimant did not make an appointment to see either Ms Hill or Mr Trinidad on the day in question, they had no idea that the claimant would be seeking to find them. Both employees hold management positions within the respondent with numerous duties and responsibilities and cannot be expected to be in their office during working hours at all times. Further, given the findings of fact made, the claimant had at no point complained to either manager about the issues in this case so they would have no reason to suspect that the claimant may wish to discuss matters with them of a serious nature or at all.

83. This is not a case where either manager made an appointment to see the claimant but failed to show up. It is therefore difficult to see how the respondent could possibly be said to have no reasonable or proper cause for failing to be in their office when the claimant dropped in. Further, the burden is on the claimant to establish this and she has failed to do so.
84. Even if the respondent had no reasonable or proper cause for the action in question, it is hard to see how this can be said to have destroyed or seriously destroyed trust and confidence or indeed that their actions were calculated or likely to do so in accordance with *Malik* against the factual background to this particular case. It seems to me that the act relied on fits entirely within the description in *Kaur* of an entirely innocuous act not capable of constituting a breach of the implied term of trust and confidence. It is a case where the claimant has mistakenly interpreted this as hurtful or unacceptable.
85. Critically here, if the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. An employee who does not resign employment following a series of acts which amount to breach of the implied term of trust and confidence cannot subsequently rely on these acts to justify a constructive dismissal unless she can point to a later act/omission which enables her to do so. If the latter act on which she seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw. On this basis, the claimants case fails at this point. The claimant was not constructively unfairly dismissed as the respondent did not breach the implied term of trust and confidence.
86. However, given the next issue in paragraph 55 of *Kaur* is if not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to repudiatory breach of the *Malik* term? If it was, there is no need for any separate consideration of a possible previous affirmation? I have for completeness gone onto consider whether any of the earlier acts could be said to be a breach of the implied term of trust and confidence and if so whether the claimant has affirmed the same.
87. On the findings of fact in this case, I have found as a fact the following occurred:
- 87.1 On 2nd October 2017 the claimant was assigned to the stores;
- 87.2 In September 2017 there was this issue over her college course but not as pleaded;
- 87.3 In August 2017 the claimant made reference to certain staff harassing her in the staff survey;
- 87.4 In July 2017 comment concerning her wig was said.

88. Taking each of these points in time to determine whether the respondent committed a repudiatory breach of the claimant's contract of employment as it was a breach of the implied term of mutual trust and confidence I conclude that the last in time occurred on 2nd October 2017 in reference to the claimant being assigned to the stores.
89. Given my findings of fact in this case, the respondent had a reasonable and proper course for assigning the claimant to the stores on this one occasion. Further, the respondent's actions in doing so have not destroyed or seriously damaged the relationship of trust and confidence nor are they calculated or likely to do so. An explanation was given as to why this occurred on this occasion which I have accepted. The task in question was in any event part of the claimant's normal day to day activities and further does not fall outside a reasonable management request. It is not like the claimant was asked to do something but she would not normally do.
90. The use of the words reasonable management request is not a reference to the respondent's behaviour being assessed within a range of reasonable responses which of course would be contrary to *Buckland*, but to the reasonable and proper cause for their actions. It is not unusual in working practise for an employer to require an employee to have a degree of flexibility in the tasks that they undertake but of course there are limits to this. If the claimant was a surgeon and had been asked to clean the toilets then this clearly would not be something she would normally have been expected to do and could properly be said to amount to an action which was either calculated to or likely to destroy or seriously damaged the relationship of trust and confidence. This case is not this type of scenario. It was part of her job in any event and was done for operational reasons.
91. Again, for completeness, even if I had to determined but this act was a repudiatory breach of contract, it is likely I would have also found that the claimant affirmed the contract as she did not resign for a further 25 days and continued to attend work during that period without taking any further action to address what she would view as a repudiatory act on that occasion.
92. Again for completeness, affirmation would be an issue in respect of the events the claimant relies upon in September, August and July given the passage of time and the fact she was in working during this period. In my view the only act in this period which could possibly come close to a repudiatory breach of contract of the implied term of trust and confidence would be the comment by Binaye about her wig. This would have needed further examination given it would be the only event remaining but this is not necessary as the claimant affirmed any such breach as the incident took place in July 2017 and she did not resign until October 2017 even if her case was brought on this basis she waited too long and would have affirmed in that 3/4 months.
93. The final issue in paragraph 55 of *Kaur* is whether the employee resigned in response or partly in response to that breach? Given my conclusions it

is not necessary to consider this matter further. The claimant's claim for unfair dismissal fails and is dismissed.

Breach of contract

Was the respondent in breach of contract by failing to pay the claimant's notice monies. It is agreed between the parties that should the claim for constructive unfair dismissal succeed, then the respondent will necessarily be found to have been in a fundamental breach of contract.

94. Given the above conclusions, the claimant resigned with immediate effect and there was no dismissal. The respondent was not in fundamental breach of contract. As such, there was no breach of contract by failing to pay the claimant notice monies and this claim also fails.

Did the respondent act in breach of contract (alternatively make unlawful deduction from wages falling within s13 of the Employment Rights Act 1996) by deducting a sum from the claimant's final payment.

95. The respondent conceded on the second day of the hearing that it had breached the claimant's contract (alternatively made an awful deduction from wages under section 13 Employment Rights Act 1996) in respect of the sum of £106. Accordingly, judgment can be given to the claimant in respect of this element of her claim.
96. Given these conclusions the remedy hearing is vacated.

Employment Judge King

Date:16.09.2021.....

Sent to the parties on:

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For the Tribunal Office