EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs Juliet Nukweye Eseinune **v** **Whittington Health NHS Trust**

Heard at: Watford **On**: 27-30 June & 1 July 2022

Before: Employment Judge Andrew Clarke QC
Mr N Boustred
Mr D Wharton

Appearances

For the Claimant: In person
For the Respondent: Mr J Arnold, Counsel

JUDGMENT

1. The claim for constructive unfair dismissal is dismissed.

2. The claim alleging a detriment consequent upon the making of a protected disclosure is dismissed.

3. The claim in respect of unpaid holiday pay outstanding at the termination of employment succeeds insofar as it relates to 51 hours of accumulated untaken holiday as at the date of termination of employment, being 5 June 2020. The respondent must pay to the claimant the appropriate amount in respect of that holiday pay, which amount is to be assessed at a subsequent hearing if not agreed.

4. The claim in respect of an unlawful deduction from wages consequent upon the failure to pay wages in respect of three bank holidays on which the claimant worked succeeds as regards one bank holiday and is dismissed as regards the other two. So far as that one bank holiday is concerned, the respondent must pay to the claimant an appropriate sum in respect of one day's wages which sum is to be assessed if it cannot be agreed.

5. Insofar as the claimant has any claim before the Tribunal in respect of an unlawful deduction from wages consequent upon the failure to pay appropriate overtime payments from April 2018 to August 2019, that claim is dismissed.

REASONS

1. The claimant, a former employee of the respondent, brought her claim on 6 August 2020. It was defended and, in due course, a Preliminary Hearing took place on 24 September 2021. At that Preliminary Hearing a list of issues was drawn up and subsequently promulgated. The claimant made claims for:

   1.1 Constructive unfair dismissal being a breach of the implied term as to trust and confidence said to have taken place consequent upon nine acts or omissions on the part of the respondent;

   1.2 Whistle blowing detriment. The detriment relied upon being that the claimant was suspended, apparently in response to a complaint she had made to the Care Quality Commission ("CQC");

   1.3 That the claimant had suffered an unlawful deduction from wages and/or a breach of contract and/or a failure to pay the full entitlement of holiday pay outstanding at termination. That was a reference to two distinct matters, her having not taken all of her holidays at the time that her notice expired (and not being paid in respect of those untaken holidays) and the non-payment in respect of three Bank Holidays said to have been worked by her.

2. This hearing has proceeded on the basis that the list of issues was comprehensive and accurate. No application was made to add issues or to add to the conduct relied upon as giving rise to a breach of contract. The claimant did occasionally refer to other conduct on the part of the respondent, but only in general terms and by way of background. Her witness statement contained a suggestion that she was owed sums in respect of overtime worked in the past and not paid for. We will deal with that matter in due course.

3. We heard evidence from the claimant on her own behalf and were invited to read a short witness statement from Ms Nadine Pinnock who described herself as "an unqualified children's nurse" and who worked alongside the claimant on occasions. The lack of detail to support the generalised assertions which Ms Pinnock makes rendered her evidence of very limited worth even without cross-examination. For example, she said that the claimant "was not respected or treated with dignity" but gave no detail to support this assertion.

4. Where matters were in dispute, we treated the claimant's evidence with caution where it conflicted with contemporaneous documents. We exemplify our concerns in our findings of fact.

5. For the respondent we heard from the following witnesses. All impressed us as persons concerned to give us an accurate account of relevant events,

whilst recognising their dependence upon contemporaneous records, given the remove in time from the events in question and the extreme stress of intervening events linked to the Covid pandemic:

Rosemary Hensman, the associate director of nursing for areas including the continuing care team for children and young persons (the CYP) from May 2019 and who has subsequently retired;

Dorian Cole, the associate director of nursing for areas including the CYP until February 2019, now an employee of another NHS Trust;

Helen Unsworth, the head of that part of the CYP at the respondent dealing with Islington and Camden. She was the line manager of the claimant's line manager, Ms Miles. She is now employed by another NHS Trust having left the respondent's employment in autumn 2019.

Jeanette Barnes, the associate director of nursing for areas including the CYP from October 2019. She, uniquely amongst the respondent's witnesses, remains in that post.

Findings of fact

6. The claimant is a registered nurse with some 30 years of experience working in the NHS, principally in hospitals. On 31 October 2016 she began her employment with the respondent as a Band 7 Nurse. She was appointed as a senior nursing sister in the CYP. Although based in a hospital this was a community focused role. The CYP provides healthcare for its patients across hospitals, schools and their homes. It has teams and individual nurses operating across a range of specialisms such as oncology, epilepsy and diabetes care, as well as the team in which the claimant was located.

7. From shortly after her appointment the matron in charge of her team was Ms Diane Miles. She left the respondent's employ in September 2019. Aspects of the claimant's role were unfamiliar to the claimant. Although she possessed the nursing skills and experience required, she had not, for example, previously had to complete assessments in respect of the continuing care needs of patients. She felt that she needed help and support as well as training. Whether she ought to have been able to perform the key aspects of her role with the training she eventually received, giving her experience, is not for us to determine. However, it was clear that by mid-2017 the claimant was experiencing some difficulties in reaching a satisfactory level of performance.

8. Ms Miles was always concerned about the claimant's performance and tried to extend her six month probation period as a consequence. However, she only acted to do so after the period had expired and the claimant objected to its extension, hence human resources told Ms Miles that she could not extend it because the claimant's post had, in effect, already been confirmed by the passage of time.

9. What Ms Miles did do was to place the claimant on an informal performance management programme. Although informal, Ms Miles provided the claimant with clear written targets and actions showing the claimant where she was failing and how she needed to improve. These matters were discussed with the claimant and recorded in a detailed written schedule which was reviewed and updated from time to time. The earliest version we were shown was dated 12 July 2017.

10. The claimant resented Ms Miles' approach which she (at least at first) considered unnecessary, but having taken advice she went along with it. From her evidence and some contemporaneous documents, it is clear that she did not consider that she was failing in any way or needed to improve. Her view was that her performance was perfectly good. As will be seen, others outside the respondent's organisation shared Ms Miles' concerns.

11. In August 2017 a complaint was made about the claimant's conduct at a patient's home. A parent complained of her manner and attitude and of the handling of two procedures involving the patient. The claimant vehemently rejected the criticisms when giving evidence saying that there had been nothing inappropriate about her manner and attitude and that the procedures were undertaken by Band 3 healthcare assistances (HCAs) and not her. That she was their supervisor, present when they acted as they did, seems to have appeared irrelevant to her then and now and we note that her manner and attitude were criticised by other third parties later on. It appeared to us, as we observed her cross-examination, that she is someone who resents criticism and was and is unprepared to accept that any of her actions might have been inappropriate.

12. Part of the claimant's role was to carry out assessments as already noted. These would be presented to panels organised by those responsible for paying for the care packages recommended. These are known as the commissioners. The claimant would present her assessments at meetings of those panels.

13. In the spring of 2018, the NHS Haringey Clinical Commissioning Group appointed Ms Kathryn Collin as the new head of children's commissioning. She sat on one of these panels. Work for Haringey patients represented about 60% of the claimant's work.

14. Ms Collins was not impressed by the claimant's work and after attending her first panel she wrote to Ms Miles as follows on 22 May 2018:

> "My first IASP panel was yesterday and I would just like to send some feedback about [the claimant]…
>
> Unfortunately [the claimant] is not able to communicate effectively at panel which impacts on our ability to make decisions. This relates to both her manner and tone as she presents as well as to the content. As the heath commissioner who is ultimately responsible for making funding decisions, we need to address this urgently to ensure that your service's work is well represented.

> I have had feedback from other panel members that my observations are consistent with their own over several months and as I am new to panel, I am able to highlight this more readily than perhaps some members who have become accustomed to how this is and have accepted it.
>
> We cannot allow this to continue as the discussions on continuing care relate to our most vulnerable children in the borough and we have to feel confident that the person presenting assessments and reviews/making requests is a trusted advisor and sadly this is not the case."

15. Ms Miles followed this up with Ms Cheryl Yeates, Haringey's lead on children's therapies and specialist nursing. They spoke on 23 May and Ms Yeates responded with an email summarising her views. It appears to us that they accord with those expressed by Ms Collin. She complained about a lack of care, compassion, sympathy and empathy towards patients and their parents. She criticised the claimant's communication style and interpersonal skills. She complained that the claimant appeared not to listen to the opinions of others on the panel, especially medical representatives, where they might disagree with her. She was said to become defensive and dismissive of the views of others where she did not agree with them.

16. At about the same time, a senior social worker (Ms Jeanette Brand) also reported concerns after observing the Claimant at panel meetings and home visits. She noted the Claimant to be dogmatic, abrasive, defensive and dismissive of the views of other professionals.

17. As a result of these complaints, considered in the context of her own concerns about the Claimant's performance, Ms Miles decided that she needed to move to more formal performance management. She met with the Claimant to discuss this on 4 July 2018. However, the Claimant objected and made various complaints to Ms Miles about her treatment, in particular that she felt unsupported.

18. On 5 July 2018, the Claimant raised a formal grievance against Ms Miles. The principal allegation was that Ms Miles had conspired with Ms Collin, Ms Yeates and Ms Brand to provide unprofessional (meaning inaccurate) feedback in order to racially discriminate against the Claimant. There were also six allegations against Ms Miles alone relating to a poor induction process; her being set up to fail; her being given last minute requests; her not being provided with all the information that she needed; poor management of her probation; limited access to CPD and being subject to threatening and humiliating communications.

19. Although this involves departing from the timeline, it is convenient to deal with the conduct of the grievance and its outcome at this stage.

20. In accordance with the Respondent's procedures, an investigation was undertaken and report presented to a panel chaired by Gordon Hulliston, the Director of Operations for Children's and Young People's Services. That panel met on 12 December 2018 and 1 February 2019 and the grievance outcome was eventually promulgated on 2 May 2019. The panel heard from the Claimant and her Trade Union representative as well from witnesses. It

looked at a considerable volume of material and the second meeting was necessitated, at least in part, because the Claimant had presented new materials two days before the first panel meeting.

21. The conspiracy allegation was rejected, as were those relating to CPD opportunities and communications. It was found that the attempt to extend the Claimant's probation period had been mishandled, that her induction had not followed the induction policy and that from time to time she was given information late. The panel recommended mediation between the Claimant and Ms Miles. This did not take place. It appears that each had agreed to it at one time or another, but that the Claimant (at least) disagreed with it on other occasions.

22. It is regrettable that the grievance took so long to resolve, but there appeared to us to be reasonable explanations for the delay in particular, it appears that the whole service was struggling with the level of demand.

23. We now return to the sequence of events from the presentation of the grievance. When the grievance was received, it was decided that the formal performance management process could not be started by Ms Miles until it had been resolved. It was also decided that the Claimant and Ms Miles should not be working together until that resolution had taken place. Hence, the Claimant was temporarily removed from the department.

24. That one of the two of them needed to move was accepted as being sensible by the Claimant. However, she later complained that it was unfair that she was the one who had been chosen. We accept that where serious allegations were being made by third parties as to the Claimant's competence as regards a key aspect of her job, she could not be left in place whilst her manager was moved. That would have inevitably left her doing the work complained of without any supervision. Also, if Ms Miles was moved, someone else would need to be brought in to manage the department (probably alongside other duties which they were currently undertaking.) Mr Cole took the decision that in those circumstances, the Claimant should be the one moved to other work temporarily. That appears to us to be a decision which was properly founded upon the reasoning we have set out.

25. Although the Claimant was given other work, she maintained contact with the team in which she had worked and she and Ms Miles eventually agreed that she could return to the team in November 2018, despite the fact that the grievance still remained unresolved.

26. In January 2019, the three commissioners from the NHS teams and the London boroughs who sent work to the CYP wrote a joint complaint about the work of the team of which the Claimant formed part, in particular regarding the production and presentation of assessments. But we not deal with that at this stage as it more appropriate to deal with it later.

27. In April 2019 an assessment made by the Claimant was appealed by parents, as was their right. It was first considered at an informal appeal

panel chaired by Mr Cole. The patient had a care package in place worth about £67,000 er annum, which equated to some 57 hours per week of care. The Claimant, by her assessment, had reduced this to some 16 hours a week. The key to whether the patient needed the level of care previously supplied was whether one to one support was needed having regard to the patient's limited mobility. The appeal panel considered that it was and an email to the Claimant from Mr Cole recorded this and identified four treating doctors said to support this view. The Claimant was asked by Mr Cole to reconsider her assessment.

28. The request for a reconsideration was the appropriate next step given the panel's view. The Claimant was able to disagree, but this would lead to a formal appeal panel being constituted. If it took the view taken by the informal panel, then there would have to be a further independent assessment.

29. Mr Cole was understandably anxious to avoid a situation where the matter had to go to a formal appeal if (as he considered would be the case) the Claimant's assessment would then be set aside following that appeal because of the evidence pointed out at the informal stage and which she had not considered. Not only would this lead to delay, but it would also serve to alienate the parents of the child with whom a good future relationship would be far preferable and cause them additional and unnecessary stress.

30. The Claimant did not agree with the appeal panel and resented being asked to reconsider her assessment, which she viewed as an impermissible attempt to get her to change her view. Indeed, she subsequently described this as an attempt "to falsify a patient assessment." Ms Unsworth also spoke to the Claimant about the matter. Like Mr Cole, she did no more than note the views of the other professionals and asked the Claimant to look at her work again. We note that the Claimant's reaction to this request and her characterisation of it accords with the views expressed about her by the commissioners and others, to which we have already made reference.

31. In May 2019, Ms Hensman became the Associate Director of Nursing responsible for the CYP. Her office was located close to the CYP's own offices and although she was responsible for many other teams and individuals, she spent time looking at the team of which the Claimant formed part and she met with the Claimant. She was aware that once the outstanding grievance against Ms Miles was resolved (as it was it to be shortly afterwards) the issues raised by the complaints about the Claimant's assessments needed to be dealt with. She also became aware of the January 2019 complaint letter by the three commissioners. That was not a complaint directly against the Claimant, but the Claimant was the second most senior person in the team and had been undertaking assessments which were a focus of the complaint.

32. At a meeting on 20 June 2019, the Claimant was told by Ms Hensman that she was being taken off assessments whilst the complaints were considered

and a way forward devised. The Claimant was to be transferred to other clinical duties whilst this was done.

33. We reject the Claimant's assertion that there was no meeting of 20 June and that until a meeting of 12 August (dealt with below) she had never met Ms Hensman and did not even know who she was. We note that she vehemently denied meeting or even knowing Ms Hensman prior to 12 August despite firstly having sent emails to her (including one following the 20 June meeting) and, secondly, agreeing that Ms Hensman had moved her from assessment work and put her on other clinical duties and that this change was in place from some time in June. We note that she was unable to explain how that change took place and how it was introduced if not at the June meeting. This was not the only instance of the Claimant being unable to reconcile her current recollections with contemporaneous documents and events and led us to conclude that those recollections may well be inaccurate and must be treated with caution where not supported by contemporaneous documents or agreed with by others.

34. As a response to the 20 June meeting, the Claimant emailed Ms Hensman and Ms Unsworth on the same day asking that her name be removed from previous assessments which had been subsequently changed by Ms Miles. She complained at Ms Miles' conduct. She referred, in particular, to two recent assessments in respect of Harringay cases. She then copied her email to Ms Colin (the Harringay Commissioner) by attaching it to an email to her. Ms Colin complained to Ms Unsworth about this action. She regarded the issue raised in the email to be a matter of internal management for the CYP, noting that sending such an email to a commissioner, seriously undermined the CYP in the eyes of the commissioner.

35. On 5 July 2019, by email, the Claimant made complaints against Ms Miles. That email was acknowledged on 8 July. The Claimant was then absent sick on 8 to 21 July and from 26 July to 11 August. She raised another complaint against Ms Miles on 25 July. Ms Hensman arranged to meet the Claimant on 20 August after taking advice from HR. She took advice because it appeared to her that the complaints were really an attempt to reopen the matters dealt with in the earlier grievance.

36. Before dealing with the discussion of those complaints on 20 August, we need to look at a meeting between the Claimant and the soon-to-depart Ms Unsworth on 11 August and a further meeting between the Claimant and Ms Hensman on 12 August.

37. On 11 August Ms Unsworth met with the Claimant to discuss the various complaints against the Claimant and against the CYP team which she formed part. Mention was made of the January complaint as well as the ones against the Claimant personally. The meeting adjourned because the Claimant wanted her Trade Union Representative to be present. This was because Ms Unsworth had stated that she was considering redeploying the Claimant to other clinical work whilst the issues regarding her present work were resolved, possibly by further mentoring and training.

38. As already noted, the Claimant was absent sick from 8 to 21 July and 26 July to 11 August. Ms Hensman had noted that the Claimant had already had substantial periods of sickness of recent date such that she had a Bradford score of over 7000. The Respondent used the Bradford scoring system to assess when its sickness absence procedures should be triggered. The first stage was triggered when the score exceeded 128. Ms Hensman felt that this had not been addressed as it should in the past and decided to have a return-to-work meeting with the Claimant. One was scheduled for late July and was cancelled as the Claimant went off sick again and it was rescheduled for 12 August.

39. The Claimant failed to attend the scheduled meeting on 12 August, so Ms Hensman telephoned her. The Claimant had apparently gone to an appointment at school relating to a child the CYP was responsible for. Ms Hensman was puzzled as to how the Claimant had arranged such a meeting for her first day back at work, given the amount of preparation which would be required and given that she was supposed to be attending the return-to-work meeting. However, she simply asked the Claimant to come and see her on her return to the office. We reject the Claimant's allegation that Ms Hensman, as someone who says she did not know and had never met by that time, called her and, during what she agrees was a very brief conversation, yelled at her to complete the appointment and then return to the office to meet her. The Claimant knew Ms Hensman, had met and communicated with her, and Ms Hensman was calm during the whole conversation.

40. The 12 August meeting and subsequent meetings in 2019 dealing with sickness absence between the Claimant and Ms Hensman were all conducted in accordance to the Respondent's sickness absence policy and appropriately documented. Ms Hensman would sometimes discuss other matters after the sickness related meeting had concluded, but she was careful to keep the meetings separate. We accept that she considered it sensible to deal with other topics which she needed to discuss with the Claimant whilst the two of them were together.

41. As we have already stated, the various complaints about the Claimant and the CYP to which we have referred were discussed between the Claimant and Ms Hensman on 20 August 2019. The Claimant was told that Ms Miles was shortly to leave her post. The Claimant was relieved and this was emphasised by her stating that matters would get better once she had gone. The Claimant and Ms Hensman agreed a revised working regime to operate at least until Ms Miles departed. This included the Claimant coming to the office only once a week and working nights (with the uplift in pay that this entailed) in a different clinical role.

42. When the Claimant had first commenced work, she used a desk located in the main office. When she returned to the team in November 2018, she moved herself, but without objection, to work from a small office with two desks located near the main office. In early July 2019 Ms Miles decided to reorganise the use of office space and asked the Claimant to work back in

the main office, so that two nurses who needed an office on their own could have the small office. The Claimant did not action the request which we conclude was made for good operational reasons. We so conclude as the Claimant has never alleged otherwise. She said she had not found time to do so before she commenced annual leave. Ms Miles then moved her equipment and possessions during that annual leave to a desk in the main office. On her return, the Claimant unilaterally moved herself back complaining (by email) that the desk assigned to her in the main office was occupied by someone else when she got into work at 10am on her first day back from annual leave. Ms Miles then arranged for the desk in the main office to be labelled as the Claimant's desk to prevent this from happening again.

43. Ms Miles accepted that she should have not herself have moved the Claimant's possessions, although we note the Claimant did not complain of this at the time. Ms Unsworth who looked into the matter of the desk move following the Claimant's complaint (about her inability to access her own desk) regarded this as a petty matter between two colleagues whose relations were still somewhat strained, but one which was now resolved.

44. On 23 October (the day following a sickness absence meeting) the Claimant again met Ms Hensman to discuss the various complaints referred to above. It was agreed that the Claimant should have additional training in relation to the making of assessments and their presentation. In particular, she would be helped by Ms O'Gorman, a matron who was responsible for end-of-life care for seriously ill children and who had to carry out similar assessments relating to their needs (which would involve liaising both with parents and other health professionals) and deal with the presentation of them. Indeed, some of the children Ms O'Gorman dealt with had previously been the responsibility of the Claimant's team in the CYP.

45. On 11 November 2019, the Claimant attended a meeting with Ms Barnes who had taken over as associate director of nursing from Ms Hensman on her retirement. When discussing the complaints against her, the Claimant mentioned that she had received feedback from other service users. Ms Barnes had not seen the letters recording the service user comments to which the Claimant referred and later that day, the Claimant sent them to her attached to an email.

46. The Claimant says that at this meeting, Ms Barnes described the comments (which she had not then seen) as "all lies".

47. Having heard her give evidence, we are satisfied that she said no such thing. The Claimant made no mention of that statement in the email attaching the feedback and we note that when giving evidence she could not paint a convincing picture of how such a comment came to be made. When cross-examining Ms Barnes, she suggested to her that this comment was made at an earlier meeting in October. It being pointed out to her that she had previously said that this took place at the 11 November meeting she said that she could not recall at which meeting it occurred. We are

satisfied that Ms Barnes made no such statement at any meeting with the Claimant.

48. We have dealt with one sickness absence meeting between the Claimant and Ms Hensman, there were further such meetings in subsequent months up to and including November 2019 when she retired. In this claim, the Claimant accused Ms Hensman of "forging" the meetings. After some equivocation, the Claimant eventually told us that what she meant by this was that Ms Hensman had used sickness absence meetings to deal with other matters and had failed to record these other discussions in the meeting notes or outcome letters following from the sickness absence meetings.

49. We have concluded that what she alleges is inaccurate. If other matters were discussed after sickness absence issues had been addressed, this was in no way improper. Those issues were not recorded in the sickness absence documentation. However, copies were always sent to the Claimant and she made no comment at the time to the effect that other matters had been either improperly dealt with or dealt with and not minuted. We note that when taken to various sickness absence documents, the Claimant was unable to say (even in general terms) what else had been dealt with and not recorded. Of course, Ms Hensman accepts that she properly dealt with other matters after the sickness absence meetings had concluded.

50. On 9 December 2019, the Claimant resigned. Her resignation letter noted a lack of job satisfaction. She did not refer to any of the matters now relied upon as repudiatory breaches of contract.

51. She has been contemplating early retirement for some time and she said in her resignation letter that she now intended to retire. The Claimant had first requested early retirement in August 2017 to take effect from February 2018, but she withdrew that request. She later took a retirement study day and asked for information "as to her pension entitlement." We consider that her decision to retire made in December 2019 was related to the complaints made about her, but only in this sense. She resented being the subject of criticism and was unwilling to undertake the training and shadowing needed to help her to produce more acceptable assessments and methods of presentation. Understandably she found it embarrassing to be the subject of such criticisms, however justified, and considered it demeaning to have to shadow fellow senior nurses.

52. The Claimant was obliged to give twelve weeks' notice to the Respondent. She believed the period of notice required to be four months, however, she chose to give a significantly longer period of notice which she then extended slightly further so as to leave on 5 June 2020. That was a period of almost six months' notice. In January 2020, the Claimant's job was advertised and an appointment made for someone to start in May 2020, shortly prior to the Claimant retiring, so as to facilitate a period of handover.

53. The Claimant was by this time doing some work outside the CYP Team as had first been agreed in August 2019 as well as some CYP work. She was not undertaking assessments as the commissioners remained unhappy that she should do so.

54. On 17 January 2020 the Claimant was on duty at the home of a sick child. She was supervising a band 3 HCA overnight with a view to observing and signing off that HCA's core competencies, which the HCA would exhibit when caring for the child who needed periodic medical attention during the night. The patient, her mother and the HCA reported that the Claimant slept for at least parts of the night. The Claimant accepts that she should not have slept on duty, but having initially admitted doing so she has always since maintained that she did not.

55. As a result of the complaint, Ms Barnes interviewed the Claimant and in the light of what she said commenced a formal disciplinary investigation. She was concerned not just that the Claimant had slept when on duty but that she had signed off on the HCA's competencies when there was a real risk that she had not seen them demonstrated. The investigation led to a formal disciplinary process for which the Claimant eventually received a warning. The progress of that process and its outcome are not material to this claim.

56. Ms Barnes considered that the Claimant should not work in CYP, or in any clinical setting, while the matter was being investigated. She located alternative work in a non-clinical role. She considered that clinical work was inappropriate given the nature of the allegation made against the Claimant, in particular that concerning the possible signing off of competencies which had not been observed.

57. On 7 May the Claimant sought to rescind her resignation saying that she no longer wished to retire early. The Respondent's view was that she could withdraw her request to retire early at any time prior to the date of retirement. This was because that was a request to the NHS pension fund. However, it took the view that she could not rescind her resignation without its consent. It did not consent because it had recruited a replacement who was due to start in ten days. Whether the Respondent might have sought to find another role for her in certain circumstances was not something that was investigated before us and we note that she was someone who was the subject of an outstanding disciplinary process and whose work had been the subject of various complaints by third parties.

58. On 8 May (being the day after she attempted to rescind her resignation) the Claimant made what is accepted to be a protected disclosure to the CQC relating to aspects of the work of the Respondent. She asked for this to be treated as anonymous complaint. It was communicated to the Respondent on 15 May and inadvertently linked to the Claimant by the CQC. That the Respondent learnt that a complaint had been made by the Claimant was as a result of the CQC informing a commissioner of the complaint as it raised safe-guarding issues relating to a patient for which that commissioner was responsible. The CQC inadvertently told the commissioner the complaint

(which it described as being anonymous) was made by the Claimant by sending to it a form with her name on it.

59. As the Respondent had assessed and monitored the patient in question, the commissioner told the Respondent of the complaint by forwarding the documentation sent to it by the CQC, thus revealing its source. That the Claimant had made her complaint was communicated to the Respondent in the way set out above at 11:09 on 15 May, but this was not passed to Ms Barnes until 15:16 on the same day. She noticed that whilst the complaint was described as anonymous the CQC had sent a form to the commissioner which was then copied to the Respondent which named the Claimant as the complainant.

60. It is important against that background for us to consider the events leading up to the suspension of the Claimant on 19 May which the Claimant says was done because of her complaint to the CQC.

61. On 14 May, Ms Barnes was informed by Great Ormond Street Hospital ("GOSH") of a phone call from the Claimant earlier that day to one of GOSH's wards. The Claimant had sought information about a discharged patient who had been a child that the Claimant had dealt with when on the CYP Team.

62. As relayed to Ms Barnes by an email, the Claimant's conduct greatly concerned her. The Claimant had led those she spoke to as GOSH to believe that she remained an active part of the CYP Team, when she did not. She had claimed to be conducting an investigation into events taking place the previous day (13 May) involving the patient's parent calling an ambulance and she had clearly discussed that event with the patient's parent. The Claimant should have been doing none of these things.

63. Ms Barnes was concerned to establish if the Claimant had accessed patient record to obtain details about this or any other patient in the recent past. At 14:36 on 14 May, she asked for an audit to take place. The result of that audit was that the Claimant had accessed several patient records since she had ceased (at least temporarily) to work in the CYP Team. Several of these were the records of adult patients which she had never needed to access as part of her CYP work or otherwise.

64. We note that the Claimant denies accessing the records for any improper purpose and denies accessing adult records at all. It is unnecessary for us to determine the truth of what she says indeed, we lack the evidence to determine those matters. It is enough for our purposes for us to find (as we do) that the information which Ms Barnes received was as we have set out above.

65. What concerns us is the Respondent's reaction to the information Ms Barnes received, both from GOSH and from those she asked to conduct the audit. She discussed the matter with HR during the afternoon of 14 May because she felt that she probably needed to suspend the Claimant whilst her access to patient records and her inter-action with GOSH was fully

investigated. She was given a copy of the Respondent's decision tree document on possible suspension to complete. This required her to analyse and record the risk as she saw it of continued active employment, as distinct from suspension on full pay and benefits. She completed that form on 14 May and determined that it was, in her view, appropriate to suspend the Claimant.

66. As a consequence of her decision, she wrote to the Claimant on 14 May inviting her to a meeting to discuss her possible suspension. Details of the allegations leading to this course of action were given and the Claimant was told that she could have Trade Union representation at the meeting. The meeting was eventually rearranged to 19 May to enable her chosen Trade Union representative to attend and a further invitation letter was sent.

67. All of those events (save for the sending of the second invitation letter) took place on 14 May. That is before Ms Barnes (or anyone else at the Respondent) knew that the Claimant had complained to CQC. The suspension meeting (at which she was indeed suspended) took place after Ms Barnes had that knowledge, which she gained on 15 May.

68. Having regard to the timing of the events and the very serious nature of the allegations against the Claimant and having heard from Ms Barnes and examined the contemporaneous documentation we are completely satisfied that the suspension had nothing whatsoever to do with the complaint to the CQC.

69. The Claimant's last day of employment was 5 June 2020 as at that day the Claimant had 51 hours of holiday entitlement outstanding. This was identified in the Respondent's records, but until we and the Respondent's counsel carefully analysed the relevant documents, including ones produced during the course of the hearing, it was not clear that she had not been paid for those hours. The lack of clarity owes much to the fact that the Claimant had seized upon a date, 14 June, found in some of the Respondent's documents and had asserted that her leaving date had been changed to take account of holidays not taken and that she was entitled to be paid for those days. In fact, that date appeared only because it was the normal end date of the pay period and the documents record the instruction that she was not to be paid for the period of 6 to 14 June. The Respondent had (correctly) maintained that she had no entitlement to be paid for the period 6 to 14 June, but had failed to notice that she had not been paid in respect of her outstanding holiday entitlement.

70. The Claimant also maintained that she had not been paid for three bank holidays which she had worked. The records show that she was paid for two which she had worked in April and May 2020. The third was during the period of her suspension and she did not work it, although it appears that she may have done so had she not been suspended. The Respondent has agreed to pay her for it rather than arguing about whether she was actually entitled to be paid in those circumstances.

71. In her witness statement, the Claimant also stated that she was owed monies in respect of outstanding overtime. She produced a schedule of what she said was owed. It is partly handwritten and relates to various dates from early April 2018 to late August 2019. The schedule comprises two pages, one of which is type-written and the other of which is partial type-written and partially handwritten. The partially handwritten page of the schedule reproduces part of the typed schedule on the other page and then reworks the remainder in handwriting. The notes forming part of the schedule accept that most, if not all, hours claimed were not recorded in the Respondent's work rosters. No evidence was given to us of any contemporary claim to be paid those sums. That monies were owed might be said to be raised (and, if so, for the first time) in the ET1 a little short of a year after the period covered by the last payment claimed. However, this is only raised by the Claimant ticking a box to say other monies were owed and is not referred to in the narrative accompanying the claim form. Such particulars as we have were given much later and the claim does not even feature in the claim's schedule of loss or in the list of issues. Hence, no disclosure has taken place in respect of such records as the Respondent might have of what hours the Claimant worked in the weeks in question.

72. Given the state of the evidence we find it impossible to conclude that the 27.5 hours she claims were ones which she worked, being hours in respect of which she was entitled to an overtime payment which she has not received.

The law and submissions

73. The Respondent produced comprehensive written submissions on the applicable law. The Claimant did not make submissions in relation to the law, she invited us to reach our own conclusions in this regard. We considered the applicable legal principals to be uncontroversial and can be summarised briefly as follows.

74. All contracts of employment contain an implied term to the effect that an employer should not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the necessary trust and confidence between employer and employee.

75. An Employment Tribunal must adopt an objective approach to the impact of the conduct relied upon to establish a breach of that implied term. That does not require the Employment Tribunal to enquire as to the employer's subjective intention but to consider whether the conduct, considered objectively, was calculated or likely to destroy or seriously damage trust and confidence (see e.g., Leeds Dental Team Limited v Rose [2014] IRLR 8).

76. A repudiatory breach of contract does not of itself bring a contract of employment (or any contract) to an end. That breach needs to be accepted by the other party to it to achieve that end. The breach need not be the sole reason for bringing the contract to an end. It need only be a reason. Nor

need it be shown to be the principal reason or effective reason (see Meikle v Nottinghamshire County Council [2005] ICR 1, CA).

77. In Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA CIV 978 Underhill LJ set out the questions which an Employment Tribunal usually needs to ask itself when faced with a claim for constructive dismissal: He stated that in the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

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

    77.2 Has he or she affirmed the contract since that act?

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

    77.4 If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence? If it was, there is no need for any separate consideration of a possible or previous affirmation.

78. Omilaju v Waltham Forest LBC [2005] 1 ICR 481 established that where a sequence of acts and/or omissions is relied upon as cumulatively giving rise to a repudiatory breach of contract, the last act (or last straw as it is often described) need not of itself amount to a breach of contract. Indeed, no act in the sequence need, viewed in isolation, amount to a repudiatory breach. It is the sequence taken as a whole which must be considered.

79. In the well-known case of Western Excavating (ECC) Limited v Sharp [1978] IRIR27, CA the then master of the roles, Lord Denning, said the following: (At paragraph 15).

> "Moreover he must make up his mind soon after the conduct of which he complains: for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

80. The issues of affirmation and whether or not the trust and confidence implied term has been breached are clearly related. An employee who does not quickly resign in response to an alleged breach of contract may be found to have waived the breach and affirmed the contract. It might equally be said that this conduct sheds light on the question of whether or not trust and confidence had really broken down. An employee who works on for a substantial period of time after an alleged repudiatory breach of the implied terms of trust and confidence may be said to have indicated thereby that the

conduct relied upon had not actually destroyed or seriously damaged trust and confidence, hence the employee's preparedness to work on.

81. Affirmation by giving excess notice was considered by the EAT in Cockram v Air Products PLC [2014] ICR 1065. At common law the giving of any notice would affirm the contract, however section 95(1)(c) of the Employment Rights Act 1996 which deals with the statutory concept of constructive dismissal specifically contemplates a constructive dismissal where the Claimant has given notice. Simler J in Cockram considered how this statutory provision impacted upon the consideration by a court or tribunal of the giving of notice (and, specifically, excess notice) in the context of an alleged constructive dismissal.

82. She held at paragraph 25:

> "Within that legal framework there is no basis for inferring that section 95(2)(c) provides an inflexible rule that post-resignation affirmation as a concept (however rare as a matter of fact) is excluded from consideration. Where an employee resigns on notice and, despite doing so, his conduct is inconsistent with saying that he has not affirmed the contract, that conduct must be capable of consideration by a fact-finding tribunal. Where he gives notice in excess of the notice required by his contract, he is offering additional performance of the contract to that which is required by it. That additional performance may be consistent only with affirmation of the contract. It is a question of fact and degree whether in such circumstances his conduct is properly to be regarded as affirmation of the contract."

83. In this case, it is not disputed that the complaint to the CQC amounted to a protected disclosure. The issue is whether the required causative link is established between the alleged detriment and that protected disclosure. The nature of the required link was explored in Fecitt v NHS Manchester [2012] IRLR 64. Lord Justice Elias in paragraph 45 noted the following:

> "In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."

84. The burden of proof is on the Claimant to establish that causative link (see section 48 (2) of the 1996 Act).

85. We need not set out the law in relation to the possible fair constructive unfair dismissal because we consider that we do not need to deal with that aspect of the matter, although we were addressed upon it.

86. We need not set out the law as regards claims for holiday pay. It is not disputed that a sum can be paid in lieu of holidays not taken as at the termination of a contract of employment and that a failure to pay wages due may amount to an unlawful deduction from wages under section 13 (3) of the 1996 Act. Outstanding pay for any bank holiday work should have formed part of the final payment of wages due to the Claimant.

87. The failure to pay wages for overtime worked would also amount to an unlawful deduction under part II of the 1996 Act, the burden being on the Claimant to establish what should have been paid and was not paid. The primary limitation period for any such claim is three months from the date the payment should have been made. There is a secondary limitation period of whatever time Employment Tribunal considers reasonable if it was not reasonably practicable to bring the claim in that primary period (see sections 23(2) and (4) of 1996 Act).

88. Both sides made submissions on the facts where appropriate their respective contentions are noted in the findings of fact, where this is material. Before making her closing submissions, the Claimant appeared distressed. Whether she wished to apply to adjourn was discussed with her, she was given a further period to compose herself and to consider how she wished to proceed. She decided it would be best to make her submissions which she then proceeded to do by reference to notes that she had made. So far as the Respondent was concerned, we received written submissions relating to matters of fact and the application of the law to them. Those submissions were provided to the Claimant on the evening before the day upon which she made her submissions.

Applying the law to the facts

89. We begin by considering each of the nine matters said individually and/or cumulatively to amount to a repudiatory breach of the implied term as to trust and confidence. We have revised the order of the items reversing items (ii) and (iii) from the original list so as to maintain a chronological sequence.

90. The first allegation is that “on 18 July 2018 Dorian Cole removing the Claimant from the department at the request Diane Miles.”

91. The Claimant was temporarily removed from the department on 18 July. This was not at the request of Ms Miles.

92. The Claimant was removed given the need to deal with the grievance she had raised. She accepted that one of herself and Ms Miles would need to move for a period. She questioned that later asking why it was herself who was moved, given that she had raised the grievance.

93. The choice of the Claimant was made for good reasons. It would have been inappropriate to remove the manager of the department, especially when that would have left the Claimant as the most senior employee working permanently in the department and she was the subject of very serious complaints from third-party users with regard to fundamental aspects of her work, the addressing of which complaints was now held up given the need to address the grievance.

94. The temporary move for good reason would not amount to a breach of the implied term as to trust and confidence and if it did the Claimant waived that

breach by working on in a temporary role and returning to her original role in November 2018.

95. The second complaint with which we deal is that "in April 2019 the Respondent (namely Dorian Cole and Helen Unsworth) asking the Claimant to falsify a patient assessment."

96. The Claimant was not asked to falsify a patient assessment. A senior clinician (Mr Cole) asked her to look at her assessment again. That request was made for good reason after the informal stage of an appeal process had identified material which he believed she had not taken into account. Ms Unsworth made a similar request.

97. A request made in the proper performance of his duties by Mr Cole could not seriously damage the relationship of trust and confidence, furthermore, it plainly did not do so (and/or the Claimant waived any such breach) because she worked on for a significant period of time thereafter.

98. We next turn to the allegation that "on 5 July 2019 the Respondent received complaints from the Claimant alleging bullying and harassment by Diane Miles and took no action."

99. A complaint was received on 5 July followed by a further complaint on 25 July.

100. Action was taken. The complaint of 5 July was acknowledged by email of 8 July. It was discussed with the Claimant (together with her later complaint and other matters) on 20 August once she had returned to work from two periods of sickness.

101. A way forward was agreed to operate until Ms Miles left the Respondent's employment.

102. Hence, the factual basis for the alleged breach of contract is not made out.

103. We next turn to the allegation that "on 4/5 July 2019 the Respondent (namely Diane Miles) moving the Claimant's desk."

104. The Claimant was moved from a desk in one location to a desk in another. Her personal and work possessions were moved by Ms Miles whilst she was on annual leave.

105. The move from one location to another was complained of on the basis of the desk at the new location was occupied by peripatetic staff who started work before she did. This was remedied by labelling the desk.

106. The Claimant made no contemporaneous complaint about Ms Miles moving her computer, her chair and other items and the contemporaneous correspondence shows that the Claimant was aware of the intended move and failed to find time to make the move herself before she went on leave.

107. The move was undertaken for work-related reasons. The occupation of the new desk by others was resolved. Neither that conduct, nor the moving of her personal possessions, amounted to a breach of the implied term as to trust and confidence.

108. The Claimant was initially upset at the move, however, the fact that she did not resign for another six months and then made no mention of this matter support the view that considered objectively this was not something that was likely to damage to any significant extent the trust and confidence between employer and employee. In any event, working on without further protest demonstrates a waiver of any breach and affirmation of the contract.

109. Next, we considered the allegation that "on 11 August 2019 Helen Unsworth informed the Claimant that there was a complaint against her, when in fact it was against the department and stating that the Claimant would be redeployed to clinical governance."

110. The Claimant had been temporarily removed from undertaking assignments on 20 June 2019. She then wrote asking that her name be removed from assessments which Ms Miles had changed or might change. She copied that email to Ms Colin which led to a further complaint by her in relation to the Claimant's conduct.

111. On 11 August 2019 Ms Unsworth wished to discuss with the Claimant the various complaints against her and against the team as a whole and to propose the way forward which the Claimant eventually agreed to at the meeting on 20 August with Ms Hensman. That indeed did involve redeploying the Claimant to another clinical role.

112. The meeting on 11 August was halted when the Claimant asked to be accompanied by her Trade Union representative if redeployment was to be discussed.

113. The telling Claimant of complaints against her and proposing a way forward in the short-term which involved redeployment could not amount to a breach of contract. There were such complaints and the way forward to deal them needed to be discussed. Indeed, some nine days later that way forward was agreed by the Claimant.

114. If we focus only on the January 2019 complaint, it was not specifically against the Claimant personally, but the Claimant was a senior member of the team complained of and actions and lack of action complained of were matters in which she was closely involved, if not personally responsible for.

115. In any event, any such breach of contract would have been waived by the Claimant agreeing the proposed new regime on 20 August 2019.

116. We next turn to consider the allegation that "on 12 August 2019 Rosemary Hensman over the telephone yelling at the Claimant "seeing that you are there complete the appointment and return to the office to meet with me"".

117. The Claimant was not yelled at by Ms Hensman. We note that there was no contemporaneous complaint of this. In those circumstances there can be no breach of contract arising from the conduct relied upon.

118. Next, we turn to the allegation that "in October 2019, the Respondent provided the Claimant with a copy of the complaint from [the commissioners] dated 10 January 2019, it is the Claimant's case that this was not a complaint against her."

119. The allegation related to the meeting of 23 October 2019. There was a further discussion of the complaints on that day and a regime of training and shadowing was agreed upon.

120. The allegation is closely related to that dealt with above relating to 11 August meeting and it must fail for the same reasons.

121. We now turn to the allegation that "on 11 November 2019 Jeanette Barnes in the case load meeting stated that all the feedback provided from service users across the three boroughs were all lies."

122. Ms Barnes made no such comment at that or any other meeting and again, we note there were contemporaneous complaints. Hence, there can be no breach of contract arising from the conduct relied upon.

123. Finally, we turn to the allegation that "Rosemary Hensman forging what occurred in the sickness absence meetings of 12 August, 20 August, 11 September, 24 September, 22 October, 12 November, 19 November, 29 November."

124. The alleged breach of contract now relied upon is that Ms Hensman dealt with other matters in these sickness absence meetings and did not add those matters to the minutes or letters following from those meetings. As a matter of fact, that is not the case. Hence, again there can be no breach of contract arising from the conduct relied upon. The sickness absence meetings dealt only with the Claimant's sickness absences. If Ms Hensman needed to discuss other matters with the Claimant, she did not raise them until after the sickness absence meeting was over. Such matters were not dealt with in the minutes of the sickness absence meetings sent to the Claimant and she made no complaint of this at the time.

125. None of the individual allegations made amount to a breach of contract. However, we must next consider wherever they could do so looked at altogether. In our view, they plainly could not. They do not form a pattern of inappropriate behaviour towards the Claimant. Five of the nine allegations are not made out as a matter of fact: what she alleges did not happen. As to the rest, aspects of what is alleged are inaccurate and only one allegation (relating to the desk move) is based on conduct which could, looked at objectively, be seen as inappropriate. However, the inappropriate conduct - moving the Claimant's possessions – was not complained of at the time and was not the allegation made before us, which relates to the desk move itself. In those circumstances we are satisfied that even looked at altogether

the allegations do not amount to a breach of the implied terms as to trust and confidence. We also note that there is in this case no "last straw" because the last of the events relied upon is amongst those which we have found have no factual basis.

126. Further, the Claimant did not resign because of any such alleged breach of contract, but because she decided to retire early as she was not experiencing a sufficient level of job satisfaction. We understand that. She was plainly struggling with key aspects of her job and facing further training with and shadowing of other senior nursing staff. We accept that she found that embarrassing and demeaning. However, as we have concluded, it was necessary because of her failings.

127. If there was a breach, we consider that the Claimant waived it by offering to work almost double her twelve-week notice period. However, we see that and her decision to try to rescind her resignation more as very powerful evidence that trust and confidence between her and the Respondent had not been destroyed or seriously damaged by any conduct on the Respondent's part. The offer of a longer notice period and the request to rescind were motivated, in large measure, by the Claimant's financial position. She wished to retire on 5 June but subsequently found that she would not receive a sufficient pension and, hence, decided that she wished to work on.

128. The Claimant did make a protected disclosure to the Care Quality Commission on 8 May 2020. The Respondent found out that she made it on 15 May, and she was suspended on 19 May. However, the suspension had nothing whatsoever to do with the disclosure.

129. The Claimant had been moved to non-clinical duties due to the allegation of sleeping on duty (and the associated improper certification of competencies) and to facilitate its investigation. Whilst on those non-clinical duties, she was reasonably believed to have unnecessarily accessed patient records, contacted a patient's parent, and then contacted GOSH purporting to be still part of CYP Team and conducting an investigation into a particular incident.

130. When Ms Barnes learned of this alleged conduct on 14 May, she asked for the Claimant's recent access to patient records to be audited. The result of the audit was given to her on the same day. It showed access to child and adult patient records at a time when the Claimant had no need for such access. That conduct she found to be so serious that the Claimant should be suspended whilst it was investigated. She went through the appropriate steps towards this including sending out an invitation to the suspension meeting. All of that was done on 14 May before she learned (on 15 May) of the Claimant's complaint.

131. The Claimant's case for payment for the period from 6 to 14 June 2020 on the basis that it represented a period of service added to take account of holidays not taken must fail. However, it is accepted that she was owed 51 hours of untaken holidays at the time of termination of her employment and that should be paid to her as the Respondent accepts. We consider that

there is no need to amend to add this as a further claim. The Respondent has not taken that point and, in our view, at the heart of the claim was always the assertion that she was owed money for untaken holidays. If the quantification of that claim cannot be agreed between the parties, then the Claimant may apply to have a hearing to determine the sum in question.

132. We also award the Claimant one day's pay in respect of the bank holiday which she was scheduled to work but did not work due to her suspension. The Respondent concedes that this should be paid to her. The other bak holidays which she worked were paid for. Again, if the quantum of that sum cannot be agreed, then the matter can be listed on the application of the Claimant in order for the quantum to be determined.

133. The claim (if it was made at all) in respect of unpaid overtime is dismissed. We doubt that there is such a claim in the ET1 and even if there is, it was presented outside the primary limitation period. The Claimant has not sought to explain why it was not reasonably practicable to present within that period. That is probably because the issue does not feature in the list issues which also makes no reference to the overtime claimed. In any event, the evidence in respect of the overtime claim is not evidence upon which we could properly make findings of fact in the Claimant's favour. There has been no disclosure of such records as may exist of the work the Claimant did at the time, from either party. No relevant orders were sought, or made, doubtless because the claim does not feature in the list of issues. There is no evidence of any contemporaneous claim to any of the sums in question. In those circumstances, the claim must be dismissed.

Conclusions

134. In those circumstances and for those reasons all the claims brought by the Claimant are dismissed save those in respect of untaken holidays (but only in respect of 51 hours of holiday pay) and one day's pay for the bank holiday which the Claimant was scheduled to work.

Employment Judge Andrew Clarke QC

Date: …1 August 2022……..

Sent to the parties on: 02 August 2022

For the Tribunal Office