EMPLOYMENT TRIBUNALS

Heard at:	London South	**On:**	23 – 25 January 2024
Claimant:	Mrs S Hamilton		
Respondent:	Epsom and St Helier University Hospitals NHS Trust		
Before:	Employment Judge Ramsden		
Representation:			
Claimant	Mr Hamilton, lay representative		
Respondent	Mr B Phelps, Counsel		

RESERVED JUDGMENT

1. The Claimant's claim of constructive unfair dismissal is well-founded.

REASONS

Claims

2. The Claimant worked for the Respondent as a Diabetes Specialist Nurse from 8 October 2012 until her resignation on 6 January 2022. She has brought a claim that the Respondent constructively unfairly dismissed her. Specifically, she avers that the Respondent:

   a) In the period **11 January 2018** to the **end of October 2021**, failed to address, or address appropriately, the behaviour towards her of a colleague, Abdool Nayeck (the **Management Failure**);

   b) Failed on **12 October 2021** (the date of her grievance appeal outcome) to properly uphold her grievance about Mr Nayeck's behaviour (the **Grievance Failure**); and

   c) Failed, in the period **12 October 2021** to **6 January 2022**, to implement the necessary safeguards in her case in a timely fashion following her

complaints being substantially upheld on the appeal of her grievance (which failure the Claimant characterises as the "last straw") on **12 October 2021**. The Claimant says that this relates to the fact that the Respondent failed to implement the recommendation that a senior nurse be appointed to liaise with the Claimant's line manager and occupational health in order to support her in becoming ready to return to work (the **Implementation Failure**).

3. The Claimant confirmed on the third day of the hearing that a fourth allegation of breach - that the Respondent, through its then Deputy Head of Nursing, Sarah Connor, indicated to the Claimant that resignation would be an appropriate action for the Claimant - was not being pursued.

4. These actions/inactions, the Claimant says, individually and/or collectively fundamentally breached the implied duty of trust and confidence in her contract of employment, entitling her to accept that breach and resign – which she did.

5. The Respondent denies these claims, says that the Claimant's employment ended by way of her resignation, and:

   a) In relation the Management Failure, says that it took appropriate steps to address the behaviour of Mr Nayeck;

   b) In relation to the Grievance Failure, says that it reached appropriate conclusions in relation to the complaints in the Claimant's grievance; and

   c) In relation to the Implementation Failure, says that it took appropriate steps following the outcome of the Claimant's grievance appeal. The Respondent avers that the steps recommended as part of that outcome were not implemented because they were reliant on the Claimant's engagement, and the Respondent says she ceased to engage with it over them when she resigned from her employment.

6. The Respondent contends that it has not breached any express or implied term/s of the Claimant's employment contract.

7. If the Tribunal concludes that the Respondent has breached the Claimant's contract, the Respondent avers that:

   a) That breach did not amount to a fundamental breach; and/or

   b) The Claimant did not resign in response to that breach, as she had reached the view that her relationship with Mr Nayeck, her managers and therefore the Respondent was irreparable by 19 August 2021 (expressed in her appeal of the grievance outcome). Therefore, the Respondent says, the Claimant elected to remain employed rather than resign, thereby affirming any breaches before this point in time.

8. The Respondent says, in relation to the putative "last straw" (the Implementation Failure), that:

   a) As a matter of fact, (i) it appointed Dionne Daniel (who was the Respondent's Associate Director of Nursing for Clinical Practice at the

relevant times) to liaise with the Claimant's line manager and occupational health in order to support her in becoming ready to return to work, (ii) Miss Daniel had made contact with the Claimant and begun the process of engaging with her about her return to work, (iii) Sarah Jupp was in contact with the Claimant, and (iv) Viktoria Burley (the Respondent's Head of Employee Relations who supported the Respondent in relation to the stage three grievance appeal hearing) was engaged with the Claimant's union representative, i.e., the breach the Claimant alleges did not occur;

b) Moreover, even if the Tribunal finds that the recommendation had not been acted upon, the time period between the grievance appeal outcome on 12 October 2021 and the Claimant's resignation on 6 January 2022 was not so deleterious as to be a fundamental breach or likely to destroy the trust and confidence between the parties. It was, the Respondent asserts, an "innocuous act"; and

c) Because the act alleged as the "last straw" either did not happen or was an innocuous act, it did not revive any previous alleged breaches.

9. The issues to be decided in the substantive hearing to determine the Claimant's claims were set out in the Case Management Orders of EJ Fowell of **10 August 2023**.

The hearing

10. The Respondent was represented in the hearing by Mr Phelps, Counsel. The Claimant was represented by her (lay) husband, Mr Hamilton.

11. The parties had agreed a (liability only) hearing bundle of 362 pages.

12. The Claimant gave evidence, and the witness statement of Priti Chauhan-Whittingham was also submitted in support of the Claimant's case. Mrs Chauhan-Whittingham was not in attendance at the Tribunal on the morning of the first day, but the Claimant said she was prepared to attend that afternoon or the next day to present herself for cross-examination and Panel questions. As neither the Respondent nor the Employment Judge had any questions for Mrs Chauhan-Whittingham, the Tribunal indicated that she was not required to attend the Tribunal, though the contents of her written witness statement would be taken into account so far as relevant to the issues in the case, noting that they are unchallenged by the Respondent.

13. The Tribunal also heard evidence from:

a) Daniel Camp (who chaired the Claimant's grievance hearing);

b) Peter Davies (who chaired the Claimant's stage 3 grievance appeal hearing);

c) Mrs Jupp (who had line-managed both the Claimant and Mr Nayeck at the relevant times);

d) Ms Burley (the Respondent's Head of Employee Relations who supported the Respondent in relation to the stage three grievance appeal hearing); and

e) Miss Daniel (who was tasked with providing the Claimant with support after the grievance appeal hearing outcome),

for the Respondent.

Background facts

14. The Claimant started working as a Diabetes Nurse Specialist in 1986.

15. The Claimant began working for the Respondent on 8 October 2012 in the band 7 role of Diabetes Nurse Specialist.

16. Mrs Jupp joined the Respondent in September 2015, as the Lead Diabetes Specialist Nurse in the Acute Diabetes and Community Diabetes Service, and began line managing the Claimant at that time. Mrs Jupp line managed the Claimant throughout the remainder of her employment with the Respondent.

17. Mr Nayeck joined the department in September 2017, and was also line managed by Mrs Jupp. Mr Nayeck is a dietician, and was engaged as a Diabetes Specialist Dietician, which is also a band 7 role. The Claimant and Mr Nayeck worked in the same team sometimes seeing and treating the same individuals, though their roles were different.

18. It is agreed that the Claimant and Mr Nayeck had a difficult relationship, and the Claimant dates the issues between them as beginning on 11 January 2018 (which is not challenged by the Respondent).

19. On 28 September 2018 a situation arose in relation to a patient who had experienced severe "hypos" (episodes of low blood sugar), collapsed at home and was at risk (the **September 2018 Incident**). The Claimant and Mr Nayeck disagreed about the appropriate response, and when Mr Nayeck asked the Claimant if she was questioning his competency, she confirmed that she was. The Claimant considered this reasonable in light of the patient safety risk that she perceived Mr Nayeck's advice posed.

20. The Claimant reported the September 2018 Incident to Mrs Jupp and Dr Andrew Rodin (the latter being the Respondent's Clinical Lead, Diabetes), and the three of them met a few days later. The Claimant says, and Mrs Jupp agrees, that Mrs Jupp and Dr Rodin:

a) Confirmed that her clinical assessment had been correct;

b) Indicated that they were aware of Mr Nayeck's behaviour, and that incident showed a learning issue that needed to be addressed (both about the correct response to the patient's needs and his behaviour to the Claimant); and

c) Assured her that they would be taking steps to deal with them.

It is also not disputed that Mrs Jupp said that it would be helpful in dealing with Mr Nayeck if the Claimant could apologise for the tone she had used with Mr Nayeck in this instance. The Claimant says that she agreed to do so on the understanding that Mrs Jupp and Dr Rodin would take steps as they had undertaken to do. That day, or the next day, the Claimant apologised to Mr Nayeck (which was observed by Mrs Jupp).

21. The Claimant says that, from this point onwards, Mr Nayeck's behaviour towards her "*became noticeably dismissive*", and he would treat her differently to other members of the team by, for example, ignoring morning greetings from her, and facing the other way when the Claimant was presenting in meetings.

22. Mrs Jupp says that around this time the Claimant complained to her that Mr Nayeck stopped making tea for her when he was making it for all other team members, that she (Mrs Jupp) raised it with him, and as far as she is aware this was then resolved. The Claimant disagrees that it was resolved.

23. The Diabetes Department of the Respondent had a number of reference books, including around ten copies of a book with the title 'The Carbs and Cals Book', which was used to help patients with understanding and quantifying carbohydrates and calories. Some of the Department's copies were purchased by it, others were donated by pharmaceutical companies. The Claimant, separately to the department, owned a copy of the book that she had brought with her when she started employment with the Respondent. That version of the book had her name written inside the front cover in pencil. In either January or February 2019 the Claimant mislaid her copy, and she asked the team members, including Mr Nayeck, if they had seen it, but no one apparently had.

24. In April 2019 the Claimant located her missing book, in a cupboard used to store certain leaflets, and which was used by Mr Nayeck for storing some of his own documents and books. The Claimant's name had been rubbed out and Mr Nayeck's name – written in his own handwriting - had been written over the indentation of the Claimant's name (this is referred to as the **Book Incident**).

25. On 8 May 2019 the Claimant received an email from a patient of the Department about advice given to him by Mr Nayeck. The Claimant forwarded the email to Mr Nayeck, and the exchange between them became fractious. The Claimant was expecting Mr Nayeck to follow-up with the patient directly, given he had given the initial advice (which the Claimant considered out-of-date), and Mr Nayeck was frustrated that the Claimant had not simply responded to the patient's questions without redirecting them to him. Mrs Jupp was copied in on their exchange at some point. Mr Nayeck wrote to Mrs Jupp:

"*Dear Sarah,*

Sorry to drag you into this. I'm more than happy to discuss.

Next Friday at 8:30 am will be fine."

The Claimant 'replied all':

"*Just to let you know I have replied to this pt's email as I did not think it was acceptable that his email should go unanswered*".

Mr Nayeck replied:

"*I agree. This email was addressed to you Sue and it should be left unanswered for so long. This is poor service.*"

26. On 17 May 2019, Mrs Jupp met with Mr Nayeck and the Claimant to discuss what had happened on the 8th. (This meeting has subsequently been referred to by the parties as the **Informal Mediation**, though it was not described in those terms at the time.) The purpose of the meeting was to talk about how things could be improved between the Claimant and Mr Nayeck, but the meeting became quite difficult.

27. Mrs Jupp's notes of the meeting record that:

    a) The Claimant "*said that [Mr Nayeck] should be aware of what is required and not be waiting to be told what to do as a senior dietician.*"

    b) "*Abdool became quite personal towards Sue and I pointed this out to him. He said that he did not like her and felt she did not ask him to do things in an appropriate way? He said there was a way of asking things?*

    I said it did not feel to me that Abdool was working with a team approach in mind. He had not been discussing cases with Sue. He stated that he had no problem with discussing cases with Priti (another DSN)."

    c) In the course of the meeting, Mr Nayeck referred to the Claimant as bullying him.

    d) By way of contrast, Mr Nayeck gave an example of when he felt he had been supportive to the Claimant: he saw a patient by himself for 15 minutes before the appointment time, during which the patient had said that he was going to "*kick [the Claimant]'s butt*". In the Informal Mediation the Claimant became upset as he described this, and said that Mr Nayeck should have told her about this at the time. The Claimant's distress increased, and the meeting finished early due to that distress. The Claimant subsequently left work and went home because of the degree of her distress.

28. The Claimant also made a note of this Information Mediation meeting. While Mrs Jupp has described in evidence to the Tribunal that she perceived Mr Nayeck as "*acting in an obstinate manner and he was very open about how he felt about the Claimant, which was arguably not constructive*", the Claimant's note records that Mr Nayeck "*became very aggressive during the meeting*", "*refused to discuss*

issues", and bluntly stated "*I do not like Sue [the Claimant]*". The Claimant's note records that she raised the Book Incident in this meeting, and that Mr Nayeck said that he had taken the book, scrubbed out her name and written his name in the book because the Claimant had two copies.

29. Mrs Jupp does not recall the Book Incident being discussed in the Informal Mediation meeting, and nor do her notes refer to it.

30. Mrs Jupp emailed the Claimant on 18 May 2019, which email included the following:

"*Please don't worry about calling me if you want to speak to me as I know how distressed you were yesterday.*

I have been reflecting on the meeting and will probably need some advice from HR regarding Abdool's behaviour. I had to try to remain impartial during the meeting which was extremely difficult considering the circumstances…

I think it would be better for me to get advice before I approach him formally?

I am so sorry the meeting became so personal and in some ways wished it was not necessary to have it but it has given me much more insight into Abdool's thoughts and unfortunately his inability to conform to being respectful and team spirited.

I don't want to put everything into this e-mail but as I suggested I will do a statement and aim to get further advice on the matter.

Please remember you are a fantastic nurse and I totally appreciate all that you have done to support me…".

31. Mrs Jupp met with the Respondent's Human Resources team on 28 May 2019, and was advised to refer the matter to formal mediation, which she did. Most unfortunately, there was some considerable delay in that mediation taking place.

32. The Claimant says that Mr Nayeck displayed antagonistic and aggressive behaviour towards her over the next two months, including:

a) Mr Nayeck had overseen a patient starting on a new insulin pump, and when she emailed about an issue that arisen with her pump, the Claimant forwarded that email to Mr Nayeck on 28 August 2019 – after discussing it with him - with a cover note which read:

"*As discussed*

Thanks

Sue".

The Claimant said in oral evidence that she did this because Mr Nayeck "*had done the technical stuff*" with the patient, "*he knew what had gone on with that, I didn't*".

Mr Nayeck replied:

"*I hope you did read the email from [patient name redacted].*

She wants a 1:1 appt with you. She got one for [date]

It seems you know her very well. I only saw in pump upgrade. Not fair to pass patients to me when you know her very well.

Abdool"; and

b) Similarly, when the Claimant saw that a patient last seen by Mr Nayeck had emailed the team on 16 October 2019 asking for confirmation from a medical professional (in light of her diabetes) that she could join a gym, she forwarded that email on to Mr Nayeck, this time without a verbal discussion but with a fuller explanation for the 'forward':

"*Hi Abdool*

I hope you don't mind me forwarding this to you. I last saw [patient name] in April 2018 and so am not up to date with her!

I note you have seen her a couple of times recently and wondered if you be willing to respond to her request?

Thanks you

best wishes

Sue".

Mr Nayeck responded:

"*Hi Sue,*

Just to say I don't mind replying to [patient name] but you [could have done this yourself she is just] asking whether she can join the Gym with diabetes.*

*Any healthcare professional can say yes to this. It does not have to be because I saw her in the past it has to be me. The time you took to forward the email to me you could have written back to her and say '**yes you can exercise at Gym with diabetes**'.*

I really don't know why you do things this way. If you had seen this patient in the past I would have never forwarded this email to you because as a diabetes specialist healthcare professional I should know whether someone with Type 1 diabetes can exercise at Gym or not.

Best wishes

Abdool".

* This text is handwritten, above what appears to be an accidental redaction, but the Respondent has not queried its accuracy.

The Claimant says that Mrs Jupp informed her at the time that Dr Rodin referred this email of Mr Nayeck's to her (Mrs Jupp) – calling her on a Sunday - as he felt it to be unacceptable. Mrs Jupp cannot recall this, and

she no longer has access to her emails or personal drive as she has since retired.

What is agreed by Mrs Jupp is that Mr Nayeck's approach to advising the patient was incorrect - it was important that the individual circumstances of the patient be considered before any message was sent to them about gym membership. In other words, she agreed with the Claimant's approach, that someone who knew the case would need to consider whether it was appropriate to endorse the patient's gym application or not.

33. The mediation which HR advised at the end of May 2019 should take place between Mr Nayeck and the Claimant took place on 17 December 2019, with a mediator employed by the Respondent. Neither Mr Nayeck nor the mediator gave evidence to the Tribunal, but the Claimant said that:

"*From the outset of the meeting [Mr Nayeck] was dismissive of me, stating again that he did not like me and was not interested in meaningful resolution. SF [the Mediator] did draw up a brief plan to move forward".*

34. A handwritten "Agreement after Mediation" document signed by the Claimant and apparently signed by Mr Nayeck records four points of agreement:

- "*Sue agrees not to check Abdool clinics before the day starts unless it is required (meeting the same patients, sick leave, etc)*
- *Abdool to follow advice regarding the tone of emails and not send every message as high priority*
- *Sue to discuss Sarah her expectations regarding the dietician's role and Abdool understanding of the nurses expectations*
- *to communicate in a civil manner with each other at work. Saying hello, not excluding from conversations. Being polite.*"

35. The Claimant's evidence is that:

"*The only change that occurred from [Mr Nayeck's] side is that he no longer made drinks for the team in the morning so by extension I was no longer specifically excluded in that regard. There was no follow up to the mediation, no date to review progress, and [Mrs Jupp] was not involved in the process.*"

She also observed that:

"*I regularly spoke with SJ about how difficult I was finding working with AN. Not only was it difficult on a professional level, but it was extremely draining on a personal level as it was quite clear to me that he still harboured some sort of personal issue against me.*"

By contrast, Mrs Jupp's witness statement notes that:

"*the Claimant and I would have bi-weekly or monthly check-ins in. At these meetings, the Claimant did not raise any further incidents with Mr Nayeck and I thought that the mediation had led to a period of relative truce between them*."

36. After this mediation, seeking to act on the third point of agreement from the formal mediation ("*Sue to discuss Sarah her expectations regarding the dietician's role*"), the Claimant asked Mrs Jupp for a copy of the Claimant's job description. Mrs Jupp declined to provide it, as (following advice she took from the Respondent's HR team) she did not think it was appropriate to do so.

37. On 2 July 2020, Mr Nayeck sent an email to Dr Rodin and Mrs Jupp, informing her that he had been bullied at work by the Claimant over the preceding two years. His email made numerous complaints about the Claimant.

38. Mrs Jupp informed the Claimant verbally of the complaint on 8 July 2020. Mrs Jupp talked the Claimant through the next steps, and gave the Claimant a copy of the Respondent's 'Book of respect' and a leaflet of 'what to do if someone has made a complaint about you'. Mrs Jupp told the Claimant that she "*felt sick*" about the fact that Mr Nayeck had put in a complaint about her. When asked about this comment when giving her evidence, Mrs Jupp said that: "*It felt like it was a constant ongoing process. Every time you think you're achieving something. That's why I said I felt sick. Maybe I don't have the handle on this process. This is why we had the situation where he complaint. If I had a complaint made against me, I would be angry.*"

39. On 14 July 2020 Mr Nayeck wrote a fuller letter, making wider allegations against the Claimant than those in 2 July 2020 email, to Dionne Siley, the Respondent's People Business Partner Medicine Division (the **Nayeck Complaint**). This complaint comprised ten allegations relating to the Claimant.

40. A copy of the Nayeck Complaint was given to the Claimant by Mrs Jupp, and this was received by the Claimant on 3 August 2020, with Mr Nayeck's permission.

41. Mrs Jupp met with Mr Nayeck on 12 August 2020, and he agreed to temporarily work from a separate unit on Wednesdays and Fridays so as to limit his time with the Claimant.

42. On 28 August 2020 Mrs Jupp recommended that the Nayeck Complaint be investigated as a disciplinary matter concerning the Claimant. Mrs Jupp's evidence was that this was standard protocol at the time for complaints of bullying and harassment, and was not a reflection of her view of its merits.

43. Tracey Whelan was appointed as the Lead Investigator of the Nayeck Complaint, assisted by others.

44. Mrs Jupp was interviewed as part of that investigation on 22 September 2020, and in the course of her interview observed that "*it is a clash of personalities – not malicious.*"

45. The Claimant attended an investigation meeting into the Nayeck Complaint on 24 September 2020, and submitted written evidence to the investigation team responding to each of the points in the Nayeck Complaint, which included:

a) "*Abdool was personally very abusive to me saying for example 'I don't like you'*";

b) "*He had stolen a book which belonged to me and written his name over mine, yet denied having it and refused to accept this was wrong*";

c) "*He doubted my competence*";

d) "*This whole situation with him has been both stressful and upsetting and I don't think I have been protected from what is amounting to his bullying tactics*";

e) "*I tried very hard to build a better relationship with Abdool particularly following mediation. I have offered him tea or coffee, have tried to talk to him about eg how he enjoyed his Eid celebrations… I have not had any reciprocal treatment from Abdool*"; and

f) "*One of the reasons I am really upset is that I'm not sure how the problem can be resolved to enable me to be comfortable in my role at Epsom and St Helier Trust*".

46. On the same day (24 September 2020), Mrs Jupp sent the Claimant a WhatsApp message, which included:

"*Was thinking about you this afternoon. I hope that will be the end of the situation now. Lots of love*".

47. Just under six weeks later, on 4 November 2020, the Claimant contacted Mrs Jupp to see if the investigation had reached a conclusion, and she did the same on 9 November 2020. Mrs Jupp reached out to Mrs Whelan to enquire, and informed the Claimant that she had done so.

48. The Claimant had been given information about the availability of counselling when she attended the investigation meeting, as she had been struggling to deal with the situation, and she commenced some counselling sessions within the Hospital in early November 2020.

49. The outcome of the investigation into the Nayeck Complaint was conveyed to the Claimant, and separately to Mr Nayeck, by Ms Whelan on 1 December 2020. The Claimant was told that there was no case to answer, but that aspects of her behaviour could have contributed to Mr Nayeck feeling bullied. The Claimant's evidence is that she became very upset on hearing this, as she says no clarity was provided about the aspects of her behaviour that Ms Whelan thought could have contributed to the situation. The Claimant said that "*There was no discussion regarding the concerns I had raised… about his behaviour towards me*".

50. Ms Whelan suggested, in terms of a way forward for the Claimant and Mr Nayeck, that:

a) An independent facilitator meet with the Claimant and Mr Nayeck to facilitate a conversation about how they could work together;

b) This would result in the production of a set of guidelines for when they worked together. These guidelines were to be recorded in a "behaviour contract"; and

c) Mr Nayeck and the Claimant were to give permission to Mrs Jupp to monitor how the contract was working, and HR would only become involved if the agreement was breaking down.

Ms Whelan said that the outcome, together with the suggested course of action, would be set out in writing and sent to the Claimant.

51. Over the next week it became clear to the Claimant that she was really struggling with her mental health. She saw her GP on 10 December 2020, who deemed her not fit for work due to "*stress at work*".

52. The Claimant had some interaction with Mrs Jupp during this time, as there was a proposal made to temporarily assign her to work as a healthcare assistant on a Covid-19 ward for a short time, so as to ensure the Claimant's complete separation from Mr Nayeck.

53. The Claimant attended a meeting with Ms Whelan and Dionne Siley (a member of the Respondent's HR team) on 7 January 2021 to discuss next steps following the outcome of the Nayeck Complaint. It was agreed that they would meet again on 19 February 2021.

54. The Claimant emailed Ms Whelan and Ms Siley on 12 January 2021, to say that she would like to return to work to the Diabetes in-patient team (as this was expected to enable her to avoid Mr Nayeck), and that "*[she hoped] that [they] could consider ways that [the Claimant] could have minimal interaction with Abdool at this stage*".

55. The Claimant returned to work on 14 January 2021 to the Diabetes in-patient team.

56. The Claimant met with Ms Whelan and Ms Siley on 19 February 2021. The Claimant's witness statement says that:

"*I tried very hard to put my concerns in to a written statement in order to ensure that they could understand why this situation was causing me such distress*".

The pre-prepared written statement included:

a) "*I tried to explain to you why I have not been comfortable with the process. It does not appear that the Trust is taking my concerns about Abdool's intimidation and targeted behaviour seriously.*"

b) "*[In the meeting on 1 December] I explained that it was difficult for me to know how to respond to accusations of poor behaviour when I am not given any specific details or examples of what that relates to.*"

c) "*Throughout the years of targeted and intimidating behaviour directed to me by Abdool which has included treating me differently to others in the team, being extremely disrespectful to me in informal meetings, failing to advise*

that a patient had made a suggestion of violence towards me, and theft of personal property, I have accepted my manager advising that she was dealing with the situation, and did not escalate my concerns to a formal grievance, but the outcome of this has been Abdool himself raising a formal complaint against me."

d) "*Despite the fact that this formal process has gone on for 8 months I am still left feeling vulnerable, targeted and concerned for my safety and wellbeing at work*".

e) While Ms Whelan had suggested that the Claimant and Mr Nayeck enter into a "behaviour contract", Mrs Jupp was now suggesting an alternative way forward – that she (Mrs Jupp) deal with it. In her written statement, the Claimant expressed two concerns with that approach:

(i) The previous mediation in 2019 had presided over by Mrs Jupp, and that had not worked; and

(ii) "*how can I address my own behaviour if I am not given any detail or examples of what I am supposed to have done wrong?*"

The Claimant referred to the fact that she had not yet received a letter confirming the oral discussion of 1 December 2020 confirming that there was no evidence to support the Nayeck Complaint.

When Ms Whelan would not allow the Claimant to read out her pre-prepared statement the Claimant emailed it to her and Mrs Jupp anyway on 26 February 2021. Ms Whelan replied to that email suggesting that if the Claimant remained concerned, she could contact the Deputy Head of Nursing, Sarah Connor.

57. A meeting between the Claimant and Ms Connor then took place on 12 March 2021. The Claimant says that Ms Connor agreed that it was not acceptable that the Claimant had not been told what aspects of her behaviour had caused Ms Whelan concern, and she expressed surprise that the Claimant had not received a letter setting out the outcome of the Nayeck Complaint.

58. A further meeting between the Claimant and Ms Connor took place on 30 March 2021, where Mrs Jupp was in attendance. The Claimant and Mrs Jupp agree that Mrs Jupp shared with them both a draft "Action plan to support improved professional relationships between Mrs Susan Hamilton and Mr Abdool Nayeck", which she had drawn up with the assistance of the Respondent HR team. That Draft Action Plan set out various ground rules concerning (1) maintaining a professional relationship and (2) the operational management of day to day clinical commitments. It provided for a review at six months. Discussion took place in the meeting about the fact that the time period for review seemed inappropriately long to both the Claimant and Ms Connor.

The Claimant again stated that she did not know which aspects of her behaviour were wrong or needed to alter. Mrs Jupp contends that she gave examples in that

meeting, a fact which the Claimant disputes. Ms Connor was not a witness in these proceedings, and so the Tribunal has no evidence from her.

59. The Nayeck Complaint outcome letter from Ms Whelan was sent to the Claimant on 23 April 2021, i.e., nearly five months after the oral outcome. That letter contained the following:

"*I first met with you on 1 December 2020 with Sarah Jupp and Dionne Siley… where I advised you of the outcome of the investigation… that there was no evidence to show that you had shown bullying behaviour towards AN, or harassed him in any way. Therefore the matter will not proceed to a disciplinary hearing and no further action would be taken against you. However the investigation also concluded that there were elements of your behaviour that had also caused concern, and I acknowledged there were clear difficulties in the working relationship between you and Abdool. We discussed options for moving forward following the investigation, including a facilitated conversation between you and Abdool which would involve drawing up a behaviour contract…*

Dionne clarified how a behaviour contract would work – an independent facilitator would meet with you and AN to facilitate a conversation about how you could both work together when you returned to work. This would consist of a set of guidelines which would work for both of you when working with each other. Permission would be sought from both of you to share the agreement with Sarah so that she could monitor how it was working. If it became clear that the agreement was breaking down then further HR support would be needed to determine the next steps…

I am aware that the written outcome to the meetings has taken some time to send to you, and I would like to apologise for the long delay and for any upset and inconvenience that this has caused you."

60. The Claimant submitted a formal grievance to the Respondent on 16 June 2021 (the **Grievance**). The Claimant made seven complaints, but only four of those are relevant to these proceedings, those being that:

a) The Respondent failed to deal with the theft of her book (i.e., the Book Incident) (**Grievance Allegation 1**);

b) The Respondent tolerated targeted and abusive behaviour towards her by Mr Nayeck (**Grievance Allegation 2**);

c) The Respondent ignored and failed to report threats of violence against her (concerning the revelation made by Mr Nayeck on 17 May 2019 that a patient had said that he was going to "*kick [the Claimant]'s butt*", which neither Mr Nayeck or Mrs Jupp had reported, which the Claimant said was in breach of the Respondent's applicable policy) (**Grievance Allegation 3**); and

d) The Respondent failed to follow its "Respect" policy by not informing her (in the outcome of the investigation of the Nayeck Complaint) of the nature of the criticisms that Ms Whelan was making of the Claimant's behaviour, and

failed to put in place a clear or appropriate behaviour contract (as recommended by Ms Whelan) (**Grievance Allegation 4**).

61. In June or July 2021, Daniel Camp, the Respondent's Divisional Director of Operations for Medicine, was appointed to chair the Claimant's Grievance hearing, and that hearing took place on 28 July 2021.

62. Mr Camp wrote to the Claimant on 6 August 2021 with the Grievance outcome:

    a) Grievance Allegation 1 was partially upheld. Mr Camp noted that the department had not investigated the alleged theft, but also that it had not been formally reported so as to trigger an investigation. He concluded that the department should now make efforts to investigate the alleged theft;

    b) Grievance Allegation 2 was not upheld. Mr Camp said that he had heard evidence that there was a process underway to manage the Claimant's concerns regarding Mr Nayeck's behaviour. He recommended that the process of: (i) Mrs Jupp and HR reviewing the working relationship between the Claimant and Mr Nayeck, (ii) establishing a behaviour contract between them and agreeing its terms, and (iii) regularly reviewing that contract to support that relationship, should be commenced within six weeks of the grievance hearing (i.e., on or before 7 September 2021);

    c) Grievance Allegation 3 was upheld; and

    d) Grievance Allegation 4 was partially upheld: "*it is the investigating manager's responsibility to explain and justify comments in the outcome letter*", and he recommended that that clarity be provided.

63. On 18 August 2021 the Claimant was deemed unfit for work due to "*work related stress*" by her GP. She never returned to work with the Respondent.

64. The Claimant appealed the Grievance outcome on 19 August 2021 (the **Grievance Appeal**), challenging (in relation to the four allegations referred to in these proceedings) the outcomes for Grievance Allegation 1 and Grievance Allegation 2.

65. Peter Davies, the Respondent's then-Executive Director of Corporate Services, was appointed to chair the panel which would hear and determine the Claimant's Grievance Appeal hearing on 7 September 2021. The panel included Marsha Jones, Deputy Chief Nurse, and it was advised by Viktoria Burley, the Respondent's Head of Employee Relations.

66. The Grievance Appeal hearing took place on 5 October 2021.

67. The Grievance Appeal outcome was communicated to the Claimant by letter on 12 October 2021. The panel, "*taking all [the] points together*", had upheld her appeal. That global description is confusing, as it went on to say:

    "*It should also be noted that the panel's view was that there had been clear attempts to manage the difficult relationship between you and your colleague over some years, and that Trust had not tolerated targeted and abusive behaviour. This point could therefore not specifically be upheld; however the panel did understand*

why you were not satisfied with the outcome from stage 2 [the Grievance] hearing given the length of time that it had taken to address these issues. The panel also acknowledged the impact that this had on your well-being."

In fact, therefore, the appeal panel upheld Grievance Allegation 1, but rejected Grievance Allegation 2 - though it acknowledged that the recommendations made at the Grievance hearing stage in relation to the subject matter of Grievance Allegation 2 had taken too long to implement.

The panel went on to make two sets of recommendations:

a) "*It is clear to the panel that the circumstances raised in your grievance, and the impact on your health and well-being, means that everything that can be done to support you becoming ready to return to work needs to be put in place. We are recommending that a senior nurse from outside of the management team is appointed by the Chief Nurse's Office to take oversight of this, including working with Occupational Health and your line management*", and "*a team-based mediation is put in place to build effective relationships across the whole team, with independent facilitation*"; and

b) Recommendations regarding lessons to be fed in to the Respondent's leadership and management training for line managers and corporate communications.

68. On 15 October 2021 Mr Davies emailed various people within the Respondent's organisation to bring the Panel's recommendations to their attention. This email copied Ms Jones and the other panel member, as well as Ms Burley. It recorded that Miss Daniel had been tasked by Ms Jones with providing individual support on top of that available from occupational health to support the Claimant's return to work, although Miss Daniel was not an addressee of Mr Davies' email.

69. The Claimant was assessed by the Respondent's occupational health department on 1 November 2021.

70. On 5 November 2021 Mrs Jupp met with the Claimant (by Teams) regarding the Claimant's sickness absence.

71. Ms Burley had been in contact with the Claimant's union representative during the Claimant's sickness absence. She sent an email on 9 December 2021 to Miss Daniel and Ms Jones, to understand if either of them had made contact with the Claimant. Ms Jones replied on the same day that there had been a delay on her part as both she and Miss Daniel had been unwell and had only just resumed work.

72. The parties disagree about whether Miss Daniel contacted the Claimant in December 2021.

73. The Claimant resigned on 5 January 2022. That resignation read:

"*I am today formally resigning from my post… due to, what I believe is, a breach of contract by the Trust due to a total breakdown of trust and confidence, and thereby consider myself constructively dismissed.*

I have tried to resolve the issues of concern through the Grievance Procedure, which, on appeal, was upheld. As far as I am aware however, no action has been taken on the outcome plan advised by Peter Davies on 12/10/21, despite following this up both personally and through the RCN with both my Line Manager and HR. Certainly, no attempt has been made to ensure that 'everything that can be done to support you becoming ready to return to work', as advised in the Appeal Outcome letter. The apparent condoning by the Trust of not following policies or procedures and cruel bullying behaviours is a clear breach of contract and makes my position untenable.

The situation I have been put in by the Trust has caused both significant stress and anxiety for which I have had to seek professional ongoing help. This has been caused as a direct consequence of the actions or and poor management by the Trust."

74. Miss Daniel, apparently unaware of the Claimant's resignation, emailed the Claimant on 10 January 2022:

"*Dear Sue*

Can we touch base this week please? I will try to contact you via telephone tomorrow."

75. The Claimant replied:

"*Thank you for contacting me however I resigned from the Trust on 5th January and the matter is now with the RCN legal team.*

Regards

Sue".

76. Early conciliation began on 3 April and ended on 15 May both of 2022.

77. The Claimant filed a Claim Form on 14 June 2022.

78. The parties exchanged witness statements on 22 December 2023.

79. On 3 January 2024, the Claimant replied to that pre-hearing check, and applied for the Tribunal to make an Order for the Claimant's mobile telephone contract provider, o2, to be required to supply to the Claimant a record of incoming calls. (The Claimant was able to obtain a record of outgoing calls from her number from o2.)

80. On 17 January 2024 the Employment Tribunal refused that application.

Disputed facts

81. Much of the factual background is agreed between the parties (though they put very different complexions on the agreed facts). There are only six factual disputes between them that are of significance.

The First Disputed Fact: Did the Claimant: (a) report the Book Incident to Mrs Jupp before the Informal Mediation, and (b) raise the Book Incident in the Informal Mediation meeting?

82. In relation to the Claimant's assertion that she informed Mrs Jupp about the Book Incident ahead of the Informal Mediation:

    a) Mrs Jupp said in oral evidence that she recalled a conversation in passing on the subject, but they "*did not sit down and talk about it specifically*", and she "*[didn't] think [she] zoned into it at the time*", because otherwise she "*would have immediately gone to speak to Mr Nayeck. Which is actually the trend for the whole of my management is to deal with it on the spot and not delay*". Mrs Jupp said that the Claimant did not formally raise it with her, or present her with the evidence that would have been necessary for her to raise it with Mr Nayeck (such as being shown the actual book, with the Claimant's name rubbed out and Mr Nayeck's name written on top of the shadow of the Claimant's name); and

    b) The Claimant's witness statement implies that she raised it with someone other than Mr Nayeck ("*I did not raise it directly with AN because I was worried about how he would react*"), but does not specifically state that she raised it with Mrs Jupp. In cross-examination, Mr Phelps asked the Claimant: "*Mrs Jupp can't recall you raising the book in the May 2019 meeting – you say that you did?*"

    The Claimant replied: "*Yes.*"

    Mr Phelps continued: "*Mrs Jupp says she was probably confused about whether it was your personal book, or one of the department's general copies – do you remember Mrs Jupp outlining that?*"

    The Claimant replied, "*Yes*".

    Mr Phelps did not ask the Claimant, and the Claimant did not clarify, when Mrs Jupp said this.

83. It therefore seems that it is not disputed that the Claimant raised the Book Incident with Mrs Jupp ahead of the Informal Mediation, but the disagreement is more regarding whether it was reasonable for the Claimant to have expected Mrs Jupp to deal with it, and whether the Claimant explained sufficiently clearly that the book in question was her personal property rather than the property of the Department.

84. As for whether it was raised in the Informal Mediation, it *is* referred to in the Claimant's notes of that meeting, but *not* in Mrs Jupp's. Mrs Jupp was clear that her notes of the meeting were not as a verbatim or comprehensive record of what was said. In light of that fact, and the fact that while Mrs Jupp said that she did not recall the Book Incident being discussed in that meeting the Claimant's contemporaneous notes (written the day after the meeting) are preferred to Mrs Jupp's recollections at the time of writing her witness statement, and in the Tribunal hearing (both of which took place in January 2024, nearly five years after the

meeting in question), the Tribunal finds that the Claimant did raise the Book Incident in the Informal Mediation meeting.

The Second Disputed Fact: Was the Claimant told by Ms Jupp on 30 March 2021 of the aspects of her behaviour that caused concern, as identified by the investigation of the Nayeck Complaint?

85. There are two conflicting accounts here, with:

    a) Mrs Jupp saying that this was discussed in the meeting held between her, the Claimant and Ms Connor on 30 March 2021 in such terms that the criticisms of the Claimant's behaviour were clear; and

    b) the Claimant saying that this was not clearly communicated at that meeting (or any other time).

86. Mrs Jupp's witness statement states:

    "*At this same meeting [the meeting on 30 March 2021], we discussed the Claimant's concerns that she did not know what about her 'behaviour' was concerning (given the outcome of Mr Nayeck's grievance). I gave her some examples, being checking on Mr Nayeck's workload and clinical letters as he felt that this was not the Claimant's role to check on him as an equal, and looking over his should which bothered him (page 223). She also would have been able to conclude from the nature of the [draft behaviour] contract, what guidelines to behaviour we were hoping would assist their working relationships moving forward*";

    and later on:

    "*At the meeting on 30 March 3032, I explained to the Claimant some examples of her behaviour that was being referenced (i.e. looking at his notes, checking up on him and pinpointing things that you don't think were correct). I do not agree that she would have had no idea about what the Respondent was referring to.*"

87. Mrs Jupp gave oral evidence on the point as well. When asked whether the 30 March meeting was the only conversation they had about this, Mrs Jupp said "*We shared Mr Nayeck's grievance with her, which identified them… We talked about her not managing him – it seemed to rile him if somebody else, not her manager was managing him*".

88. The Tribunal observed that Mrs Jupp's witness statement contains some apparently contradictory statements about whether the Claimant's behaviour was problematic:

    "*I regret that she was not clear on this point but I did try to explain to her that it was not her objective performance or actions which caused concern, but Mr Nayeck's subjective experience of her behaviour (for example, her checking on his workload and clinical capability, as I described in this meeting).*"

89. The Tribunal Judge probed this, as she was unclear whether Mrs Jupp was saying that the problem was with the Claimant's behaviour objectively, or with Mr Nayeck's perception of it. Mrs Jupp said: "*It was both parties' fault. There were still issues around responding to each other. That is an individual personality thing. Both views were right or wrong in the way they approached each other.*" The Judge was left fairly confused by the response, despite a few attempts to get clarification.

90. Returning to the question of whether the Claimant was told by Mrs Jupp in this meeting about the aspects of her behaviour that were a cause of concern, the Tribunal cannot conclude that the message conveyed would have made any sense. Not only was the Judge confused in the hearing, but Mrs Jupp's witness statement (which presumably was prepared with thought and care and without the on-the-spot pressure of oral evidence in a tribunal hearing) was also confusing on this point. The Tribunal concludes that Mrs Jupp did attempt to clarify the point for the Claimant in the meeting, but that it would not have been clear to the Claimant from the explanation provided.

91. The draft behaviour contract included the following draft "Ground Rules":

Grounds rules regarding "*Maintenance of a professional approach with each other*":

"*1. Continue to discuss clinical cases in protected time. This should be in planned time i.e. clinical cases discussion on Friday mornings*

2. In group meetings listen to each other this is a forum to ensure mutual respect for each others clinical/operational discussions

3. Please be constructive with any concerns speak up whenever you have a concern, give feedback respectfully, receive feedback gracefully, admit mistakes, resolve issues together

4. Utilise each other's strengths not dwelling on weaknesses.

5. If there is a request for review for DSN or Dietician please provide a clear patient management plan this will negate the need to have conversations in between clinics

6. Maintain positive and respectful behaviour to each other

7. Value each other's perspectives. Take each others views into consideration

8. Give and receive feedback respectfully",

and Ground Rules regarding "*Operational Management of day to day clinical commitments*":

"*1. If there are concerns regarding workloads then this must be discussed directly with the line manager*

2. If there is a need to discuss practical changes within the day to day planning this should be discussed with the wider team in the most appropriate setting."

92. These are descriptions of positive behaviour – things to be done, not things to stop doing. While their inclusion indicates shortcomings in existing behaviour, in a situation where each individual considers their own behaviour to be appropriate and the other's to fall-short of the required standard, they could reasonably read this as a list of things necessitating change on the other person's part, and as justifying their continued behaviour in a way they regard as consistent with this.

93. The Claimant should not have been expected by the Respondent to have deciphered from this list what represented a concern with her own behaviour – it should have been spelled out to her.

94. The Tribunal concludes that the Claimant was not clear, either from the 30 March 2020 meeting or from the draft behaviour contract, which aspects of her behaviour were of concern to Ms Whelan. Moreover, it does not seem that clarification was ever provided by Ms Whelan as to what she meant, even if Mrs Jupp attempted to clarify development points for the Claimant from her own (and Mr Nayeck's) perspective. The Tribunal finds that Mrs Jupp's communications were not clear, and consequently the Claimant was not apprised of the aspects of her behaviour that required improvement. This was a cause of considerable distress to the Claimant.

The Third Disputed Fact: Did the Respondent fail to address, or address appropriately, the behaviour towards her of Mr Nayeck (the Management Failure)?

95. It was really the September 2018 Incident that brought Mr Nayeck's behaviour towards the Claimant to their manager, Mrs Jupp's, attention. Mrs Jupp agreed that that incident raised concerns about Mr Nayeck's clinical approach to the situation presented by the patient (which she regarded as a training issue), but also about his conduct towards the Claimant. As regards his behaviour, Mrs Jupp says that she did address it in 121s and development reviews with Mr Nayeck, but she also agreed that the deterioration in the relationship between Mr Nayeck and the Claimant was marked from that point on. As Mrs Jupp put it in cross examination, the "*deterioration felt constant*".

96. She acknowledged that there were a number of further incidents of Mr Nayeck's behaviour towards the Claimant being inappropriate, and said that when she was copied into emails which showed this she "*would deal with that incident directly*". When Mr Hamilton put it to Mrs Jupp that her response did not seem to have the effect of stopping the next incident, and Mrs Jupp replied: "*Yes, but as a manager, that's all I can do.*"

97. There was a continued pattern of Mr Nayeck behaving inappropriately to the Claimant after the September 2018 incident, namely:

    a) His actions in the Book Incident;

b) When the Informal Mediation meeting took place, Mr Nayeck became, in Mrs Jupp's words "*quite personal towards Sue*";

c) Mr Nayeck's tone of communication to the Claimant in the October 2019 emails about a patient's gym membership request was the cause of sufficient concern to Dr Rodin that he contacted Mrs Jupp on a Sunday to say that it was inappropriate;

d) Mr Nayeck was, according to the Claimant, dismissive of the Claimant, and open about the fact that he did not like her, in the mediation meeting of 17 December 2019; and

e) The Claimant's evidence was that there was no change in Mr Nayeck's behaviour after the formal mediation, save that rather than making tea for everyone else besides the Claimant, he now made tea for no one. This was despite the fact that the formal mediation had concluded with them agreeing, among other things, "*to communicate in a civil manner with each other at work*".

98. While the Respondent has said in submissions that the evidence before the Tribunal represents a "smattering" of the communications between the Claimant and Mr Nayeck over a three year period, the Respondent has not put forward other evidence, such as friendly or cooperative emails, to counter the picture described and evidenced by the Claimant.

99. Moreover, the response of the Respondent was limited:

a) There was no response to the Book Incident until the Claimant raised a grievance about it, despite her having raised it with Mrs Jupp;

b) When Mr Nayek was "*quite personal towards Sue*" in the Informal Mediation, this prompted Mrs Jupp to speak to him about it;

c) Whatever action was taken after Dr Rodin complained to Mrs Jupp about Mr Nayeck's tone of communication with the Claimant it seemed not to make much of a difference, as she was again treated dismissively by Mr Nayeck, who openly said he did not like her in the mediation meeting of 17 December 2019;

d) Moreover, while Mrs Jupp had referred the difficulties between the Claimant and Mr Nayeck for formal mediation on 28 May 2019, that mediation did not take place until 17 December 2019 – which Ms Burley, the Respondent's Head of Employee Relations, agreed was an unreasonable delay;

e) The Claimant says that she continually raised Mr Nayeck's behaviour towards her with Mrs Jupp in 121 meetings after the formal mediation. While Mrs Jupp's evidence is that there seemed to be a relative truce between them, the fact that Mrs Jupp described, when Mr Nayeck raised a grievance about the Claimant, feeling sick because "*it was a constant ongoing*

process", shows that she was aware that there were ongoing difficulties between them;

f) The Claimant said there was no follow-up to the mediation, and this was not disputed by the Respondent;

g) When the Nayeck Complaint was raised, it took five months for the outcome to be communicated to the Claimant verbally, and nearly ten months for that outcome to be communicated in writing;

h) While Mrs Jupp hoped that the investigation of the Nayeck Complaint in September 2020 would "*be the end of the situation now*", the Claimant was still expressing to the Respondent in February 2021 - having returned to work after a period of stress-related absence - how and why she was finding the situation with Mr Nayeck so difficult. As the Claimant put it: "*It does not appear that the Trust is taking my concerns about Abdool's intimidation and targeted behaviour seriously*";

i) Mrs Whelan had suggested, on 1 December 2020, that an independent facilitator be used to try to forge a way of working for the Claimant and Mr Nayeck (recorded in a behaviour contract) – but the Respondent did not act on this recommendation, with Mrs Jupp stepping in to try to improve the situation with some sort of behaviour action plan;

j) Mrs Jupp tried to make sure that the Claimant and Mr Nayeck would not have to work together, but as the Claimant put it, that was by changing the Claimant's role so that the Claimant would work in a different team; and

k) Despite the Claimant's repeated requests, the development point Ms Whelan referred to in the Claimant's own behaviour was never made clear to her, which caused her considerable distress and anxiety.

100. This is not to say that Mrs Jupp did not make efforts to support the Claimant (for example, the 24 September 2020 WhatsApp message), but Mrs Jupp was not simply a mediator between the Claimant and Mr Nayeck. She did not need to avoid "taking sides" in the face of inappropriate behaviour by Mr Nayeck. Rather she had a duty to protect the Claimant from "*quite personal*" behaviour Mr Nayeck towards the Claimant (as Mrs Jupp described it), and she should have escalated her approach, or have escalated the matter to a more senior colleague to do so. Some of that behaviour – such as the Book Incident – was really quite reasonably disturbing to the Claimant, and the Claimant's perception that the "talking to him" approach being pursued by Mrs Jupp was making little difference was shared by Mrs Jupp, at least from the point in time when the Nayeck Complaint was made (as her evidence in cross-examination was that at that point she realised that she didn't have a handle on the "*constant and ongoing*" difficult situation between the Claimant and Mr Nayeck).

101. In light of this, it is entirely unsurprising that the Claimant, when she made her statement on 19 February 2021 to Ms Whelan and Ms Siley, expressed her

disappointment in the Respondent's response to Mr Nayeck's behaviour: "*Throughout the years of targeted and intimidating behaviour directed to me by Abdool which has included treating me differently to others in the team, being extremely disrespectful to me in informal meetings, failing to advise that a patient had made a suggestion of violence towards me, and theft of personal property, I have accepted my manager advising that she was dealing with the situation, and did not escalate my concerns to a formal grievance, but the outcome of this has been Abdool himself raising a formal complaint against me.*"

102. Despite Mrs Jupp's view that there was nothing more that she could have done than repeatedly (and apparently fruitlessly) speak to Mr Nayeck, the Respondent organisation could have:

a) Followed-up on the formal mediation – meeting with both the Claimant and Mr Nayeck to discuss how the commitments they made on 17 December 2019 were being adhered to (or otherwise);

b) More efficiently resolved the Nayeck Complaint. It was not appropriate that it took five months to reach a verbal outcome, and nearly ten months for a written outcome;

c) Acted on Ms Whelan's recommendation of using an independent facilitator to try to improve the relationship between Mr Nayeck and the Claimant;

d) Clarified Ms Whelan's recommended behavioural improvement on the part of the Claimant so that the Claimant could respond to and act on that;

e) Considered whether it was appropriate to take Mr Nayek through a disciplinary process for inappropriate and disrespectful behaviour towards the Claimant; and/or

f) Reassigned Mr Nayeck so that he was moved away from working with the Claimant, rather than the other way around, given the only articulated behavioural issue was on his side.

103. This Tribunal is not asked to determine whether Mr Nayeck's behaviour was, or was not, appropriate towards the Claimant, but it is asked to conclude whether the Respondent responded appropriately to that behaviour. On the Respondent's own evidence Mr Nayeck's conduct and communications towards the Claimant continued to fall far short of the standards it expected, and yet it appeared to do very little beyond speaking to Mr Nayeck – which evidently made no difference - except for make suggestions that it did not then follow through.

104. The Tribunal finds that the Respondent did not fail to address, but <u>did</u> fail to address appropriately, the behaviour of Mr Nayeck towards the Claimant (the Management Failure).

The Fourth Disputed Fact: Did the Respondent fail to properly uphold her grievance about Mr Nayeck's behaviour (the Grievance Failure)?

105. The Claimant alleged that the respondent tolerated targeted and abusive behaviour towards her by Mr Nayek (Grievance Allegation 2).

106. Mr Camp's conclusion on this allegation in his letter to the Claimant on 6 August 2021 was:

"*I do not uphold this grievance. I heard from all parties that there was indeed a process underway to manage your concerns regarding this behaviour – there had been informal meetings, mediation, 1:1 management of the other individual to which you were not party, and 1:1 support for you prior to the grievance progressing to stage 2 and this hearing.*"

107. Upon the Claimant's appeal of that conclusion, Mr Davies, writing on behalf of the Grievance Appeal panel on 12 October 2021, said that:

"*the panel's view was that there had been clear attempts to manage the difficult relationship between you and your colleague over some years, and that Trust had not tolerated targeted and abusive behaviour. This point could therefore not specifically be upheld; however the panel did understand why you were not satisfied with the outcome from the stage 2 hearing given the length of time that it had taken to address these issues. The panel also acknowledged the impact that this has had on your well-being.*"

108. The allegation made by the Claimant is specifically that the Respondent tolerated targeted and abusive behaviour by Mr Nayeck. The Respondent did make some attempts to address Mr Nayeck's behaviour, so this factual allegation by the Claimant is not made out.

The Fifth Disputed Fact: Did Miss Daniel speak to the Claimant in December 2021?

109. The Claimant and Miss Daniel gave diametrically opposed evidence on this question, with the Claimant saying that she has never spoken to Miss Daniel, and Miss Daniel saying that they spoke on the telephone some time in December 2021 after the 9th.

110. The Claimant says:

a) There is a landline at her home address, but it is used by her family only for the purpose of having internet access - there is no telephone plugged in to that landline, and all telephone calls she makes or receives are via her mobile 'phone;

b) The contact details on her Grievance Appeal form filed with the Respondent (and included in the Bundle) identify a mobile telephone number as a "home" contact details (the document in the Bundle reflects this, though it is a different number to the number on the o2 telephone records included in the Bundle);

c) She has been able to obtain from her mobile telephone provider, o2, a record of all outgoing calls the Claimant made in the period when Miss Daniel says the Claimant called her back. The Claimant says that she can account for all of the numbers on that telephone record – none are Miss Daniel's; and

d) She has not been able to obtain from her mobile telephone provider a record of any incoming calls (as set out in her application for an Order under Rule 31 requiring o2 to disclose these records).

111. Miss Daniel says:

a) While she had been informed that there was someone she needed to contact, she was not given the Claimant's contact details until December 2021, when Ms Burley gave her the Claimant's telephone number. Miss Daniel could not remember whether that telephone number was for a landline or a mobile telephone;

b) There are three landlines in the office where Miss Daniel works, and she has a mobile telephone. She could not recall which she used to telephone the Claimant;

c) She does not know the telephone number of the three landlines in the office;

d) At some point, Miss Daniel changed her mobile 'phone, retaining her same telephone number. However, there was a short period of time when she was using her new mobile but her 'old' number had not transferred over to it. Therefore Miss Daniel is not in a position to identify the telephone number from which she called the Claimant;

e) She telephoned the Claimant at the end of the day when she (Miss Daniel) was working late. The Claimant did not answer, but called her back shortly afterwards;

f) They had a conversation in December 2021 about the Claimant's sickness absence and whether she was ready to return to work. Because the Claimant was still unfit for work and not yet ready to be fit for work, Miss Daniel concluded it was not appropriate for her to talk to the Claimant about the latter's return to work arrangements;

g) On that telephone call Miss Daniel said that she would check in with the Claimant in a few weeks' time to see if the situation as regards her fitness to work or her readiness to be fit for work had changed;

h) She followed up with the Claimant a few weeks' later by email, on 10 January 2022, as set out in agreed facts (and the email correspondence is disclosed in the Bundle). Miss Daniel said the brevity and tone of that email reflect that she and the Claimant had previously had an oral discussion when Miss Daniel introduced herself, her role, and her reason for contacting the Claimant; and

i) When the Claimant replied she informed Miss Daniel that she had resigned.

112. Mr Phelps complained about the late disclosure of the Claimant's telephone records, but Mr Hamilton explained that until witness statements were exchanged (on 22 December 2023) the Claimant did not know that the Respondent was taking the position that Miss Daniel had spoken to the Claimant by telephone in December 2021. Mr Hamilton said that after exploring the records that the Claimant could access by contacting o2, the Claimant then applied to the Tribunal for an Order to require o2 to disclose those records, which application was refused. The Tribunal agreed that it was unfortunate that the realisation of this factual dispute between them was not appreciated at an earlier date, but it is not a situation where the Claimant can be criticised.

113. Moreover, the Respondent would have known on the same date as the Claimant (22 December 2023) that its telephone records for the three landlines Miss Daniel may have used to make the call, and Miss Daniel's mobile records, would also have been relevant information for the purposes of resolving this issue. No such records were produced or evidence provided of the efforts the Respondent has taken to obtain those records.

114. In any event, the records produced by the Claimant do not assist the Tribunal with the question of whether Miss Daniel telephoned the Claimant, or whether the Claimant and Miss Daniel spoke in December 2021, as:

a) No evidence is before the Tribunal about the numbers on the telephone records the Claimant has produced besides her word that she can account for each of them as people she knows; and

b) They relate to a different telephone number to that cited on the Claimant's Grievance Appeal form.

115. Both witnesses were very credible on the subject of whether the telephone conversation took place.

a) Miss Daniel was resolute that she had spoken to the Claimant in December, and pointed out to Mr Hamilton that there was no benefit to her (Miss Daniel) in lying, and that she took seriously the oath of truth she had sworn on the Bible.

b) Mrs Hamilton was equally confident that she had not spoken to Miss Daniel. When it was put to her by Mr Phelps that the terms of Miss Daniel's 10 January 2022 email were odd if they had not already been in contact (containing no introduction or context for Miss Daniel, who was otherwise unknown to the Claimant, getting in touch), the Claimant agreed, and said that that was what she had thought on receiving it. The Claimant said that she had been desperate to be contacted by the Respondent. When Mr Phelps pointed out that no firm plans could have been made while she was off sick in any event, the Claimant disagreed and said "*I was off sick because of work. Occupational Health had advised my reason for being off*

work was not medical… Paul Davies absolutely understood what the work issue was doing to me, that's why he was saying 'let's get you ready to return to work'". This response suggests that, as Mr Hamilton later said, if the telephone call had happened, "*we wouldn't be here*" (i.e., at the Tribunal).

116. Mr Phelps avers that the crucial evidence of assistance to the Tribunal is the Claimant's reply to Miss Daniel's email of 10 January 2022. It does not, he points out, ask who Miss Daniel is, or enquire why she is contacting the Claimant. Mr Phelps observes that Miss Daniel could have been contacting the Claimant about matters relating to her resignation, such as her pension or payment in lieu of notice. Mr Phelps asks the Tribunal to infer from the Claimant's lack of enquiry that the Claimant knew who Miss Daniel was from their prior conversation in December. He warns that the gaps in evidence are a shaky basis for making a finding on whether the December telephone call took place. On that last point, the Tribunal agrees, but there are gaps in evidence on both sides. Indeed, the Claimant's application to the Tribunal for a Rule 31 Order to require o2 to disclose the incoming calls suggests a confidence on her part that those telephone records would vindicate her position.

117. As for Mr Phelps' suggestion that it was odd for the Claimant not to enquire who Miss Daniel was, Miss Daniel's email signature appeared at the foot of her email of 10 January 2022, identifying her as "Associate Director of Nursing – Clinical Practice". It was apparent that she was not from the Respondent's HR team contacting her about her pension or notice pay. The Claimant would have known from that email signature that Miss Daniel was contacting her either (a) pursuant to Mr Davies' instruction but after-the-event, when the Claimant had finally "*had enough*" (as the Claimant put it at one point) and resigned, or (b) by way of general follow-up on the events concerned. It is understandable that, having resigned, the Claimant may not have had the energy or inclination to engage with Miss Daniel in either of these contexts, not least because the Claimant described how she was having CBT at this point, and "*was really suffering*".

118. The Tribunal concludes that the Claimant's evidence is to be preferred on this point. The passion the Claimant had for her role as a Diabetes Specialist Nurse, and her devastation as to how her career ended, was evident to all who attended the hearing. The Tribunal considers that if the Claimant had spoken to Miss Daniel, she would not have resigned.

119. None of this is to say that the Tribunal doubts the credibility of Miss Daniel, but her memory of the detail is not clear. She does not recall the date she spoke to the Claimant – which would be pretty important information in the context of that contact being look to bring an employee who has been off on long-term sick 'back into the fold', especially given that contact was undoubtedly very late. It is possible that Miss Daniel spoke to a different person at the time in question, and that some confusion has arisen as to who that was. This would explain the lack of introduction

in Miss Daniel's 10 January 2022 email. The Tribunal casts no aspersions on Miss Daniel's honesty.

120. It is understandable that Miss Daniel cannot recall which telephone she used to make the call, but no evidence been adduced to the Tribunal of the telephone number provided to her by Ms Burley, or of any efforts on the part of the Respondent to obtain telephone records to support her assertion that there was a relevant outgoing and a relevant incoming call to one of the four telephones that could have been used. It also appears that Miss Daniel took no notes of her conversation with the Claimant, which is unfortunate and surprising given the context of the, at that stage, long-running internal dispute that her efforts were to try to resolve. This is particularly so given the substantial time delay between Mr Davies instructing, on 12 October 2021, that a senior nurse be appointed to perform this liaison role, and the earliest date at which this was attempted, which was around two months later. These are not criticisms of Miss Daniel, but are reasons why, in addition to the Claimant's credibility, the Claimant's position is preferred. The Tribunal considers the most weighty evidence in support of the Claimant's position to be her application to the Tribunal for a Rule 31 Order against o2. The Claimant would only have applied for that had she expected the product of that disclosure to prove the position she was asserting.

121. Consequently, the Tribunal finds that Miss Daniel did not telephone the Claimant in December 2021.

The Sixth Disputed Fact: Did the Respondent fail to implement, or fail to implement in a timely fashion, the recommendation from the Grievance Appeal outcome that a senior nurse be appointed to liaise with the Claimant's line manager and occupational health in order to support her in becoming ready to return to work (the Implementation Failure)?

122. An email from Mr Davies to, among others, Ms Jones, on 15 October 2021, recorded the fact that Ms Jones had "*asked Dionne Daniel to provide individual support on top of that available from OH to support [the Claimant] return to work. The management team (Dan) [Mr Camp] will need to work with HR to ensure that the group mediation we are recommending is put in place.*"

123. No evidence was offered by the Claimant or the Respondent as to whether the group mediation was put in place.

124. Miss Daniel confirmed in her witness and oral evidence that while Ms Jones had asked her to support a nurse who had been through a grievance appeal process in or around late October or November 2021, no contact was attempted with the Claimant until December 2021. As set out in relation to the Fifth Disputed Fact above, the Tribunal finds that Miss Daniel is mistaken about this, and that contact was not in fact made with the Claimant until January 2022.

125. Regardless of whether it was December 2021 or January 2022, Ms Burley agreed in cross examination that it would have been reasonable for the Claimant to expect someone from the Chief Nurse's office to contact her within a reasonable period

after Mr Davies' letter on 12 October 2021, and that that had not happened in this case.

126. The Respondent has said that:

a) The appointment of Miss Daniel;

b) The contact between Mrs Jupp and the Claimant; and

c) The contact between Ms Burley and the Claimant's representative,

were all steps taken to implement the Grievance Appeal outcome, and therefore the Claimant's contention that the Respondent failed to do this, or failed to do this in a timely fashion, fails. The Tribunal does not agree. The Grievance Appeal panel's recommendation was specifically that a senior nurse from the Chief Nurse's Office take oversight of supporting the Claimant's becoming ready to return to work. The focus was not on *appointment* of Miss Daniel, or on the engagement from Mrs Jupp (in whom the Claimant had lost confidence), or the engagement from the Respondent's Employee Relations team – it was specifically that a senior nurse from the Chief Nurse's Office take oversight of the process, ensuring that "*everything that can be done to support you becoming ready to return to work [is] put in place*". Even if the Respondent had told the Claimant of Miss Daniel's appointment that would have been something (though a far cry from "*everything that can be done*" to support the Claimant), but so far as the Claimant knew, nothing at all had been done.

127. The Tribunal finds that the Respondent failed to implement, and certainly failed to implement in a timely manner (even if Miss Daniel did get in touch with the Claimant in December 2021) the relevant recommendation from the Grievance Appeal outcome.

Law

The propriety of pursuing an allegation not explored with the other party's relevant witness

128. When a party seeks to argue that a witness proffered by the other side should not be believed, it is an important principle of natural justice that that point is put to the witness and they have the opportunity to respond to it.

129. If it is to be suggested that the evidence in chief of any witness is false then the witness should be challenged on this in cross-examination to ensure that the witness has an opportunity to refute contradictory evidence, and bring conflicting facts into direct opposition (*Browne v Dunn* (1893) 6 R 67).

130. This is not an absolute rule, but a principle, and so its appropriate application depends on the applicable facts and circumstances (*Chen v Ng* [2017] UKPC 27). For example, in the criminal context of *O'Connell v Adams* [1973] RTR 150, the

then-Lord Chief Justice said that account should be taken of the context, including in that case that one side was legally represented and the other was not.

131. The actual decision in the *Browne v Dunn* case is difficult to get hold off, and so the Court of Appeal in *Markem Corp and another v Zipher Ltd; Markem Technologies Ltd and others v Buckby and others* [2006] IP & T 102 cited the description of it from the Australian case of *Allied Pastoral Holdings Pty Ltd v Federal Commr of Taxation* [1983] 1 NSWLR 1, the relevant passage for our purposes of which is:

"*It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in* Browne v Dunn *(1894) 6 R 67.*"

132. In the High Court case of *EPI Environmental Technologies Inc and another v Symphony Plastic Technologies plc and another* [2004] EWHC 2945 (Ch), Smith J observed:

"*I regard it as essential that witnesses are challenged with the other side's case. This involves putting the case positively. This is important for a judge to enable him to assess that witness's response to the other case orally, by reference to his or her demeanour and in the overall context of the litigation. A failure to put a point should usually disentitle the point to be taken against a witness in a closing speech. This is especially so in an era of pre prepared witness statements. A judge does not see live in chief evidence, thereby depriving the witness of presenting himself positively in his case*".

The implied term of trust and confidence

133. The House of Lords, in the case of *Malik (A.P.) v Bank of Credit and Commerce International S.A. (In Compulsory Liquidation)* [1997] UKHL 23, held that there is an implied term of trust and confidence between an employer and an employee that is characteristic of the employment relationship. That term requires that an employer will "*not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence*

and trust between employer and employee". Such a breach is capable of founding a complaint of constructive dismissal.

134. The words "*without reasonable and proper cause*" have meaning. "*Reasonable and proper cause*" was found where an employer refused to promote an employee where that promotion would involve a relocation of the employee which would put her safety and security at risk (*Amnesty International v Ahmed* [2009] ICR 1450). An example of what could amount to "*reasonable and proper cause*" was given in *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727, where the EAT referred to an employer "*who proposes to suspend or discipline an employee for lack of capability or misconduct*". That proposal is "*an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process*", but "*it could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action*".

135. Every case where there is an allegation that an employer is in breach of its duty to maintain trust and confidence has to be decided on its own facts (*Woods v W M Car Services (Peterborough) Limited* [1982] IRLR 413).

136. The EAT in *Nicholson v Hazel House Nursing Home Ltd* UKEAT/0241/15 considered that the rejection of a well-founded grievance by an employer, together with acts of discrimination which had occurred, amount to a breach of the implied term of trust and confidence.

137. In *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516) the EAT upheld the Tribunal's conclusion that the employer is under an implied duty to "*reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have*". The EAT in that case recognised that in the case of such a failure, frustration on the part of the employee may build up over a period of time.

138. A repudiatory breach is not capable of being remedied so as to preclude acceptance, so an internal appeal process cannot 'cure' a repudiatory breach of the contract (*Bournemouth University Higher Education Corporation v Buckland* [2010] ICR 908).

139. Mutual trust and confidence can be undermined if the employer fails to support the employee in the face of threats or hostility from fellow employees or members of the public (*Smyth v Croft Inns Ltd* [1996] IRLR 84).

140. An aggressive or abusive management style that undermines the employee is capable of breaching the implied term (*Horkulak v Cantor Fitzgerald International* [2004] ICR 697).

141. *Abbey National plc v Robinson* EAT/743/99 was a case where an employee alleged that her line manager had bullied and harassed her, and her employer had failed to address her concerns about having to work with him with the result that

her line manager continued to treat her in an insensitive, unsatisfactory and unreasonable way over a further nine or ten months. The EAT in that case said that such a complaint was capable of amounting to a breach of the implied term of trust and confidence – what mattered was whether, on the facts, the employee was justified in treating the employment contract as repudiated by the employer by the employer's conduct.

Constructive unfair dismissal

142. The right not to be unfairly dismissed is set out in section 94 of the Employment Rights Act 1996 (the **1996 Act**). For these purposes, an employee is dismissed by their employer if:

"*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*"

(section 95(1)(c) of the 1996 Act).

143. This treatment of the employee's resignation as "constructive dismissal" pre-dates the 1996 Act, and Lord Denning MR in the Court of Appeal decision in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 described the nature of the contractual breach which entitles the employee to accept that breach and treat the employer's conduct as dismissing them:

"*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*"

144. Therefore there are three elements that an employee needs to prove to demonstrate that they have been constructively dismissed:

a) A fundamental breach of the contract of employment between them on the part of the employer;

b) A causal link between the employee's resignation and that employer breach; and

c) Evidence of the employee accepting that breach before any affirmation of the contract.

145. Underhill LJ giving the judgment of the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1 observed 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:*

(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?

(2) Has he or she affirmed the contract since that act?

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

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju *[2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the* Malik *term? (If it was, there is no need for any separate consideration of a possible previous affirmation...)*

(5) Did the employee resign in response (or partly in response) to that breach?"

Fundamental breach

146. An employer may, in the words of Lord Denning MR in *Western Excavating*, "[*show*] *that* [*they*] *no longer* [*intend*] *to be bound by one or more of the essential terms of the contract*" through a course of conduct, which may cumulatively amount to a fundamental breach of contract. This is so even if the 'last straw' incident does not, by itself, amount to a breach of contract (*Lewis v Motorworld Garages Ltd* [1986] ICR 157), although that 'last straw' must contribute to the course of conduct relied upon. A blameless act by the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer (*Omilaju v Waltham Forest London Borough Council* [2005] ICR 481).

147. The test of whether the term of the contract has been breached is an objective one. There will be no breach simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held (*Omilaju*).

148. The term breached may be an express term of the contract, or an implied one. In the case of the implied term of trust and confidence:

"*A finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract, and entitling the employee to resign and claim constructive dismissal*" (*Morrow v Safeway Stores plc* [2002] IRLR 9).

149. Where there has been a 'course of conduct' and the employee has continued to work, the employee may still rely on that course of conduct where it is continuing, despite the fact that the employee has continued to work under the contract, seemingly affirming it in spite of the employer's breaches – the effect of the 'last straw' is to revive the employee's right to resign (*Kaur*).

Causal link

150. There must be a causal link between the breach by the employer and the employee's resignation (one case example is that of the Court of Appeal decision in *Meikle v Nottinghamshire County Council* [2005] ICR 1).

Acceptance of that breach without affirming the contract

151. The issue of affirmation was discussed in the EAT case of *Leaney v Loughborough University* [2023] EAT 155, where HHJ Auerbach helpfully summarised the relevant general principles, which I have used below.

152. Where one party is in fundamental breach of contract, the injured party may elect to accept the breach as bringing the contract to an end, or to treat the contract as continuing, requiring the party in breach to continue to perform it – that is affirmation. Where the injured party affirms, they will thereby have lost the right thereafter to treat the other party's conduct as having brought the contract to an end - unless or until there is thereafter further relevant conduct on the part of the offending party.

153. An employee who claims unfair constructive dismissal based on a *continuing cumulative breach* is entitled to rely on the totality of the employer's acts notwithstanding prior affirmation of the contract provided that the later act – the last straw – forms part of the series. The effect of the final act is to revive the employee's right to terminate his or her right to terminate the employment contract based on the totality of the employer's conduct (*Kaur*).

154. Affirmation may be express or implied. Affirmation can be implied if the innocent party:

    a) calls on the guilty party for further performance of the contract, since that conduct is only consistent with the continued existence of the contractual obligation; or

    b) themselves does an act which is only consistent with the continued existence of the contract.

    However, if the innocent party further performs the contract to a limited extent but makes it clear that he:

    c) is reserving his rights to accept the repudiation; or

    d) is only continuing to so as to allow the guilty party to remedy the breach,

    such further performance does not prejudice his right subsequently to accept the repudiation (*WE Cox Toner (International) Ltd v Crook* [1981] ICR 823).

155. Provided the employee makes it clear their objection to what is being done, they are not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job (*Marriott v Oxford Co-operative Society* [1969] 3 WLR 984).

156. Mere delay in communicating a decision to accept the breach as bringing the contract to an end will not, in the absence of something amounting to express or implied affirmation, amount in itself to affirmation (*Cox Toner*) - but the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation, because of what occurred during that period.

157. Giving more colour to that, in *Cox Toner* the employee was accused of gross dereliction of duty by his employer and threatened with dismissal. He worked under protest while engaged in angry correspondence about the matter, which he asserted amounted to a fundamental breach of contract, and he gave the employer an ultimatum that he would resign unless the allegations against him were withdrawn. That active engagement between the parties on the issue continued for six months before it became clear that the employer would not withdraw the allegations. A month later, the employee resigned, claiming to have accepted the employer's breach. The EAT found that the employee had not affirmed the contract in the six month period when he sought to show the employer that it ought to retract its accusation – he was clearly working under protest, and preserving his right to accept the employer's breach. However, as he had ample time in that period to take advice and look for alternative employment, it found that when his ultimatum was rejected and he continued to work for another month it must have appeared to his employer that he had decided not to resign but to continue in the employment, thereby electing to affirm the contract.

158. The issue of affirmation is one of conduct, not of time, and the conduct relevant to whether there has been affirmation depends on the context (*Chindove v William Morrisons Supermarkets Plc* UKEAT/0201/13). Whether an employee is sick and not working was considered relevant context in the *Chindove* case, as was the duration of that sick leave relative to the employee's length of service in both *Chindove* and *Leaney*. As HHJ Auerbach put it in *Leaney*:

"*the tribunal needs to consider the nature of what is at stake for the particular employee in the particular case and the practical implications of the decision whether or not to resign for that particular employee. In a given case lengthy service might provide the context for other more specific factors, such as whether the employee would be abandoning a secure and stable job that would be difficult to replace, or whether resigning would entail the loss of valuable benefits that had been built up over time, and would be hard to replicate… for someone with the decades-long service that this claimant had, resigning might involve particular upheaval and distress; and that he might reasonably have needed to take some appreciable time to come to such a decision*".

He also considered that the fact that negotiations were taking place in the period of "delay" might be significant to whether the employee affirmed the contract.

159. The exercise of a contractual grievance or appeal procedure in an attempt to give an employer an opportunity to resolve the issues that give rise to the breach of

contract is not likely to be treated as an unequivocal affirmation of the contract (*Kaur*). Indeed, the Tribunal should take into account if the claimant has raised a grievance at all (it need not be contractual) when assessing whether the employee has affirmed the contract – the employee will generally be treated as continuing to work and draw pay for a limited time while giving the employer the opportunity to 'put matters right' (*Brooks v Leisure Employment Services Ltd.* [2023] EAT 137).

Contributory conduct

160. Blameworthy or culpable conduct on the part of the claimant can reduce any award made to them if their dismissal is unfair – specifically, this can reduce either or both of the basic and compensatory awards.

161. As for the basic award, section 122(2) of the 1996 Act sets out that:

"*Where the tribunal considers that any conduct of the complainant before the dismissal… was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

162. In the case of the compensatory award, section 123(6) of the 1996 Act provides that:

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*"

163. If the tribunal has made a prior finding that, by reason of the conduct of the claimant, it would be just and equitable to reduce the basic award, it must do so (*Carmelli Bakeries Ltd v Benali* UKEAT/06/16/12/RN).

164. This differs from the position as regards a compensatory award. In respect of that, if a tribunal concludes that the claimant's dismissal was to any extent caused or contributed to by any action of the claimant's blameworthy conduct, it must apply section 123(6), whether that point has been raised by the respondent or not (*Swallow Security Services Ltd v Millicent* UKEAT/0297/08).

165. "*Whether in any particular case it is appropriate to deal with the question of the element of contribution at the liability stage or whether it is better merely to make the findings of fact and leave the precise determination as to the amount of liability at the remedies hearing must be a matter of judgment for each Tribunal*" (*Sodexho Defence Services Ltd v Steele* UKEAT/0378/08/CEA).

166. The case law on contributory conduct in the unfair dismissal context may be summarised as follows:

a) The assessment falls to be made by the tribunal, not the respondent (*London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220);

b) That assessment is to examine the blameworthiness or culpability of *the claimant's* conduct. The blameworthiness of another person is not relevant (*Parker Foundry Ltd v Slack* [1992] ICR 302);

c) In the case of the basic award, the sequential questions to be answered by the tribunal are:

   (i) Was the claimant's conduct before the dismissal blameworthy or culpable? (And that conduct is not confined to conduct that caused or contributed to the claimant's dismissal – any conduct by the claimant prior to dismissal can be taken into account – *Parker Foundry*.)

   (ii) If so, would it be just and equitable to reduce the basic award?

   If the answers to both question is "yes", the basic award is to be reduced to the extent that is just and equitable;

d) The different statutory language means different questions are to be answered in relation to an adjustment of compensatory award for contributory conduct:

   (i) Was the claimant's conduct before the dismissal blameworthy or culpable?

   (ii) Did that conduct cause or contribute to the claimant's dismissal to any extent? It is not enough for the tribunal to simply identify misbehaviour on the part of the employee – the conduct must have had a causative link to the dismissal to some extent: *Hutchinson v Enfield Rolling Mills Ltd* [1981] IRLR 318. This is not a hypothetical analysis of what would have happened if the dismissal had been fair (*Renewi UK Services Ltd v Pamment* EAT 0109/21);

   (iii) If so, by what proportion would it be just and equitable to reduce the compensatory award for that conduct?; and

e) The tribunal must identify what conduct on the part of the claimant it is basing the reduction on, and explain the rationale for setting the reduction at the level it does (*Sandwell v Westwood* EAT 0032/09).

Application

Is it open to the Claimant to allege the Grievance Failure, given the Claimant's contention that the Grievance Appeal outcome failed to properly uphold her Grievance was not the subject of cross-examination of the grievance appeal chair, Mr Davies?

167. Mr Phelps for the Respondent argued in submissions that, as the Grievance Failure was not put to Mr Davies in cross-examination (no cross-examination was carried out of Mr Davies), the Claimant has effectively indicated her intention not to pursue that argument and the Tribunal should not allow her to pursue it in the

absence of that cross-examination. The Respondent relies on the case of *EPI Environmental Technologies* in support of this contention.

168. The Claimant made no submissions, and so did not respond to this point, but the Tribunal observes that:

a) The *Markem* and *O'Connell* cases indicate that a failure to cross-examine is a rule of *professional* practice – and the Claimant is here represented by her lay husband;

b) In addition, the *Markem* case indicates that the necessity of putting a case to an opponent's witness in cross-examination is necessary "*unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters*". The Case Management Orders of EJ Fowell of 10 August 2023 clearly state, in the Case Summary section, that "*Mrs Hamilton says that the Trust was in breach of this duty [of trust and confidence] by… failing to properly uphold her grievance about her colleague's behaviour*", so the Respondent was clearly on notice that this was a "live" issue;

c) The Claimant is not attacking Mr Davies' *credibility* as a witness, or saying that anything said by Mr Davies was *false* (as was the case in *Browne v Dunn*) – she is simply saying that she does not agree that his conclusion, that Grievance Allegation 2 was not upheld, was the correct one. Mr Davies' evidence on this point is clear from his witness statement, and the Claimant's evidence on the same point is clear from her witness statement and her oral evidence. There are no conflicting facts between them: Mr Davies reached an assessment of what those facts meant in the context of the Grievance, and the Claimant's disagrees with that assessment. In that context, a failure to cross-examine Mr Davies should not, in the Tribunal's view, be properly regarded as conceding that point;

d) While Smith J in *EPI Environmental Technologies* considered that a case should be put positively by witnesses being challenged with the other side's case, Mr Davies *was* challenged to do so by the understood Case Summary from the 10 August 2023 Orders. Smith J noted that "*This is important for a judge to enable him to assess that witness's response to the other case orally, by reference to his or her demeanour and in the overall context of the litigation*" – but Mr Hamilton (and by extension, Mrs Hamilton) was not impugning Mr Davies' honesty, and indeed, thanked him for the overall recommendations he expressed on behalf of the Grievance Appeal panel which, as Mr Hamilton put it, gave the Claimant the impression that Mr Davies "*had got it*", in terms of understanding the Claimant's position. Mr Hamilton for the Claimant recognised that "*the Trust are not going to admit they tolerated abusive behaviour [i.e., uphold Grievance Allegation 2] and leave themselves in a liable position*", and he indicated that the Claimant accepted that at the time but felt that Mr Davies' recommendations left her

with a pragmatic way forward that she avers was, unfortunately, not followed through by the Respondent.

169. For these reasons, in the Tribunal's view, there is no unfairness to the Respondent by Mr Hamilton's failure to cross-examine Mr Davies. It is clear what the Claimant's arguments are, and the Respondent has proffered its resistance of those arguments. Mr Davies' written statement is taken into account by the Tribunal, and there is no factual conflict to resolve between Mr Davies and the Claimant. The Tribunal is capable of assessing the merits of the Claimant's complaints of the Grievance Failure on the basis of the evidence, and it does not consider the Respondent is in any way disadvantaged by the lack of cross-examination of Mr Davies (otherwise the Tribunal judge would have asked questions of him, which she did not).

Was the implied term of trust and confidence breached by the Respondent?

170. The Claimant contends that, individually or collectively:

a) The Management Failure;

b) The Grievance Failure; and/or

c) The Implementation Failure,

fundamentally breached the implied duty of trust and confidence in her contract of employment.

171. As set out above, the Tribunal has found that:

a) The Claimant's assertion that the Management Failure occurred is made out (the Third Disputed Fact);

b) The averred Grievance Failure is not made out on the facts (the Fourth Disputed Fact); and

c) The Implementation Failure did occur (the Sixth Disputed Fact).

172. The question therefore becomes whether the Management Failure and the Implementation Failure, individually or collectively, amounted to conduct on the part of the Respondent that was "*without reasonable and proper cause*" "*calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*" (the *Malik* test).

173. No representations were made by either party on whether the Respondent had "reasonable or proper cause" for the Management Failure or the Implementation Failure. The Claimant was a long-serving employee, who frankly deserved more from the Respondent as regards each of the Management Failure and the Implementation Failure. The Tribunal cannot see that there was reasonable or proper cause for either of them.

174. While the Tribunal does not consider that the Respondent's conduct was *calculated* so as destroy or seriously damage the relationship of confidence and trust between them, it was *likely* to do so, both in relation to the Management Failure and the Implementation Failure. The Tribunal finds that each those individually, and the two collectively, met that threshold.

175. In relation to the Management Failure, the Respondent failed – over a number of years - to take adequate action in relation to Mr Nayeck's behaviour, including when the Claimant was made unwell due to the stress that that caused. The Claimant's evidence of the impact that that had on her was powerful: she was (as Mrs Jupp agreed) a gifted nurse, who loved her job, and she was immensely distressed to have found herself in a situation where she could not do it. This was not, as the Respondent's Counsel suggested, just a common situation where not every employee in a team gets on with each other. It was significantly more than that, as was acknowledged by the Respondent at times, even if that acknowledgement was not followed through by decisive action to change things. (Examples of this were Mrs Jupp's reaction to the Nayeck Complaint, where she "*felt sick*" because it made it clear that, as she put it, she didn't have a handle on the process, which was a "*constant and ongoing*" one. Another was the Grievance Appeal panel's subtle but clear acknowledgement of the significance of what had happened when their letter, penned by Mr Davies, said that "*It is clear to the panel that the circumstances raised in your grievance, and the impact on your health and well-being, means that everything that can be done to support you becoming ready to return to work needs to be put in place.*" There is significance in the inclusion of the words "*the circumstances raised in your grievance*" – acknowledging that this was far more than run-of-the-mill friction between colleagues.)

176. In relation to the Implementation Failure, the Grievance Appeal was hugely significant to the Claimant's relationship with the Respondent, as acknowledged in the panel's outcome letter to the Claimant. The failure to implement the recommendation of a senior nurse taking oversight of doing "*everything that can be done to support [the Claimant] becoming ready to return to work*" was, in the circumstances, very "likely" to destroy or seriously damage the relationship of confidence and trust between employer and employee – that relationship was hanging by a thread, which was tacitly acknowledged by the panel in its outcome letter quoted here.

177. When asked why she felt she had to resign, the Claimant answered:

"*The two-and-a-half years prior to the appeal was becoming more and more difficult. I've been asked about all the things the Trust did to try to manage the situation – that horrific meeting in May 2018, the follow-up mediation was seven months later – it's almost like a 'tick box' exercise, to show that we've done something. All the things that were done was lip service… The first time I felt someone was understanding what was going on was when Peter Davies gave me the appeal outcome. I thought, 'Finally, this is a way forward'… and this will start the process of getting me back to work. I followed it up in December to try and find*

out what was happening. I had nothing back. By 5th January and 6th January, I did it because I had had enough. … I was having CBT at this point – I could not handle another year of going through this. I was really suffering."

178. It is plain to the Tribunal that the Management Failure and the Implementation Failure each separately, and collectively, breached the implied term of trust and confidence between the parties. A nurse who had worked for the Respondent for more than nine years had been brought to such a state of stress, distress and poor health by the Respondent's failure to respond to Mr Nayeck's behaviour and to act on the Grievance Appeal panel's recommendations that she could not take any more. This is clearly a case where the Claimant was justified in treating the employment contract as repudiated by the Respondent by its conduct (and there are analogies between the facts here and the cited cases of *Smyth*, *Horkulak* and *Robinson*).

Was the Claimant constructively unfairly dismissed?

179. As set out above, there are three questions to be addressed in relation to this question:

a) Was there a fundamental breach of the contract of employment by the Respondent?;

b) Was there a causal link between the Claimant's resignation and the Respondent's breach?; and

c) Is there evidence that the Claimant accepted that breach before affirming the contract.

180. The first question, as to whether there was a fundamental breach of contract, has already been answered in the affirmative – there was a fundamental breach of the implied term of trust and confidence by the Respondent. Despite the Respondent's contention otherwise, a breach of the implied term of trust and confidence is a fundamental breach of contract (*Morrow*), and even if it were not automatically, it was in this case.

181. In relation to the second question, of whether there was a causal link between the Claimant's resignation and the Respondent's breach, the terms of the Claimant's resignation of 6 January 2022 make that connection:

"*I am today formally resigning from my post as DSN at Epsom and St Helier NHS Trust due to, what I believe is, a breach of contract by the Trust due to a total breakdown of trust and confidence, and thereby consider myself constructively dismissed.*

I have tried to resolve the issues of concern through the Grievance Procedure, which, on appeal, was upheld. As far as I am aware however, no action has been taken on the outcome plan advised by Peter Davies on 12/10/21, despite following this up both personally and through the RCN with both my Line Manager and HR.

Certainly, no attempt has been made to ensure that 'everything that can be done to support you becoming ready to return to work', as advised in the Appeal Outcome letter. The apparent condoning by the Trust of not following policies or procedures and cruel bullying behaviours is a clear breach of contract and makes my position untenable.

The situation I have been put in by the Trust has caused both significant stress and anxiety for which I have had to seek professional ongoing help. This has been caused as a direct consequence of the actions of and poor management by the Trust."

182. While the Respondent has sought to argue that the Claimant had reached the view that her relationship with Mr Nayeck, her managers and therefore the Respondent was irreparable by 19 August 2021, as expressed in her Grievance Appeal, the Claimant's evidence was that she was genuinely hopeful when she received the Grievance Appeal outcome that Mr Davies had outlined a way forward. Legally, while the Claimant's failure to resign before the Grievance Appeal outcome could be regarded as affirming her contract of employment, the Respondent's subsequent breach, being the Implementation Failure, revived the Claimant's right to resign (as per *Kaur*).

183. While the Respondent has sought to say that even if the Tribunal finds that Miss Daniel did not contact the Claimant, that was an "innocuous act" (and so could not revive any previous breaches), the Tribunal finds that it was very far from innocuous. While there is absolutely no evidence that Miss Daniel acted deliberately or with any malice whatsoever in failing to contact the Claimant, the absence of contact was very significant to the Claimant, and understandably so. In the context of all that had happened, and the elevation of the Claimant's hopes that a way forward could be forged by the Grievance Appeal outcome, the silence that followed spoke volumes to her, and it was reasonable for it do so. The appeal panel was clear that "*the circumstances raised in [her] grievance, and the impact on [her] health and well-being, [meant] that everything that can be done to support [the Claimant] becoming ready to return to work needs to be put in place*". Silence from the senior nurse over a nearly three month period, despite the Claimant's follow-up, was not doing "*everything that can be done*", and that broken commitment was very far from an innocuous act.

184. It is clear to the Tribunal that the Claimant resigned in response to the Respondent's breach.

185. On the third question, the Respondent has sought to argue that the Claimant affirmed any prior breaches at the time of her Grievance Appeal, but even if she did, there was a further breach in the form of the Implementation Failure. There was no argument made by the Respondent that the Claimant affirmed any breaches after the Grievance Outcome – and rightly so. The Claimant was on sick leave, was a long-serving member of staff hoping to resolve a very difficult situation that had made her unwell, and had shown some patience in waiting for the

Respondent to contact her, but she clearly did not affirm the contract in spite of that delay, given her chasers. There was no affirmation of the contract in the period after the Grievance Appeal outcome up to the Claimant's resignation.

Contributory conduct

186. Mr Phelps averred that there were three ways in which the Claimant's conduct was blameworthy or culpable:

a) The lack of engagement from the Claimant in relation to the proposed behaviour contract put forward by Mrs Jupp;

b) Not clearly raising the Book Incident with the Respondent; and

c) Resigning despite contact from the Respondent in November 2021.

187. The Tribunal considers that:

a) It was perfectly reasonable for the Claimant to be sceptical of the merits of the proposed behaviour contract, and Mrs Jupp's involvement in that, given the length and extent of the difficulties that remained between the Claimant and Mr Nayeck under Mrs Jupp's management;

b) Mrs Jupp said in oral evidence that the Book Incident had been discussed with her, she just had not appreciated the severity with which the Claimant regarded it. The Claimant cannot be criticised for that; and

c) As has already been noted above, the Grievance Appeal panel's instructions were specific – that a senior nurse be responsible for ensuring that "everything that can be done" was put in place. Contact between the Claimant's trade union representative and the Respondent's Employee Relations team is very different to that. The Claimant chased up with the Respondent what was happening in that regard. The Tribunal finds nothing blameworthy or culpable in the Claimant's resignation in that context.

188. The Tribunal finds that this is very far from establishing any form of contributory conduct.

Conclusions

189. For all of the above reasons, the Claimant's claim that she was constructively unfairly dismissed succeeds.

Employment Judge Ramsden

Date 8 March 2024