EMPLOYMENT TRIBUNALS

Claimant: Ms M Vambe

Respondent: Equilibrium Healthcare Group Limited

HELD AT: Manchester **ON:** 14 & 15 August 2017

BEFORE: Employment Judge T Ryan

REPRESENTATION:

Claimant: In person
Respondent: Ms R Wedderspoon, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of constructive unfair dismissal is not well founded and is dismissed.

2. The claimant is ordered to pay a contribution to the respondent's costs in the sum of £3,670.00

REASONS

1. By a claim presented to the Tribunal on 16th January 2017 the claimant brought complaints of constructive unfair dismissal and intimated a claim for other payments. The respondent resisted the claims. At the outset of this final hearing the claimant confirmed that only the claim of constructive unfair dismissal was pursued.

2. The respondent's case throughout has been that the claimant was not dismissed, but that she resigned.

Evidence

3. I heard evidence from the claimant herself. She called Kenneth Mahuma. His statement appears at page 511 of the agreed bundle. He was not questioned by the parties or the Tribunal. The claimant included a number of other statements from written witness, which I have read and taken into account, but they were not called.

4. For the respondent, I heard evidence from Ms Mara Chenda-Joseph, the Registered Manager of the Jigsaw Independent Hospital and from Ms Avril Djalo the General Manager who was the claimant's line manager and who in turn reported to Ms Chenda-Joseph.

5. The witnesses from whom I heard all made statements. Ms Chenda-Joseph produced two witness statements, one as originally drafted and exchanged with the claimant and then a statement that was amended after Ms Chenda-Joseph had attended a conference with Counsel.

Findings of fact

6. The Jigsaw Independent Hospital provides in-patient mental health services to patients have been admitted subject to section 2 or other sections of the Mental Health Act 1983. Each ward has a registered nurse assigned to it whose waork is supported by support workers who are not registered. The claimant was working on Montrose ward when Ms Joseph started in April 2016. She was moved after that to Cavendish ward.

7. The claimant is a qualified mental health nurse who was required to be registered with the NMC. She was employed by the respondent from 15 December 2012. She was described by Ms Joseph as a very experienced nurse.

8. In September 2016, probably on the 20th, a nurse Lauren Inman raised concerns with regard to the claimant's treatment of a support worker KD. It was round the timing of this issue that the statement of Ms Joseph was changed. Originally she had given a statement which implied at least that that concern was raised prior to the annual development review that Ms Chenda-Joseph did conduct that day but in the second statement and in her evidence she suggested it happened on the same day but afterwards.

9. There was an annual development review (pages 131ff). It recorded no concerns about the claimant's practice. There was no suggestion that she was doing anything other than fulfilling her job description and acting professionally.

10. There is a difference in detail between the claimant and Ms Chenda-Joseph as to whether that review was done by an exchange of emails or at a meeting. It was the claimant's evidence that Ms Chenda-Joseph sent her an email with the line manager's comments in and then she submitted her comments and then the review was subsequently signed off by Ms Chenda-Joseph.

11. There is no evidence of the date when the review was compiled or signed off. It contains the date for the next review as the 1st October which might suggest that it had been signed off on 1st October 2016, but Ms Chenda-Joseph said there was a meeting and it was signed off that same day. It seems likely that it was

probably concluded in a meeting. I would expect that a Registered Manager would normally conduct a meeting with a Registered Nurse who was responsible for one of the units in her ward there are no other notes and no other records to indicate either way. Whether there was a meeting or not is of no great significance in my judgment. I am satisfied on Ms Chenda-Joseph's evidence that she signed it off on 20 September 2016. Had there been an email trail to show another date that would have been of assistance but absent that I have to decide on the basis of the evidence.

12. Ms Chenda-Joseph's evidence was that after that meeting a Lead Support Worker, Paula Pheasey spoke to her and explained that KD had some issues with the claimant. She said that earlier that week on 19 September KD had spoken to her and according to Ms Pheasey's account the claimant had put KD " under pressure to do all her paperwork". Apparently KD had been admitted to hospital for two days in the week commencing 12 September with chest pains and she described Ms Pheasey described KD as appearing really upset.

13. Ms Chenda-Joseph's evidence about this issue was supported by a fact finding meeting with Lauren Inman to the effect that she, Lauren Inman, had reported the matter on that day as well. Ms Chenda-Joseph was not clear as to who came first but her evidence was that both women came. Lauren Inman's account was similar but not identical to the account given by Ms Pheasey.

14. Whether those accounts were received by Ms Chenda-Joseph before or after the annual development review is, in my view, little to the point because I would not have expected Ms Chenda-Joseph to raise those concerns with the claimant at that annual review. That review was not arranged for the purpose of dealing with that sort of performance related issues.

15. By 22 September 2016 Ms Chenda-Joseph with the Head of HR was conducting a fact finding meeting with Ms Pheasey, (pages 214-215). In addition to the matters I have already recited Ms Pheasey explained at the meeting that on duty the following day, which would have been 20 September, Lauren Inman had moved KD to another workplace when the claimant "had a massive go at her when she hadn't done some paperwork".

16. KD told Ms Pheasey she felt alienated, she was in the office all day doing MB's paperwork and other staff were getting at her for not being out working on the unit. Ms Pheasey described KD as normally really pleasant and good at her job.

17. On 26 September 2016 a further fact finding meeting was held by Ms Chenda-Joseph with Lauren Inman (page 216). This was a much more detailed account, In summary Ms Inman said that on 19 September she had seen KD crying. She had spoken to her. KD said that the previous day she had stayed late to do the claimant's paperwork and that when she gave it back to her, presumably the following day, the claimant complained that KD had not used proper English and told KD she had to do it again so that she did not finish it until 9.15 p.m. on the Sunday night. KD reported that Ms Inman. According to Ms Inman, KD also said she was asked by the claimant to write care plans and safeguarding forms and another incident report when she had not been on the unit at the time. Apparently on one occasion when KD had been on a break she alleged that the

claimant had told her that Ms Chandry Joseph would be mad at her as she had missed a deadline.

18. During their conversation, KD said that she would go off sick but Ms Inman advised against that. In fact the following day KD was not working and was admitted to hospital overnight with chest pains. Ms Chenda-Joseph subsequently said that KD had a nervous breakdown.

19. Ms Inman told Ms Chenda-Joseph that she had told KD not to worry. She said she was unsure what to do herself. When she spoke to KD again, KD had said that she herself wanted to speak to Ms Chenda-Joseph.

20. Ms Inman was also aware that KD had previously raised an issue through supervision and with Ms Djalo, the General Manager. Ms Djalo gave evidence to me that she did recall some issue being raised of that kind but she had been on leave in the weeks of 19 and 26 September so it must have been before that.

21. So, by 26 September there were two members of staff, a Registered Nurse and a Lead Support Worker reporting issues between the claimant and KD.

22. The claimant, as with all other Registered Nurses is required to be registered with the NMC and to maintain that registration as a condition of practice. It is also a requirement under her contract of employment that she maintains her registration and failure to do so can be classified as gross misconduct. There was no dispute about that.

23. There was no dispute that reminders would be sent out by the NMC by email to all members reminding them to renew their registration in time.

24. The claimant's registration lapsed at midnight on 30th September 2016 not having been renewed by her.

25. The claimant worked a shift from about 8 a.m. until 8 p.m. on 1 October 2016.

26. The claimant accepted that she had received email notification of the lapse of registration but it was not until that night at about 10 p.m. when she said that she looked at her emails that she realised that her registration had lapsed.

27. She accepted that she had worked on that day as a nurse without being registered.

28. At about 10.13 p.m. the same evening she called Ms Joseph and informed her that the registration had lapsed.

29. The claimant was required to come to a meeting on the next day she was due in, which was 4 October, with Ms Chenda-Joseph and Ms Djalo. Notes of that meeting were taken (pages 156-160). There was no particular challenge to the note.

30. The claimant was questioned about reminders for the renewal. She said that the last email reminder was sent on 1.43 a.m. in the morning of 1st October and she

saw it after she left work. She was questioned both then (and by Ms Wedderspoon in cross examination) as to whether she had not seen her emails before that. The claimant's account was that she didn't often read her emails, usually only once a week.

31. Given that the claimant reported the matter so promptly to Ms Chenda-Joseph that night it seems to me that it is likely that the claimant had simply not read that email. I am satisfied that she had received and read previous reminders.

32. The claimant explained that the reason that the de-registration had occurred was because she had changed her bank details or her bank card to which her direct debit was linked and as a result, when the NMC had tried to take the registration fee, the payment had failed and that is how the registration lapsed.

33. I also record that it was also common ground by the time of the hearing that nothing untoward had occurred with regard to the claimant's practice in respect of the shift that she had worked on 1 October. At the time that the shift in the meeting occurred it was clearly important for the respondent to consider as a matter of safeguarding whether anything adverse had occurred at that time.

34. Ms Chenda-Joseph in the meeting described the incident as "reportable as safeguarding". The claimant was told that she was being suspended pending an investigation for working without registration. There was a note to the effect that Ms Joseph explained the return to work process after lapse of registration.

35. Ms Djalo asked at the meeting if the claimant had paid for the registration by that time. The claimant said she had not done so yet. Since the direct debit had not worked she had requested a new link from the NMC and she said "she needs a reference from her employer, CPD [compulsory professional development] information to send to NMC prior to paying her renewal fee".

36. According to the claimant there was a discussion then about the reference. Although there is no record this effect it was Ms Chenda-Joseph's evidence that she said she was not in a position to give a reference at that stage.

37. It was clear to me from reading the NMC forms on re-registration that certainly another registrant with the NMC has got to sign the character reference as has the employer. I suspect, that if it was appropriate Ms Chenda-Joseph could have signed both as the Registered Manager and as a registrant herself, but there was no suggestion that a reference would be provided that day.

38. On 6 October (page 222) by email the claimant wrote to Ms Chenda-Joseph asking, "Is it possible for you to give me a reference and email it to me as I have to send all 3 references in a recorded mail."

39. Ms Chenda-Joseph did not reply to that until 14 October 2016. It is likely that was because she was on leave. Ms Chenda-Joseph accepted that she normally replies to emails even when on leave but she did not at that stage.

40. What had happened was that on 7 October 2016 Ms Djalo had a fact finding meeting with the claimant (pages 161-162). In the course of that meeting Ms

Djalo asked how far the claimant had got with regard to completing the process of re-registration. The claimant said she had paid and sent the re-admission form. Ms Djalo is recorded as saying “can get this on your way out”. It is likely that was itself a reference to the reference that the claimant needed to send to the NMC. Ms Djalo said she could not remember saying this specifically but it was likely that she knew that Ms Chenda-Joseph was present in the office that day.

41. There was a discussion about whether the claimant should cancel her annual leave. She was due to go on leave between 10 and 31 October, leaving the country because her brother was ill. Ms Djalo said the claimant did not need to cancel leave because being on suspension would not change her salary grading during the period. The claimant had been reduced to a Support Worker rate of pay until re-registration was complete.

42. The claimant's case was that she did go and speak to Ms Chenda-Joseph that day. That was not included in her statement although it is contained in emails later on. She was not asked about that in cross examination. There is a dispute between Ms Chenda-Joseph and the claimant on this.

43. The claimant's case is that she went from the meeting with Ms Djalo, spoke to Ms Chenda-Joseph, asked her for a reference and Ms Chenda-Joseph said that she would provide her with a reference by Monday 10 October.

44. Ms Chenda-Joseph denied that she had spoken to the claimant that day. She was in another meeting at that time. She had not at any stage said that she would provide the claimant with a reference nor that she would do so by 10 October.

45. Ms Chenda-Joseph was in fact in a meeting with KD (pages 219-221). She was accompanied by Ms Alexander, the Head of HR and all the participants signed that note on 7 October 2016. The issues that KD reported, were eventually to make their way into a letter to the claimant. KD gave her account of what had occurred in relation to the events earlier described by Ms Inman and Ms Pheasey.

46. On 12 October 2016 (pages 477-479) Ms Chenda-Joseph wrote to the claimant setting out the matters that were being investigated. The list included: failing to maintain registration; failing to uphold NMC standards by failing to renew and not informing the employer in time; failing to commit to upholding the NMC standards by working as a nurse and not being registered; failure to commit to the professional standards by not ensuring the obligation to keep registration up to date; failing to uphold the code of conduct and putting patients at risk of avoidable harm when working without registration, failing to ensure the safety and welfare of patients; breach of contractual obligations by failing to re-register and practising in breach of the four themes of the NMC code of conduct.

47. Ms Chenda-Joseph wrote: "As I made you aware, because you failed to re-register in time you will need to make an application for re-admission to regain access to the register, NMC requires that you go through a formal process of re-admission, which can take up to six weeks to complete depending on the circumstances".

48. She said that in the interim period the claimant will not be permitted to work. She referred to Article 44 of the Nursing and Midwifery Order 2001 and said that the claimant by failing to re-register and working had contravened legislation. Article 44 makes it an offence, she said, for someone to falsely represent themselves as being on the register or being on a part of it or use a title which they are not entitled to or to falsely represent themselves as having qualifications. In fact, reading Article 44, each of those is an offence provided it is done with the intention to deceive, expressly or impliedly. That was not stated in the letter and I have some doubt whether Ms Chenda-Joseph considered or appreciated that point at the time.

49. The claimant was advised that suspension was being continued, Ms Chenda-Joseph was aware the claimant was taking annual leave between 10 and 31 October and upon her return the suspension would be imposed.

50. On 14 October 2016 Ms Chenda-Joseph responded to the claimant's enquiry of 6th October saying, "Unfortunately I am unable to complete a reference for you as per your request … I can clarify the reason behind this with yourself on your return from annual leave".

51. The claimant replied saying "there is no need to clarify your reasons". Ms Chenda-Joseph responded on 15 October, "I will speak with you and will do so upon your return from leave".

52. On 16 October the claimant emailed HR asking them to provide a reference. She said that waiting until November was not an option as it might complicate her re-admission to the register. She said she had cancelled her leave and plans upon receiving Ms Chenda-Joseph's response to a request.

53. She added, "the initial agreement was for Mara to send me a reference on the 10/10/16 but she was able to respond by email on 14/0/16". So the claimant was there asserting at least some communication took place which led her to believe that Ms Chenda-Joseph had agreed to send her a reference by 10 October.

54. On 17 October Ms Chenda-Joseph wrote to the claimant that she could see her the following day as she was available. The claimant responded saying she was unable to attend because she had what she described as an emergency at home. She re-iterated that Ms Chenda-Joseph had promised to issue the reference on 10 October.

55. On 19 October Ms Chenda-Joseph wrote to the claimant (227 to 229) re-iterating the position with regard to what had occurred earlier and about the request for a reference. She did not refer in terms to 10 October but she did say "for the avoidance of doubt, I have not offered you any promise to provide you with a character reference, as I am unable to make such a statement either on my own behalf as a registrant or on behalf of the company". She then set out why she could not do so and she explained that a further serious allegation had been brought to her attention regarding the claimant's conduct. She stated that the company had undertaken a fact finding process and were continuing an investigation under the disciplinary policy. She explained that was the reason why they could not confirm the standards of character required by the NMC.

56. Ms Chenda-Joseph re-iterated the substance allegation about the claimant's failure to renew her registration. She re-iterated that she would have preferred to discuss this with the claimant in person prior to sending a letter due to the seriousness of the allegation.

57. Ms Chenda-Joseph informed the claimant of the further allegations made against her. These were the matters that were raised by KD. Under five bullet points she set out that the claimant was alleged to have: coerced a junior member of staff to fulfil functions and duties that could not be delegated; allowed the alienation of a new member of staff; use threats to a member of staff to ensure they completed tasks; instructed a junior colleague to complete clinical documentation regarding events at which they were not present; and left the unit for long periods of time leaving junior colleagues unable to locate her for advice or guidance.

58. Mr Chenda-Joseph said that in doing those things the claimant had failed to uphold the NMC standards.

59. Ms Chenda-Joseph invited the claimant to come to an investigatory fact finding meeting with regard to the second set of allegations on 3 November 2016.

60. On 26 October 2016 the claimant requested documents from the respondent prior to the meeting: a copy of her contract; copies of when she was employee of the month; a copy of the "safeguarding" and copies of her training certificates.

61. It was explained to me that the reference to safeguarding was the outcome of the safeguarding enquiry that was to be conducted. It had been said at an earlier stage that the claimant would be given a copy of that in due course.

62. In a later email of the same day the claimant also asked for those documents of HR and said that she also required copies of the fact finding investigation for when she was moved to Oaklands.

63. On 27 October Ms Harper of HR wrote to the claimant saying that her request would be addressed by Ms Chenda-Joseph upon her return from annual leave on 31 October. In another email at about this time the claimant had asked also for company policies regarding investigation time scales, the company's statement on suspension and investigation and policies on bullying and harassment and professional registration.

64. The next event was that by a letter sent sent to Ms Chenda-Joseph and HR at 11.28 a.m. on 1 November 2016 the claimant resigned (pages 487-488). The letter was dated 31 October.

65. The letters set out in five numbered paragraphs matters which the claimant said amounted to a "fundamental breach of contract, anticipated breach of contract and breach of trust and confidence".

66. In the first paragraph the claimant said that it was only on one day that she had worked without registration.

67. In paragraph two, the claimant accepted there was an obligation on the respondent to investigate with immediate effect whether her working on that day had put patient's lives at risk. She said that the nature of the incident and the length of time during which it happened would have determined a reasonable time scale for that investigation to be concluded. In evidence the claimant told me that she thought a reasonable time scale for that would be two weeks.

68. At paragraph three claimant accused Ms Chenda-Joseph of deliberately refusing to be reasonable and taking advantage of the fact that investigations do not provide a timeframe to "abuse the process and accuse me of offences under Article 44 of Nursing and Midwifery Order 2001 despite being fully aware … that nothing I have done amounts to any offence under Article 44. You have continuously subjected me to undue disproportionate and harsh treatment that fundamentally breaches the contract".

69. In paragraph four she makes a serious allegation. I quote it in full. "Aware that there is nothing that fits the category of the type of outcome you wished, you have taken advantage to manipulate the process and continue to do so, fabricating allegations and gradually building a case for serious and gross misconduct towards a disciplinary hearing and gross misconduct with the potential outcome of dismissal which I consider are in anticipation to breaching the contract. There was no mention of these so-called allegations during the follow up fact finding and investigatory meetings."

70. In paragraph five the claimant complains that she had not been given a reference and objected that Ms Chenda-Joseph wanted to meet with her to explain why she would not do so. She said if those allegations were as serious as claimed there were various opportunities to present them. There was no mention of any of those allegations on 4 or 7 October 2016.

71. Although not set out in this resignation in answer to Ms Wedderspoon the claimant said that she also relied upon the failure of the respondent to provide the documents requested on 26 October as an act contributing to the fundamental breach of contract on which she relied.

72. On 8 November 2016 the respondent wrote to the claimant offering her the opportunity to take part in the investigatory process and gave the claimant had until 16 November to do so. The claimant declined.

73. I am told and accept that on about 18 November the claimant was re-admitted on to the NMC Register.

74. There were further opportunities to participate in the disciplinary investigation offered on 8 December but the claimant declined to do so.

75. The respondent then continued with its fact finding meetings and investigations and then determined the outcome of the investigation. The claimant did not take part in that process and those matters are not relevant for the purpose of deciding whether there has been a fundamental breach of contract in respect of

which the claimant resigned such that she is to be treated as having been constructively dismissed.

Submissions and relevant law

76. I was reminded by Ms Wedderspoon in submissions of the test to be applied by the tribunal in determining this issue. She referred me to two cases, the case of **Frenkel Topping Limited v King** UKEAT 0106/15 and in the judgment of the President, Langstaff J, she referred to paragraphs 11 to 14.

> 11. The Claimant could only claim to have been unfairly dismissed if the employer had broken its contract with her, if the breach was sufficiently serious to be a repudiatory or, to use another description, fundamental breach of the contract, if she had resigned at least partly in response to the breach, and if before doing so she had not by her actions or inaction affirmed the contract. As to that, the Claimant alleged that there had been seven matters, each of which individually or all of which cumulatively constituted a repudiatory breach. The thrust of her case was that the breach or breaches upon which she relied were breaches of the implied term of trust and confidence. It is worth restating the classic formulation of that term, as derived from **Malik v BCCI** [1997] UKHL 23 though this formulation derived in turn from earlier cases, including in particular **Courtaulds Northern Textiles Ltd v Andrew** [1979] IRLR 84:
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> > **"… the 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."**
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> 12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of **BG plc v O'Brien** [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in **Malik v BCCI** [1997] UKHL 23 as being:
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> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
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> 13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in **Morrow v Safeway Stores** [2002] IRLR 9.
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> 14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In **Woods v W M Car Services (Peterborough) Ltd** [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in **Tullett Prebon plc v BGC Brokers LP & Ors** [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.

77. Ms Wedderspoon also referred me to a decision of the Court of Appeal in **Omilaju v Waltham Forrest London Borough Council** [2005] ICR 481.

78. Ms Wedderspoon's focus on this case was the statement at paragraph 22:

> "…an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective."

79. I recognise that it is always difficult for a claimant who is bound to be very largely subjective in considering decisions taken about her employment. I should record that this is a not untypical case where the claimant has been unable to separate out the subjective and the objective. A considerable part of her witness statement described how she felt. She talked about the respondent, as she felt, attempting to destroy her career. The respondent probably could not and did not as a matter of fact do that but the claimant's case is that is what they were seeking to do. I do not see this of the claimant in any critical way. I mention it to underline the need for a judge to apply the test objectively.

80. In her final submissions, the claimant relied in particular on the change in the statement of Ms Chenda-Joseph, an unreasonable time frame for bringing matters to her attention and the inconsistencies that she said the Tribunal had witnessed.

Conclusions

81. The claimant's primary allegation was that the KD allegations had been fabricated.

82. To test this, I considered the accounts that I have recited to see whether they suggest fabrication. The first account in time was that of Ms Pheasey, page 214, she made a statement to the effect that she had been spoken to by KD on 19 September, that she herself had gone to Ms Chenda-Joseph on 20 September and by 21 she records that Ms Inman had moved KD.

83. The second account was that of Ms Inman. Ms Inman said KD was working on 18 September until 9.15 p.m. At some point KD had been told by the claimant that the paperwork was not good enough. On 19 KD had spoken to her and was upset, that she had gone to another manager who said she would move KD and KD was moved. She reported KD wanted to talk to Ms Chenda-Joseph, that KD was not at work on 20 September and that she on that day spoke to Ms Chenda-Joseph. The next day KD was back from work but on the other unit and she thought that KD had spoken to Ms Chenda-Joseph on that day.

84. On 7 October KD's account was that she worked until 9.30 p.m. on a date that was not stated. The claimant had criticised her English. She said she spoke to Lauren Inman but she did not mention Paula Pheasey. She said she had gone to hospital with chest pains. By 19 September she had moved units and she had spoken to Ms Chenda-Joseph.

85. Ms Chenda-Joseph's two statements recite that Paula Pheasey had spoken to her first and then she conducted the development review and then Paula Pheasey and probably Lauren Inman had spoken to her all on 20 September.

86. It is the claimant's case that primarily Ms Chenda-Joseph was responsible for fabricating the KD allegations but, in my judgment it would have to be the case that Ms Inman, Ms Pheasey and KD were all involved in this fabrication of allegations.

87. I have to say that that analysis together with the evidence of Ms Chenda-Joseph simply does not persuade me on the balance of probabilities that the claimant has begun to make that out. There are differences in the accounts but there are substantial correlations. They are not the sort of differences or correlations in my judgment which suggest to me that there has been fabrication. These accounts show the sort of pattern that I would expect to see where different people on different occasions are trying to give their accounts.

88. More notably it is clear that there were conversations between Ms Chenda-Joseph and each of the other three women which occurred prior to the claimant's registration having lapsed. It is suggested by the claimant that Ms Chenda-Joseph should have informed her of these matters earlier.

89. In my view that is not a realistic suggestion. Where allegations are made which might lead to serious concerns about a person's conduct in my judgment it is appropriate for them not to be raised with the person concerned until steps have been taken by the employer to investigate. That is generally good employment practice. It seems to me this should emphatically be appropriate practice in the case of a professional person whose career at some point might be at risk if the allegations were to be upheld and reportable to a professional body such as the NMC. On my finding that those matters arose in the way that the documents suggest and as Ms Chenda-Joseph recounted, then until the investigation had been undertaken it was appropriate for Ms Chenda-Joseph not to raise them with the claimant at an earlier stage.

90. I reject the allegation of a fabricated case being brought against the claimant. It is not borne out by the facts. In reaching this conclusion it has occurred to me also, although this was not put to any witness, that the fabrication would have to have involved, at least to some extent, members of HR as well. In my judgment the alleged fabrication is even less likely for that reason.

91. Having rejected the allegation of fabrication I reject also, by the same underlying reasoning the allegation of building a case of gross misconduct in order to achieve the dismissal of the claimant. Without the finding of fabrication there is nothing in my judgment that suggests the investigations were not conducted "without reasonable and proper cause".

92. As to the failure to provide a reference, whilst it was possible for Ms Chenda-Joseph to have written a reference on 7 or 10 October, had she done so, she would have been bound in those circumstances to refer to the potential safeguarding issue and to the investigation and potential disciplinary proceedings. Ms Chenda-Joseph's case was that in an earlier case she had

encountered while working for another employer in similar circumstances she had not written a reference at that stage. For that reason she did not feel she could put her name to a reference at this point for the claimant.

93. Whether she was right or wrong in that as a matter of professional practice I am not I a position to judge. I see the force of the claimant's argument that without a reference she was disadvantaged. Equally, I see that providing a reference which referred to the matters under investigation might have been disadvantageous. My conclusion is that this probably does not weigh strongly in the balance in contributing to a factor that amounts to a fundamental breach of the contract of employment. It is not necessary for me to go further than that but I do to this extent. It seems to me that some employees might have given a reference in guarded terms at the stage that the claimant sought one, others might not. Given that the claimant admitted already one serious concern it seems to me that it would be a counsel of perfection to say that failing to do so on this occasion showed the necessary intent to abandon the contract.

94. The claimant accepted that an investigation would have to be carried out after 1 October 2016. Whether Article 44 of the regulations provide that it is a criminal offence to practice as a nurse without being registered may be open to debate. I have little doubt that the underlying proposition may be correct. That appears to be the view of the NMC and Ms Chenda-Joseph was entitled to take that view.

95. The only other matter concerns failure to provide documents in advance. Given the background, the claimant argues that it was wrong not to provide all those documents at the time. In my judgment they were not refused but the claimant was required to wait until Ms Chenda-Joseph returned. She did not do so. She resigned by a letter dated 31 October which was the day upon which Ms Chemda-Joseph returned. The delay was not in itself unreasonable. The proposed meeting of 1 November was not a disciplinary hearing but a fact-finding interview. For those reasons this criticism is of less force.

96. Taking all these matters into account in this way I have come to the conclusuion they do not amount to a breach of the fundamental implied term.

97. For the sake of completeness, I record it was not suggested by the respondent that if I were to find contrary to my finding that the claimant was in fact dismissed that the respondents were seeking to argue a potentially fair reason fo that dismissal.

98. For those reasons, I hold the claimant was not dismissed. Thus, she cannot be unfairly dismissed. The claim for unfair dismissal itself must fail.

Application for costs

99. After I had announced to the parties the effect of my judgment, Ms Wedderspoon made an application for costs.

100. Orders in respect of costs are governed by rules 74 - 84 of the Employment Tribunals Rules of Procedure 2013.

101. A judge is required to consider making an order for costs, in a case where the receiving party has been legally represented at the hearing, in the circumstances set out in rule 76(1) which are where: “a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or any claim or response had no reasonable prospect of success.”

102. If it is decided that any of those circumstances apply then there is discretion to make an order of costs.

103. The order may be for: a specified sum not exceeding £20,000, for an agreed sum or for the whole or part of an amount determined by a detailed assessment in either the tribunal or a County Court.

104. The rules provide that the judge may have regard to the ability of the paying party to pay in deciding both whether to make an order or how much that order should be. As a matter of fairness this should usually be considered whether it is raised by the party or not.

105. The respondent submitted that the claimant's conduct of the proceedings had been unreasonable in that the claimant had no prospect of establishing a number of matters. These were set out in a letter from the respondent’s solicitors to the claimant of 4 August 2017. The letter was a warning that there might be this application. letter. Together with the case of **Frenkel Topping,** to which I have referred already, the respondent drew to the claimant's attention the provisions of Rule 76 concerning the power of the Tribunal to make an order for costs.

106. The letter warned the claimant that if she pursued the claim the solicitors would likely be instructed to make a costs application on the basis that the claim had no reasonable prospect of success and that she had acted unreasonably in pursuing it. It set out these matters: there was no evidence that Ms Chenda-Joseph or anybody else victimised or embarked on a campaign to remove the claimant; the respondent had no option to follow its internal procedure, saying that it would be seriously remiss of the respondent not to investigate the allegations; it was standard practice to list the allegations, there was no evidence whatsoever to suggest the allegations were fabricated; the timescale of the investigation was reasonable – there was no delay in dealing with it; and the claimant was given ample opportunity to engage in the process.

107. I am satisfied that those four points were justified by the findings that I have made.

108. The letter also said that Ms Chenda-Joseph had no other option but to decline to provide a character reference to the NMC and that her decision could not rationally be said to amount to an act of bullying or victimisation. I have already stated that I do not necessarily agree that Ms Chenda-Joseph had “no other option” but I do not find that her failure to do so amounted to bullying or victimisation.

109. The letter indicated that the costs were likely to be between £4,500 and £5,500. The claimant responded on 11 August 2017 saying she would not

withdraw the case and she submitted that the second statement by Ms Chenda-Joseph damaged or further damaged her credibility and she reserved the right to ask the Tribunal for an uplift.

110. In fact the respondent's solicitor's costs in this case were in the order of £7,000 to £8,000 excluding VAT. Of that sum the respondent sought the costs incurred between 4 and 12 August which were £1,110 in relation to 11 hours work detailed on a billing guide report together with Counsel's fees of £2,650 excluding VAT.

111. Ms Wedderspoon took instructions and confirmed the respondent was registered for VAT (and thus could reclaim that) and therefore I excluded VAT from the calculation of costs. The total sum by my calculation sought was therefore a total of £3,760.

112. The claimant's companion who attended for moral support spoke for her in resisting the application for costs. He asked me to refuse to make the order. He explained the claimant was not seeking money but justice. He explained the claimant could not get employment and it was made hard for her to do so and she had a number of debts.

113. The claimant told me she had got new employment with ASE healthcare earning £2,104 net a month. Her partner is also a Registered Nurse. She declined to tell me his income saying he was working through an agency. The claimant said she was working on a similar pattern.

114. The claimant told me that her partner pays their rent of £400 a month. She pays £50 a month to a debt management agency in respect of her historic debts and she gave me a list of what she paid out in round terms. By my calculation it came to about £1,000 a month, against an income of £2,100 a month.

115. I accept that, in addition, the claimant has to buy clothes for her and her children and contribute to the other household expenses. The claimant told me that with her partner she had savings of over £1,000. , Mr Dixon reminded me she was still seeing her GP as a result of the effects of this case. He told me the claimant could not afford representation.

116. I noted that the claimant's own updated Schedule of Loss (500) indicates that she had incurred fees for legal advisors in a total sum of £5,280. It appears that that some she has so far paid £3,130.

117. The claimant has also paid Tribunal fees of £1,200. I asked Mr Dixon why, when those fees were reimbursed, as a result of the Supreme Court striking down the employment tribunal fee regime, why that should not also be counted be counted to the claimant's credit and which would help her pay any order made in favour of the respondent.

118. Mr Dixon submitted that that would be an injustice because some people had not been able to pay fees to bring their claims to the tribunal. Whilst I accept that may be true, it is nothing to the point. I have to decide this application on the facts which apply in this case.

119. Mr Dixon also told me that the claimant was also paying £250 a month to her family in Zimbabwe.

120. The respondent argued, in support of an order being made, that the claimant has not disclosed details of her partner's income as a fully qualified Nurse who is in work.

121. It seemed to me that the appropriate way of looking at the financial implications is this. The claimant has currently savings of £1,000. She has paid £3,000 to lawyers. She is entitled to receive a refund of tribunal fees of £1,200. Whilst I accept the claimant may not be able to pay the entirety of the sum claimed by the respondent immediately her financial circumstances do not provide a compelling reason not to make some order for costs. Furthermore, her financial circumstances are not such as to make an order in the sum which the respondent seeks. That sum of £3760 is in, my judgement, a fair and proportionate figure.

122. Therefore, the question is whether I should exercise my discretion to order that the claimant should pay the fees.

123. Having regard to the analysis as set out in the costs warning letter, I accept that the respondent is entitled to say that the conduct of this case was unreasonable in that the claimant pursued a case that had no reasonable prospect of success. It could perhaps even have been maintained that at an earlier stage than 4 August, the claim had no reasonable prospect of success.

124. The fundamental plank of the claimant's case that the respondent was in fundamental breach of contract was her contention that the allegations against her in respect of the staff support worker KD were fabricated. In my judgment the claimant did not at any stage have any reasonable prospect of proving that. She fell far short of doing so at this hearing. Therefore pursuing that case on that flawed basis was unreasonable.

125. Those were serious allegations. They are allegations of impropriety which, were they upheld, could have well have affected the reputation of the employer and may have resulted in the registration of Ms Chenda-Joseph herself being in question. For a manager to fabricate such allegations about a registered practitioner would raise a serious issue of professional misconduct. For that reason to make those allegations without a proper basis was unreasonable. To pursue a claim to a hearing, despite a warning appropriate terms, was unreasonable conduct.

126. For the avoidance of doubt, I wish to make it clear that I have not taken into account the fact that the claimant had, on her own account, legal assistance in bringing the complaint forward. I simply do not have any information as to what the nature of that assistance was. I have therefore decided this application as if the claimant had not received advice whatever that might have been.

127. In those circumstances, I consider that my discretion to make an award for costs is triggered and in the exercise of that discretion I consider it appropriate to make the award in the sum sought by the respondent of £3,760.

128. I make no order concerning the date for payment.

129. In conclusion, I offer my apology to the parties for the length of time it has taken to produce this written judgment and reasons. I regret that this should be the case but it is due to the pressure of other judicial work.

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Employment Judge Tom Ryan

Date 13 December 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
14 December 2017

FOR THE TRIBUNAL OFFICE