



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Brooks

Respondent: University Hospital of South Manchester NHS Foundation Trust

HELD AT: Manchester **ON:** 7, 8, 9 and 10 March 2017
13 March 2017
(in Chambers)

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr T Kenward, Counsel

Respondent: Miss A Smith, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair (constructive) dismissal fails and is dismissed.

REASONS

1. The claimant brings a claim of constructive unfair dismissal following her resignation from the respondent's employment on 7 March 2016. The claimant relies on a number of incidents (separately and/or together) which I set out below as comprising individual acts or a course of conduct breaching the implied term of trust and confidence, some of which, she alleges, also were a breach of the implied term of a safe working environment and a failure to investigate a grievance.

Claimant's Submissions

2. The claimant submitted in a List of Issues prepared for the Tribunal a number of incidents which she relied on as forming the above referred to course of conduct. She submitted that the questions the Tribunal had to answer was:

- (1) Was the claimant dismissed?
- (a) Did the respondent breach the implied term of trust and confidence through the various acts or omissions relied upon by the claimant as giving rise, whether separately or cumulatively, to such a breach, namely the acts and omissions as cited in her resignation letter and/or as summarised in section 8.2 of her ET1 claim form and/or as described in detail in her statement of evidence as set out below? The matters referred to were:
- (i) Causing the claimant to be overstretched from 2013 as a result of the department in which she worked being understaffed and no adequate changes being made.
 - (ii) The failure to take any or any adequate step to deal with the claimant's department being under resourced.
 - (iii) The behaviour towards the claimant of Don Sturgeon on or around 9 April 2016, including in a meeting attended by other members of the department, after the meeting in his room and later in the claimant's room.
 - (iv) Allowing the respondent, Don Sturgeon, to a complaint of bullying made by the claimant to pursue a complaint against the claimant without giving any consideration to the motivation of the respondent, Don Sturgeon.
 - (v) The failure to act upon other concerns and/or complaints raised regarding Don Sturgeon (by other employees).
 - (vi) The failure to relocate the workplace or workstation of Don Sturgeon rather than the claimant.
 - (vii) The failure to provide the claimant with appropriate reassurances regarding any arrangements for her return to work and/or handling of any future behaviour on the part of Don Sturgeon towards her.
 - (viii) The delay in raising the disciplinary allegations with the claimant.
 - (ix) The delay in dealing with the disciplinary allegations against the claimant.
 - (x) The pursuing of a flawed disciplinary case against the claimant and/or the failure to find that any other disciplinary allegations made against the claimant were unfounded.
 - (xi) Notifying the claimant that the disciplinary case which she had to meet was that of an allegation of having deliberately altered a tender submission and then finding her guilty in respect of different allegations to those set out in the case brought against her, namely that she "did instruct pharmacy staff to

insert the highest prices from other bidders into missing fields in the financial template of the Bath ASU bid” and that she had accepted a late submission.

- (xii) Finding her guilty of having “instructed” pharmacy staff as aforesaid when the contemporaneous evidence simply referred to this having been her suggestion.
 - (xiii) Refusing to allow the claimant to challenge the finding of misconduct and/or the outcome of the investigatory/disciplinary process.
 - (xiv) The threat of dismissal through the capability process.
 - (xv) The failure to disclose documents in response to the claimant's request.
 - (xvi) Indicating to the claimant that the Bravo solutions portal had been checked in relation to the issue of a late tendered submission when access was password protected and the respondent did not have the password in order to have checked the Bravo Solutions portal.
 - (xvii) Failing to consider adequately or at all the impact of the respondent's continuing treatment of the claimant on her health.
 - (xviii) Did the respondent breach the implied term in respect of the duty to promptly redress grievances? (Relying on the matters above and the failure to address these issues adequately).
 - (xix) Did the respondent breach the implied term in respect of the duty to provide a suitable working environment and to take reasonable care of the health and safety of the claimant at work? (The claimant relies on the matters set out at paragraph 1(a) insofar as they adversely impacted on her working environment and her health and safety at work).
- (2) If so, were the aforesaid breaches, whether considered individually or cumulatively, sufficient to constitute a repudiatory breach entitling the claimant to resign and treat herself as having been constructively dismissed?
- (3) Did the claimant leave in response to the breach or breaches and not for some other reason?
- (4) Did the claimant leave without delaying too long in terminating the contract in response to any breach so as not to be deemed to have waived the breach?
- (5) If the answer to (1)-(4) above is “yes”, is the respondent able to show a potentially fair reason for any dismissal which falls within the Employment Rights Act 1996 section 98(2)? (The respondent did not argue this).

Respondent's Submissions

3. The respondent's submissions are dealt with in my conclusions.

Witnesses and Evidence

4. For the claimant I heard from the claimant herself; Jacqueline Cottrell, Supplies Manager for the respondent and Janet Dalton, employee of the respondent previously within the Supplies Department as Deputy Supplies Manager. For the respondent I heard from Emma Carter Employee Relations Advisor, Gareth Davies Deputy director of Finance at the time, Jonathan Hilton Head of Procurement from September 2015.

5. There was an agreed bundle of documents.

Findings of Fact

My findings of fact are as follows:

6. The claimant began working for the respondent on 4 January 2010 as an interim procurement manager. She had previous experience at other hospitals undertaking this role. She was appointed to the permanent position in August 2010. The Head of Procurement at the time was Lisa Hewitt and she had advised the claimant she was hoping to build a team in procurement to meet the needs of the Trust. The claimant's evidence, which the respondent did not dispute to a large extent, was that the procurement team was never sufficient for a Trust of the size of the respondent. The claimant struggled throughout this period working at home to keep up with the work. There are a number of reviews of the hospital's costs throughout this period by eminent accountancy consultancy firms such as KPMG and PWC, and there was a final one by Newton Europe.

7. In September 2014 Head of Procurement, Lisa Hewitt, resigned and decided to return to the private sector. At this time the Deputy Director of Finance, who was in effect the line manager of the whole section, Mr Gareth Davies, asked the claimant and the Supplies Manager, Jackie Cottrell, if they would consider running the department together, which they agreed to do so if the department as filled with additional staff to cover their absence and the understaffing.

8. Mr Davies advised that he was looking at various solutions at this point in time and that in line with the continuing theme throughout the NHS he was seeking an amalgamation of sorts with another hospital department nearby in order to save money by eliminating duplication of costs. He was liaising with Stockport Hospital Trust for that purpose at that time, and as an experiment it was agreed that their Head of Procurement, Tracey Stockwell, would manage both departments for an experimental six month period doing two days a week but being available, as far as she could, the rest of the week. Tracey Stockwell took up this position in or around September 2014.

9. It was accepted by Gareth Davies, that this was a difficult time and no progress was made in any further amalgamation between the two departments.

10. In December 2014 there was a redundancy exercise called MARS (Mutually Agreed Redundancy Scheme), and the claimant applied. It was supported by her managers and from the details provided it was supported because there was an ongoing plan to improve the staffing of the department by amalgamating with Stockport and then there would be additional slightly lower level procurement staff to cover the claimant's work. However, as by the time a decision was made it was clear this was not going to happen, i.e. by January 2015, the claimant's application was refused.

11. The claimant said that she had a meeting with Gareth Davies and Tracey Stockwell which was embarrassing, where she was asked to explain why she had applied. However, this appears to be a normal meeting that was part of the process and nothing turned on this as Gareth Davies and Tracey Stockwell both supported her application. The claimant suggested that she would only have received three months' pay in respect of this because she did not have five years' service. Mr Davies did not know. However, again nothing really turns on this as the respondent did not attempt to make out a positive case that the claimant went off sick for some reason connected with the refusal to make her voluntarily redundant. This was hinted at because the respondent said that the claimant had said to Tracey Stockwell on being refused that she would make life difficult for the Trust as a result. However, we did not hear from Tracey Stockwell; it was hearsay from Mr Davies, and the claimant denied that she had said this.

12. Following the decision to terminate the arrangement with Tracey Stockwell it was decided to recruit an interim Head of Procurement full-time. This would be done on a contract basis and the claimant and Mrs Cottrell attested that they were both looking forward to this as this would be a real help. On 8 April Mr Don Sturgeon was appointed as an interim manager, the claimant said on a weekly contract as she had seen the contract through her role. However, Mr Davies was unable to confirm the exact details and the notice period required by Mr Sturgeon's contract.

13. The claimant had a brief one-to-one with Mr Sturgeon and Mrs Cottrell on his first day where nothing of note occurred. However, the following day she informed Mr Sturgeon that she had a 9.00am de-brief meeting with an unhappy supplier who did not win a tender and did he want to sit in, but he declined.

14. There was a procurement meeting at 10.00am which he did agree he would attend. The claimant explained this was an informal weekly meeting to assist the members of the procurement team, of which there were four permanent members, by going through each contract and stating if they experiencing any particular problems internally or externally, and to register where each contract was up to. There was a worksheet explaining details of each contract from launch to award status. The claimant said that the department had created the worksheet themselves as although there was software available the Trust had been unable to purchase it and they had been holding this meeting for a length of time, certainly under Lisa Hutton and Tracey Stockwell's management. The claimant led this meeting. It took an hour.

15. At the conclusion of the meeting the claimant asked Mr Sturgeon if he wanted to add anything. He stated that the worksheet and the format were useless and that she had wasted one hour of everyone's time. However, in the email she sent immediately after this meeting, the next day, the claimant said:

“On concluding our meeting (one hour) he opened with that he ‘had never attended such a bad project meeting in all his life’ and ‘we had just wasted an hour of everyone’s time’. He then went on to make uninformed comments on our work plan. I explained that the Trust had not been able to be financially supported with a contracts database and that the initiative was taken to build our own excel spreadsheet that captures all awarded contracts throughout the last five years and served us perfectly well to deliver a £2million CIP two years ago and is in fact used by our finance team to capture the leasing portfolio. He did seem to be bothered that my fellow Band 7 plus 2 x Band 6s and 2 x interim Band 5s had to unfortunately witness this as it was obvious he had no duty of care for the team and just wanted to demonstrate a draconian management technique of ‘who’s boss’. He was informed that this was our weekly catch up on projects (purposely made informal) whereby colleagues update the team on their own projects with a view to discuss and gain assistance from team colleagues to help achieve a good outcome. He was further informed that due to the constant changes of the CIP team (as people kept leaving) it was difficult to gain an up-to-date comment on each project. I tried to point out that I had no jurisdiction over the interim CIP team but he was not interested in any explanation.”

16. CIP is Costs Improvement Programme which was a separate programme but also looked at the contracts the Trust awarded. The claimant said that she felt totally humiliated in front of the team.

17. From the claimant's own words the tirade was aimed at the whole team and I find that Mr Sturgeon did use the word “we” because of the wording of the claimant's email. However, as the claimant was responsible for the meeting and responsible for the team it is understandable that she felt that this was mainly aimed at herself.

18. Tracey Stockwell asked Mr Sturgeon to remain to speak to him and ten minutes later he asked the claimant to come to his office. The claimant understandably thought that Ms Stockwell had spoken to him (Tracey Stockwell was in a handover period with Mr Sturgeon) and advised him to apologise. However, Mr Sturgeon then continued to say the meeting was poor to the claimant and said that the Chief Executive could walk in any minute and would not be happy with that. The claimant felt that his continued criticisms when he had only known the claimant for 24 hours and had not seen her work was extremely upsetting and she managed to say that she did not appreciate his public humiliation of her in front of the team. She said she was sorry her previous exemplary work record did not suit his lack of procurement knowledge and he replied “no need to apologise”. However, clearly that was not the gist of what the claimant was saying.

19. In the same email sent to Zara Payne on 13 April 2016 the claimant described what happened next as follows:

“The team left the meeting room and he stayed behind with Tracey Stockwell. Approximately five minutes later he asked me to join him in his office whereby I innocently believed he would apologise for his outburst. However this was not the case and he went on to admonish me for not accepting that my work was poor. At this point I informed him that I did not appreciate his public humiliation and that he had put our under-resourced team into shock. I have since learnt that this was brought to his attention as he has informed members of the team we are now under review and that is what he had been brought in to do as his background

was in change management and he will be assessing everyone. I unfortunately became upset but he told me not to get upset and that I must realise the CEO could walk in at any minute.”

20. A further incident which the claimant did not refer to in her email was that he came into her office around 4.00pm and she described it as “intimidating me by saying that no-one was sat at the other desk in my office and perhaps he would move in”. She said he had his own office for confidential reasons and she described the events in her witness statement as he ignored this and began to rub his hands right across her desk in a waving motion saying “I could learn a lot by sitting here”. The claimant was made nervous by this and stated: “You are not the first HOP I have had to train and you won’t be the last” to which he said, “We will see”. The claimant said, “He left the office and I became upset”.

21. Mr Davies stated in evidence he had advised Mr Sturgeon that he could sit in the claimant’s office and he would learn a lot, and although in his witness statement he said this was a later point in time, on reflection in evidence he stated it was earlier, before Mr Sturgeon started. I accept the claimant’s evidence that Mr Sturgeon’s demeanour in saying this was not an innocent one and she felt intimidated by this.

22. The claimant went home early, did not sleep and the next day she phoned Gareth Davies to explain she was too ill to attend and explain what had happened. She rang Gareth Davies the next day, could not get through to him and advised his secretary on the Monday she would not be attending work. Later that morning she picked up a message on her mobile from Mr Sturgeon asking where she was, which the claimant was extremely distressed by as she did not want any contact with Mr Sturgeon after what had happened. She does refer to this in the email referred to above. She said:

“I am shocked that this bully has gained my personal mobile number and has left a message saying he has not heard from me. I am too upset to deal with this dreadful self absorbed person and I do not know how he gained my personal mobile number. I have tried to get a doctor’s appointment today but was told to phone back at 8.30 in the morning. Given the circumstances and the fact that this person’s behaviour has caused my absence I do not wish to have any further contact with him.”

23. On Tuesday 14 April Mr Davies emailed the claimant and said:

“Apologies I didn’t phone you back yesterday. I had a full day session. Unfortunately Geraldine didn’t take your contact number yesterday so could you please email your home/mobile number so I can give you a call. Would it be ok if I call after 5 as I am in meetings 12.30 to 5?”

24. The claimant responded “yes” and advised him that she had a two week sick note which she had sent to Jackie Cottrell.

25. Mr Davies then emailed later on the Tuesday to say he had tried to call her but the phone diverted. He said he was sorry to hear she would be off for two weeks. He went on to say:

“I have spoken to Don and he has assured me that his comments were not intended to be a personal attack aimed at you and he is keen to resolve things. I have also spoken to Tracey independently and she confirmed that Don's comments were directed to all the participants in the meeting.”

He went on to say:

“How can I help you return to work? Would a meeting between me, you and Don help on your return? In the interim I would be grateful if you could forward the sick note for Don's attention, if you would scan in and email it to Don and myself. Under the Trust's policy Don is your line manager. He will therefore need to have sight of the note. He said he was not in again until Thursday and would be happy to speak to her then.

26. The claimant was also upset by the fact that Mr Davies suggested she should send the sick note to Mr Sturgeon. Mr Davies accepted in evidence that it was common practice for sick notes to be sent to Jackie Cottrell; however this practice was not correct. There was no explanation for why he was not happy to tolerate the accepted practice in this instance. The claimant also disputed the information that Mr Davies had gained from Mr Sturgeon and Ms Stockwell. Mr Davies expanded in evidence to say that Tracey Stockwell did feel guilty because she had been in charge for six months and that this meeting had taken place under her management and she had never queried it or criticised it. He felt that Tracey was the most independent witness as she was not employed directly by the Trust and she was leaving in any event. However, we did not hear from Tracey Stockwell. Mr Davies explained that he understood the claimant had raised a complaint with him and he was dealing with it informally by having a word with Mr Sturgeon and with Ms Stockwell.

27. The claimant replied to that email on 15 April, copied to Andrew Jones, Head of HR. She said in this email:

“Thank you for the feedback on your enquiries. Unfortunately I find it even more concerning that you accept that the new interim Head of Procurement would aim this type of behaviour at the whole team he had taken over in just 24 hours. Are you therefore saying you are happy for this type of behaviour? I am sure if you were to check with your own staff that attended said meeting you would say otherwise and that in the main it was directed at myself.

I am completely surprised that a thorough investigation into this person's behaviour has not been undertaken as I believe you would be very surprised at some of the comments this person has made to other members of staff, one in particular directed following his outburst ‘that he was just playing games’. It is understandable that both yourself and Tracey Stockwell have a vested interest in this interim Head of Procurement, especially as you both interviewed and elected him to the post, but as I mentioned to you on the phone, I am sure the Trust has taken up substantial background checks on this candidate given that this section of the Finance Department is located a half mile away from the main team it would seem appropriate not to speak to all the UHSM staff that were present and I am sure if the Trust was interested in gaining an account from the permanent members of UHSM that were present the Trust would have no alternative than to

dispense with this interim and find a more suitable motivational candidate that would work well with a dedicated team.

That said, we were not asked how things were going during the six months of the part-time HOP. Although her health suffered with stress and high blood pressure with trying to run UHSM on two days a week, not once was our team approached and asked how we were. As you know, this complete lack of support and being understaffed was the reason for my MARS application with all the constant talk of the department being outsourced and the fact that at every opportunity replacement posts were only being offered on shorter hours and fixed term contracts. Our department felt totally abandoned and unsupported.

I was informed that my MARS application had been turned down due to the lack of staff in the section but I was happy on hearing that a new full-time candidate would be found. This would alleviate the pressure on both myself and the other Band 7 in the department, only to find that a bully had been sought that was determined to start shrinking the department as soon as possible. This you would have confirmed if only you would have taken the opportunity to speak to your own staff and not just gain the views of the person in question and the part-time HOP from Stockport who is looking forward to leaving and regaining her own health.

Regarding my sick note, the original was posted yesterday and a copy was scanned to Jackie Cottrell which has always been the protocol in the five years I have worked for the Trust. I will be following my doctor's instructions and due to my anxiety I will not be having any involvement with the person who has caused my illness and I expect that the Trust at the very least will undertake a duty of care towards my health. My doctor has asked me to return to the surgery in two weeks to assess the response of the medication he has given me, and at that point I hope to be well enough to start a formal grievance procedure."

28. The claimant never did put in a formal grievance. It was pointed out on her behalf that the respondent's Dignity at Work Policy does not require this. The procedure begins with an informal stage which states that if the employee cannot confront the 'bully' themselves they could ask a manager, HR professional or TU representative to do this. The formal stage should be instigated where the informal procedure has failed or the bullying etc. is persistent or the instance is so serious and is severe such that the employee feels unable to raise a complaint through the informal procedure. The respondent believed throughout it was dealing with the matter at the informal stage.

29. On 16 March, unbeknown to the claimant at the time, Mr Sturgeon sent an email to two people in the Pharmacy Team, Darren Staniforth and Alison Gregg, regarding "Chemo outsourcing/dose banding tender issues – strictly confidential". The email began: "Can you please confirm that I have addressed the issues below as you can recall them. Also were you asked to exclude Bath ASU at any time for a late submission or non compliance?". The two members of the pharmacy team, as became clearer later on when this matter was investigated, did not respond to this very detailed email. The issue was whether the claimant had 'instructed' the pharmacy team to insert prices into a tender where the tenderer (Bath ASU) had failed to provide prices in the proper format, and that she had instructed them to use the highest price from the other tenders in order to complete the assessment of the tender.

30. There was an email the next day to Mr Davies about the same matter was not disclosed and presumably was unavailable, although this seemed odd that this would not have been kept.

31. In his email Mr Sturgeon suggests that the claimant on 9 April was stressed and concerned and that this was because on Thursday 9 April the tender that was the subject of the email had been won by Hospira and that the claimant was overheard discussing the outcome with Jackie Cottrell and Janet Dalton about a possible challenge to the tender process by another contractor, Bath ASU. On 9 April the claimant had written to the supplier and had advised Mr Sturgeon that she had written to them and she did not think they would challenge the result. It has to be said reading this email up to this point it appears that one construction which could be put on it is that Mr Sturgeon was providing another reason why the claimant might have been stressed and gone off work following 9 April as an alternative to the narrative presented by the claimant that Mr Sturgeon had been bullying towards her. Mr Sturgeon in the email said that Tracey Stockwell had said to him that this might be the reason she had not turned up.

32. On Monday 15 April Mr Sturgeon said as the claimant had not attended for work he met with AG and ES from Pharmacy who advised they were expecting a challenge from Bath ASU and the meeting with them had not gone well, He said that the pharmacy staff had mentioned to him at that point that they had a concern about the blank prices and the tender analysis had been completed, under advice and instruction from the claimant. Mr Sturgeon said that Mr Staniforth had explained that as the Bath tendered submission had blanks in the pricing area the claimant had given "clear and specific instructions to DS and AG that the blank pricing fields should be populated with the same price submitted by the most expensive supplier for that product". Mr Sturgeon said: "I find this highly irregular and in serious breach of OJEU legal process". Mr Sturgeon said Mr Staniforth told him there was a specific instruction from the claimant that he was not happy with but he complied with the request and this information was used in the tender evaluation.

33. There was an email sent to the claimant by Mr Staniforth on 2 February which stated:

"I have finished the financial analysis and as per your suggestion where Bath ASU had not provided enough information to complete it I have assumed the most expensive price from other suppliers. Where this has happened the line price is in red. The information is in all the copy of dose banding XLS file."

34. In Mr Sturgeon's view at this point in time the tender should have been declared as non compliant as the correct information had not been provided or Bath ASU should have been asked to revise their submission. Further, he understood that Bath ASU was late with their tender submission but yet it was still accepted. He went on to say that, however, "it was clear Bath ASU would still not have won the tender and that the final outcome of the tender was sound". He was in dialogue with Bath ASU to try and prevent a challenge. He then went on to explain the risk should the matter escalate.

35. It should be explained that OJEU is a reference to the rules required by the European Union in respect of large tenders where the process should be transparent in order to ensure a level playing field between contractors within Europe. Non

compliance can have serious results up to having to pay a fine the equivalent of the tender. In this case the tender was between just under and just over £2million.

36. Mr Sturgeon ended his email with:

“I believe that the instruction to use the most expensive prices quoted by a competitor in the tender for a supplier which had blank pricing fields in their submission was a serious misjudgement which requires further investigation.”

37. There were emails which detailed that the claimant had advised the pharmacy department to do this. The emails which were retrieved from 2 December 2014 stated:

“Hi Darren, although three submissions out of four was received on time – Bath ASU did not send the hard copy/CD-Rom as requested, stating that they ‘could not load onto a CD’? – also they made no attempt to deliver the hard copies either (minus the CD). However they did upload an electronic version via the tendering portal (this was not requested). My question to you is – how important do you believe that their submission would be to the Trust? As I could apply to a director of finance for permission to accept should you feel it would be crucial to this process? If not I would have accept the excerpt below from the tender policy within the Trust’s SFIs. Thanks, Sheila.”

38. The insert said:

“Late tenders – late tenders will only be considered where there are exceptional circumstances: tenders received post submission deadline but prior to the opening of the other tenders may be considered after the designated officers have concluded that the delay was no fault of the tenderer – only in the most exceptional circumstances will a tender be considered which is received after the opening of the tenders and only then if the tenders have been duly opened and have not left the custody of the Chief Executive or their nominated officer or if the process of evaluation has not started.”

39. Mr Staniforth’s reply was copied to Tracey Stockwell, Duane Williams, Alison Gregg and Anne O’Brien:

“Hi Sheila

As long as it does not jeopardise the rest of the process I would like to be able to consider the submission from Bath ASU. Your small print does not set out in what form the tender needs to be submitted so I would have thought that the form in which it is delivered is up for debate. In either case the answer is that we would like to have them in the process as I believe they have some products that would be of interest to you.”

40. The claimant replied:

“Not an issue, we will gain permission. In the meantime please see attached snapshot of instructions to tender...”

41. More details came out in the eventual investigation, but for the moment to say that the claimant said this was Duane Williams’ tender he was part of the CIP team

and for some reason she was supervising it at this point. She also said she had taken advice at the time due to a fortuitous phone call for another reason from the respondent's lawyers, Hill Dickinson. The conversation was: was it worth the risk of ruling Bath ASU out on the basis of being late as technically they might seem to be on time? They agreed it was not.

42. Mr Davies decided not to conduct any investigation at this point as the claimant was off sick.

43. The claimant had a number of Occupational Health appointments called in this context "Employee health and wellbeing service consultation report". The first one was on 7 May. This stated that her GP had diagnosed her with work related stress and she was taking appropriate medication. She was having nose bleeds and sleep disturbances as a result of the medication. The report went on to say:

"Today Ms Torres-Fernandez was very tearful and upset by the incident that occurred at work. I have given her the details of the employee assistance programme to access counselling and she tells me she would like to avail herself of this service. Ms Torres-Fernandez is not currently fit for work and I will review her in two weeks' time to discuss her progress and how the barriers for a timely return to work can be addressed."

44. On 22 May the same Occupational Health nurse stated that the claimant had accessed support via the employee assistance programme and was finding it helpful. She went on to say:

"Ms Torres-Fernandez was still very tearful and anxious during the consultation today, particularly when discussing the incident that occurred at work. She tells me she had a meeting with yourself and a HR representative and she felt she had been able to explain the circumstances surrounding the incident and this had helped. A return to work can be facilitated once there is some resolution of the situation as Ms Torres-Fernandez sees it."

45. On 1 June Mr Davies summarised a health review meeting held on 20 May. In this he stated:

"It was extremely helpful to meet with you and to understand in detail the circumstances that have resulted in you being absent from work. You explained your absence was mainly the result of a work based incident with your interim line manager. I confirmed I had initiated a meeting with your line manager to understand his version of events that led to your absence from work, where he confirmed he would be willing to meet with you to put right what he believed to be a misunderstanding that occurred as a result of this meeting and to support your return to work. Nicky Ashtiany-Scott offered a process of mediated support through HR colleagues to enable this meeting to take place. However you declined this offer and confirmed that you did not feel able to return to your position within the Trust while the interim line manager remained in post. You also shared your concerns regarding what you felt was a general lack of resource that had been allocated to the department over a long period dating back to when Lisa Hewitt was manager.

I confirmed I would need to consider all the facts relating to your absence, the current interim arrangements for the Head of Procurement and the shortly to be completed review the Trust had commissioned from the North West Procurement Development Team (NWPDP).”

46. Mr Davies explained that the scope of this review was:

“...to make recommendations on how to develop the procurement function in order to make it more fit for the purpose to meet the future financial challenges faced by USHM and the NHS in general...It is anticipated the review will include recommendations around the Head of Procurement post that has remained substantively vacant since September 2014. The review is scheduled to be completed before the end of June and it is my intention for the next two weeks to retain the status quo until the NWPDP has completed its review.”

47. Mr Davies explained in tribunal that he wanted a permanent solution to all the problems with the team as he understood that not only was the claimant’s illness the result of the incident with Mr Sturgeon but also the understaffing of the department was also an issue for her. He wanted to be able to solve both problems at once and the review team, he was hoping, would come up with a long-term “sustainable solution”.

48. The claimant saw Occupational Health again on 9 June and again they stated that:

“Ms Torres-Fernandez was still very anxious during the consultation today and was visibly distressed when mediation was discussed. She tells me she does not feel able to consider this at present. Her return to work could be facilitated once there is a resolution of the situation as Mr Torres-Fernandez sees it and I advised that you maintain open dialogue to address these issues.”

49. There was a further meeting on 24 June with the claimant and HR and notes were taken of that meeting by Jackie Cottrell. There was a lengthy discussion at this meeting about the understaffing of the unit. The claimant stated she was “at the end of her tether at this stage”, which is why she applied for MARS. She said that Mr Sturgeon’s comments were a complete shock and she repeated what he had said. She said that the information presented at the meeting was the information presented to Finance, and Finance had never complained. She said that in the meeting afterwards Mr Sturgeon said it was poor work and he was not going to accept it. She said another colleague had told her he was nasty, vitriolic and threatening with them in their first one-to-one. She said he was quietly aggressive with her. She stated she had never experienced anything like it before; it was like a lunatic was in charge.

50. At this stage she mentioned that “Don had informed other members of the team they had previously been threatened in work with a knife, a gun and had prevented a member of staff from interfering with his motorbike tyre”.

51. She stated she had, “Major concerns of how the Trust was handling this” and that she could “not consider returning to work while this man is still in post”. Again she discussed the under-resourcing of the department. Mr Davies said that he had told Mr Sturgeon to change his style as it was not working; that he appeared to be

stunned but he had taken on board what Gareth had said. He had stated he did not mean anything personally. Again mediation was mentioned but declined by the claimant, as she was advised by the GP, EHW and the counselling service not to have any interaction with him. She was asked how she would feel about returning to work if “Don” was not in post and was not replaced i.e. if they could not find another interim, and she mentioned the option mentioned last year about her and Jackie Cottrell sharing the job with appropriate backfills. A further EHW report of 26 June said the same matter about the barriers.

52. In respect of the allegations from colleagues, Ms Cottrell gave evidence and stated she had emailed Mr Davies in July 2015 but that he had not dealt with the matter, but they had had a quick conversation where he had said “what can I do apart from banging your heads together?”. Mr Davies had denied this in evidence but Ms Cottrell produced an email of 16 July which said that:

“Morning Gareth,

I don't want to trouble you but I've now had an altercation with Don this morning. Unfortunately I reacted to him. I am not prepared to put up with this. When you have five minutes some time I'd like to speak to you. There are too many blurred lines of responsibility in this department.”

53. Mr Davies could only explain the fact that he had not responded to this email and had not produced a copy of it himself by the fact that firstly he had left the Trust, but also that his inbox was often full and that emails could not be received in those circumstances. This was disputed, however, as the claimant's witnesses stated that the sender would get a message saying it could be sent because the addressee's box was full. On balance I believe Ms Cotterill's evidence about the conversation as otherwise there would have been further email communication.

54. The claimant was advised on 17 July that her sick pay would reduce to half pay from 8 August.

55. On 20 July the claimant had another OHU appointment which again said:

“In my opinion the main barriers to return are non medical in nature and need to be resolved operationally as more could be achieved by management rather than clinical intervention. A return to work in any capacity is unlikely to be successful unless the root triggers are resolved. Mrs Torres tells me her anxiety increases significantly when she considers returning to work without the cause of her absence being fully addressed.”

56. Mr Davies wrote to the claimant again on 23 July in response to a letter of 20 July which had not been received. He said it was his intention to contact her in any event regarding developments in the procurement team, “as I am very pleased to tell you the Trust has now managed to secure £60,000 to invest in the team following recognition that the team is under resourced particularly in your area”. He then advised that a partnership with Central Manchester NHS Foundation Trust was being considered and they were looking at collaboration options with their procurement and supplies team. This included the provision of a secondee to cover the Head of Procurement and Supplies at USHM from the beginning of September. Mr Davies stated in evidence:

“I wanted to make sure we had a more sustainable solution to this position, rather than merely replacing one interim with another which would be unsettling.”

He stated:

“As a result I have been able to serve notice to Don Sturgeon which will terminate mid September once he has completed a handover to the colleague from Simon Walsh’s team. From August to the remainder of his contract he will be based with the CIP team and therefore will only directly line manage members of that team.”

57. He went on to say:

“In response to your references to Don Sturgeon I can confirm your comments regarding the incident on your first of working with Don were taken seriously. I explained I had spoken to Don regarding the incident and made it very clear what behaviour is expected while he is working at UHSM. I have spoken to your colleagues regarding their experience of working with Don. Mediation was suggested as a possible option as Don was keen to explain he felt the events were a misunderstanding and mediation is something that the Trust actively encourages. It was felt appropriate for consideration at that point. As you had only worked with Don for less than 24 hours you had not raised a formal grievance regarding Don’s behaviour therefore a formal investigation was not invoked.”

58. He went on to say that the options for a return to work were, given that if she did not feel comfortable working in the main office in International House where Don would be based whilst managing the CIP team, were as follows:

- “(1) I would be happy for you to return to work based in the main finance office for a short period and undertaken UHSM work. This working with Jackie Cottrell who I hope will be leading the operational side of the procurement supplies team in the interim; or
- (2) Due to your level of knowledge and experience in the procurement team myself and Simon Walsh feel you would be well placed to work with Simon to undertake some project work based either in the finance office at UHSM or with the procurement team at CMFT until Don leaves UHSM.”

59. On 13 August 2015 the claimant emailed Gareth Davies referring to a phone call she had had the day before with Mr Davies, where they had agreed the claimant would return to work on 24 August. She stated:

“I do feel much better in the knowledge that the Trust has finally agreed to terminate the interim HOP Don Sturgeon with his leaving date being 15 September. I would have waited to his actual departure however I am conscious that colleagues are about to go on annual leave and are extremely concerned that the department is left without a senior permanent member of staff. I also thank you for suggesting an alternative office for me to work in. However, I did not think it appropriate that I should be the one to leave the office I have worked in since starting at the Trust and having to constantly explain to colleagues why I am not based with the team. As you know, I have stated all along that I was not prepared to work for this interim and you have now found a way forward for this

which will be suffice [sufficient]. You did reiterate as per our previous telecom discussion that you wanted me to return to my usual responsibility of running the business as usual i.e. expiring procurement contracts that both myself and the senior buyer, Nigel Stoute, were tasked with for the last 5½ years. You also confirmed that the interim HOP Don Sturgeon would be finally leaving the Trust on 15 September and that he would only engage with the CIP team of interims and have no involvement with myself or Nigel who will endeavour to rescue the expiring contracts. We also discussed my lack of confidence in the Trust and the timescales of dealing with this episode and in view of this I request if you would be kind enough to give me assurances that Don Sturgeon has been made fully aware that he has no jurisdiction over my work and therefore has no need for engagement, and most importantly that if he lapses into another outburst he will leave the Trust with immediate effect. Would you be kind enough to reply to my email that the foregoing has been discussed with Don Sturgeon and I in turn will assure my advisers that this is the case...I do hope that you will understand my reasons for this request. Not only is this a normal working habit for me in risk assessing agreements that we undertake on behalf of the Trust, but I would not be protecting my own health if I failed to gain this agreement and for obvious reasons cannot rely on the Trust and in particular the HR department to protect a permanent member of staff from a bullying interim given the four months that this has taken to date.”

60. On 19 August 2015 Mr Davies replied. He stated that she would report to Jackie Cottrell for the interim period until the CMFT secondee was in place. He went on to say:

“Don has no direct responsibility for your work and you are not required to report to him. Clearly I cannot promise that you will never come into any kind of contact with him. You are aware I spoke to Don about the situation that gave rise to your absence to work and he was made aware that this management style was not in line with my expectations at the point of taking on a new team. I will of course monitor the position closely over the period of your return until Don’s end date mid September. I am also happy that extra managerial support will be in place in the procurement and supplies team at UHSM from the beginning of September. I however cannot guarantee that you will not need to interact during the period until Don leaves the Trust, but I expect the highest degree of professionalism from all parties in line with the Trust’s values.

In more general terms I can assure you that the timescales in respect of managing your return to work are partly reflective of our desire to respond patiently and with thought towards your health, taking into account advice from EHW. It would be useful to understand what it is you believe the HR team should have done differently in this case as it seems to those involved that this case has been treated with the greatest care and attention but we are always keen to get feedback.”

61. He also recorded that there would be a phased return for the claimant and that he looked forward to her return on the 24th.

62. On 23 August 2015 the claimant replied:

“Unfortunately I have suffered a setback with my health brought on by your email below which I was saddened to receive given the contents of its focus. I am currently not well enough to address the issues. I have made an appointment with my doctor for Monday 24th and will update accordingly.”

63. Mr Davies replied he was sorry about this but he believed that the sentiments in his email of 19th were in line with the conversation they had had on 24 July. In evidence Mr Davies said that he could not give an assurance that he would immediately dismiss Mr Sturgeon as he felt there would be an obligation to look into any incident reported even though Mr Sturgeon was an agency worker. It was also put to the claimant, but she felt that as he was on a weekly contract this could happen.

64. On 8 September the claimant had another appointment with Occupational Health with a consultant physician. I have to say I found that this letter quite difficult to follow. He began by saying he was aware he only had one view of the situation but that the distress was largely around an interpersonal problem with a particular new manager. He went on to say:

“I can give you simple medical advice and assessment of fitness for work. However, that may not get to the real issues and help you nudge the situation forward so I will offer some thoughts on the broader situation.”

65. He agreed that the claimant was not medically well enough to return to work. She is suffering from what he called “acute unchronic uncertainty”. She had had underlying stresses (presumably a reference to the understaffing) and the acute distress came against that background and was the final straw. He stated the following:

“I suggest that the HSE risk assessment domains are in place to start. They are demands, control, role, relationship, support and change. The meaning of the words is largely self evident. The first thing to acknowledge is that any complex NHS organisation has all of these stressors and that they cannot be removed completely. Management action has to be ‘as far as reasonably practicable’ but listing and acknowledging the issue goes a long way to satisfying a ‘suitable and sufficient risk assessment’ and it reassures staff that their concerns are understood.”

He stated:

“My suggestion is that you and Ms Torres-Fernandez meet to look at how she perceives the residual risk to her emotional health within the department and how you see it, and what steps are in progress to mitigate the risks. My reading of the situation is that unless she understands what she is coming back to (in terms of demand and other domains) and understands her value and place in the system she will struggle to resettle. She will be still be experiencing ‘uncertainty’ which is the real problem for someone who likes ‘order’...”

66. I understand from this that he was suggesting either a formal risk assessment or some sort of informal meeting where they would go through all the things the claimant was still upset about. This is now a different situation from the previous situation where the claimant was stressing she was only upset about Mr Sturgeon. a

Obviously by 15 September Mr Sturgeon would be gone and that barrier would be completely removed and there was no chance that the claimant would come in touch with Mr Sturgeon. It would be fair to say that at this stage the “goalpost had moved”. Mr Davies agreed that it would be fair to say the respondent’s attitude hardened at this stage, it was understandable as they felt they had done everything the claimant wanted, put her under no pressure to return but she had asked for assurances they could not give and overreacted to an email setting this out. The period of cross over would only have been two weeks and it had been the claimant’s choice to come back earlier than Mr Sturgeon’s leaving date. At the very last minute the claimant was raising new matters.

67. It was decided then that if the claimant was not now returning as agreed she it would be necessary to investigate the matters raised regarding the Bath ASU tender.

68. In conjunction with the HR Mr Davies then wrote to the claimant on 25 September stating that they were going to investigate “serious issues that have been brought to my attention that call into question your integrity and honesty and will require immediate investigation”. These were the matters relating to the earlier chemotherapy tender and the email of 16 April from Mr Sturgeon.

69. Mr Hilton, who was the new interim Head of Procurement, was going to be the investigating officer. Mr Davies explained this by saying that they had decided to put this off because the claimant was ill; that they had removed all the barriers to the claimant returning to work in their view but the claimant was still not returning to work and they felt that it was reasonable to now proceed with the investigation.

70. It was stated that Mr Hilton would be investigating that:

- “(1) During February 2015 you deliberately altered a tendered submission that exposed the Trust to a high level of risk; and
- (2) You have been engaging in work activities/events in relation to your private business whilst you have been off sick with stress to the extent that this appears to have taken priority and compromised your potential phased return to work.”

71. The second limb related to facebook posts which showed the claimant had attended events at a boutique called The White Ribbon, and that she was listed as a director of that business. The respondent stated that the matter had been referred to them anonymously and they were obliged to look into it.

72. Mr Hilton then began his investigation by interviewing the two pharmacists, Darren Staniforth and Alison Gregg.

73. The claimant attended her interview on 2 October with Mr Hilton and Rebecca Bailey from HR. The claimant was accompanied by her union representative, Kate Sobczak. The claimant’s first question at this meeting was which tender it was, and she was advised it was the dose banding pharmacy tender. The claimant was provided with no documentation at this stage, even though the emails were available. The claimant did remember it and said she had taken the tender as far as issuing the intent to award and she had conducted a de-brief meeting with a disgruntled supplier named Bath ASU who had been forced from the meeting

because they felt they had the cheapest prices but they had not completed the financial section of the tender submission. She went on to say:

“Pharmacy had completed the financial evaluation section due to the complexity of it due to the different dose sizing. ST had informed Pharmacy that Bath ASU could be eliminated from the tender process on the basis they had failed to complete the financial section. However due to the limited number of suppliers Darren Staniforth wanted to keep them in the tender process and ST agreed that they did not have to be knocked out of the process. ST stated that there should be an email trail relating to this from January/February 2015. ST stated that the financial section of the tender was 20% of the overall marks and that she had suggested that they could take the other two bidders’ prices and put the lowest of those in the gaps to give them something to work with for scoring purposes. Pharmacy had made the decision to use the average price of the other bidders to fill in the gaps in the Bath ASU financial section.”

74. Mr Hilton said that it looked like the most expensive prices had been used and she said they would need to speak to Mr Staniforth about this as he made the eventual decision that the most expensive would be used to fill the gaps. She stated they could not go back to ASU and requested they completed the gaps because that was not allowed in the procurement process. She said nobody had expressed any concerns about this approach. However, in evidence the claimant also said that no other tender scoring processes had been conducted in this way as they had always been asked for and had picked up as part of the Q & A procedure process. She said she was not aware the tender was submitted late as all the tenders went to the Chief Executive’s PA and were opened by the Finance Managers. She was asked whether she considered the tender was compliant. She said: “Yes, due to the omissions in the finance section but Pharmacy wanted to keep them in”. She said if it was up to her she would have regarded them as non compliant and she did tell Mr Staniforth this was an option but advised there was this other approach and he chose to score via that method.

75. The claimant was asked whether she thought there was a risk involved. She said: “Did not believe there was a great risk of any challenge as the tender was incomplete and would not put the Trust at risk”. She stated she would never expose the Trust to risk as in the past she had worked very hard to protect the Trust from risk despite the staffing struggles faced by the department. She explained she would not have adjusted anything by choice but she felt very confident there was no risk to the Trust and the department wanted to keep Bath ASU in the process. According to the notes, she then said that she had had a conversation with Darren in which he provided the highest price figures for the excel spreadsheet which ST then inserted into the tender documentation. She could not recall if she discussed it with Tracy Stockwell. She said there was an audit trail. She was advised that the matter had not been raised earlier because she was off with work related stress.

76. Regarding the working at the boutique matter, she explained that the business was formed 18 months ago and because her daughter had lived in Spain she could not get a credit rating so the claimant had agreed to be a director on the basis that she would not receive a dividend and was not involved in the operation of the business, which had been agreed with the accountants. She said she had worked in the shop a few times in 2014 and attended one board meeting a year. She did not do any work for this; had not assisted in the recent opening of the new branch and her

other daughter was going to replace her as director and be responsible for the running of the new branch in Sandbach. She said she did attend a fashion show on 11 September as it was a Joshua Tree charity event and as a Parish Councillor she was invited as a guest. She had no involvement in the organisation of it.

77. In his interview with Mr Hilton on 21 October Darren Staniforth said:

“Along the way it was suggested where there wasn’t a price to assume the most expensive – worse case scenario...A phone conversation between Sheila Torres-Fernandez and myself, sent email to Sheila to confirm and send the information. Seemed odd to me but sent it over.”

78. Mr Staniforth said that Sheila was mainly supporting the procurement although somebody else was also involved later on. Mr Staniforth explained that Bath had not given the individual prices, only the batch costs, so they could not complete the scoring matrix and they had made a late submission. He said Sheila had told Alison and him about it. He did not know how late. He was asked to accept it and explained:

“Sheila’s asking if we want to accept and I said ‘yes’. There were different circumstances, accelerated time to submit within ten days. Why there was a late submission, it was complex. It was very difficult to turn around. There was a lack of time for parties to complete.”

79. He was asked the conversation with Sheila on the phone regarding scoring. Mr Staniforth said:

“Haven’t done this so it could be more expensive. In the end we used the batch costs and it was still more expensive. I said ‘should we exclude’ to Sheila? We got the impression it would cause more ruckus. Didn’t expect them to do so much back process.”

80. “Who’s decision was it to keep Bath in?” he was asked. “Yes, Sheila’s decision. Ran the numbers. Would be close if the numbers were assumed to be the most expensive. It was a better way than excluding”. He said that Bath had been intending to challenge but that they had run the batch costs through the tender and they still would not have awarded it.

81. In the interview with Alison Gregg she informed Mr Hilton that she had not been directly involved as far as she recalled but that Darren Staniforth had possibly had a phone call about it; and that Sheila had advised they could not go back to Bath because otherwise they would have to go back to all the tenderers, and “then we were told to put the highest value in”. She also said that Don had sent lots of information to her and Mr Staniforth and asked them to sign a statement but they had not done so.

82. In relation to the late tender, there was no evidence the claimant had sought permission for a late tender. There was correspondence with the Director of Finance regarding an earlier extension of the deadline by one day but this was not this situation. The claimant in evidence said she could not be sure she had not obtained a later extension, but in her witness statement and evidence to the Tribunal she appeared to suggest that because she had spoken to Hill Dickinson she was

satisfied they could accept a late submission. However Mr Hilton did not have this information at the time.

83. On 3 November 2015 the claimant had emailed Rebecca Bailey regarding her statement from the investigation which she had corrected, and she said she had a number of questions but she was waiting for the statement to be agreed first. Ms Bailey replied on 3 November 2015 saying, "Thank you for returning your statement. Just to clarify, we do not send these back out for further agreement", and she would now include it in her management statement of case alongside the original to be considered at the conclusion of the investigation process.

84. The claimant replied saying that her queries were:

- (1) Timescale for process – what are these likely to be?
- (2) Further clarity of the actual allegation – can she provide a copy of the actual altered tendered submission?
- (3) Could she clarify who alleged the act of misconduct?
- (4) Can she explain fully, given that she did not actually award this contract how it has exposed the Trust to a high level of risk?
- (5) Can you provide me with a copy of the risk assessment that the interim Head of Procurement undertook with this contract before his final decision to send out his award letter?
- (6) Regarding the disciplinary policy, can she explain why under section 5 (proceed to investigation) the Trust did not comply with 5.1.4 and left the matter for five months until after the interim Head of Procurement had ceased to work for the Trust?

85. Ms Bailey replied on 11 November 2015:

86. "In response to your queries for many of the below questions the answers will be contained in the findings of the investigation report...In terms of the HR process led aspects, we hope to have the investigation report writing completed by the end of November. If it is decided a hearing is required this will be scheduled as soon as possible following completion of the report...The investigation was not commenced immediately due to your sickness absence in relation to work related stress. It was hoped the matter could be investigated after your recovery and return as per the return to work. However, unfortunately this did not proceed as expected therefore a decision was taken to commence the investigation at that time since it was unclear how long it would be before you were able to return to work."

87. Mr Hilton concluded the claimant did instruct Pharmacy to insert highest prices from other bidders into the missing fields and failed to follow Trust procedures when she accepted a late submission. He decided that this was misconduct. He dismissed the issue regarding the working in the boutique.

88. In relation to the first allegation, in his report, which the claimant was to receive later on, he referred to the respondent's definition of misconduct as follows:

- “(6) When an employee knowingly or through neglect makes any false, misleading or inaccurate oral or written statement or entry in any record or document written or automatically processed.
- (7) When an employee without sufficient cause destroys or mutilates any record or document for the purposes of the Trust or alters, erases or adds to any entry in such a record or document written or automatically processed.
- ...
- (21) Failure to follow UHSM policies and procedures.”

89. In relation to allegation 1, which was “around the time of February 2015 ST deliberately altered a tendered submission that exposed the Trust to a high level of risk”, it was said that information had come to light from Don Sturgeon on 17 April “indicating that Sheila had instructed the pharmacy staff who were evaluating the tender to insert the highest price from other bidders into the Bath ASU pricing document to populate the missing fields in their financial submission”. He said this instruction was identified as a risk because should Bath ASU had formally challenged the process under EU Remedies Directive this could have led to the contract being held as ineffective and the Trust could have had a significant financial penalty imposed upon it. In the event, following de-brief meetings and further correspondence, Bath ASU did not formally challenge the procurement process.

90. The fact was referred to that Mr Sturgeon had raised a concern regarding the tender being submitted late but being accepted, when procurement regulations state a late submission should be excluded due to non compliance. He noted that the claimant thought that she had agreed with Pharmacy to insert the average price for the bidders; however this was clearly incorrect from the emails. However, the claimant did not have the emails at the time, of course.

91. The claimant, as stated at her interview, did not know the Bath ASU tender was submitted late. However, again she did not have the advantage of having seen the emails. In evidence the claimant would say that she understood that it was submitted via the portal from Duane Williams, the CIP member of staff whose original responsibility the bid was.

92. Mr Hilton noticed there was no record of the Director of Finance ever having received a request from the claimant to accept a late tender. He concluded that the claimant did instruct Pharmacy staff to insert the highest prices from other bidders into the missing fields in the financial template of the Bath ASU bid, and that she did not follow the Trust’s procedures regarding accepting a late submission. He said that this substantiated allegation did constitute misconduct but was not sufficiently serious to be referred to a disciplinary hearing and recommended that the misconduct should be dealt with informally in line with clause 5.1.10 of the USHM disciplinary policy. This says that:

“At the conclusion of the investigation the investigating officer will recommend an appropriate course of action based on his or her findings. Options will normally be as follows:

- Take no action due to insufficient evidence
- No case to answer
- Deal with the matter informally through informal counselling or other methods such as discussion
- Offer the parties counselling or conciliation which will need to be agreed with the parties...
- Identify any training and development required
- Proceed with a capability
- Proceed to a formal disciplinary hearing”

93. In respect of appeals, an appeal was available in accordance with 5.8 against “formal disciplinary action”. This meant that the claimant could not appeal against Mr Hilton’s decision.

94. Mr Hilton was cross examined at length about the fact that used the word “instructed” which was a word that was contained within the email of 16 April from Mr Sturgeon and also it was assumed in the 17 April email which had not been disclosed. Mr Hilton said no, it was a word he used, and that although the claimant was now using the words “suggestion” or “advised” Pharmacy to put that amount in, he felt that “instructed” was still correct as she was the expert procurement person in that situation, not the pharmacy staff, and they were highly likely to take her advice.

95. A health review meeting was held with Mr Hilton, HR and the claimant on 24 November when Mr Hilton updated the claimant on changes to the team, the collaborative working with Central Manchester and the fact they were looking for finding for an additional post. He also discussed completing the trust’s joint stress risk assessment form in line with the recommendations from EHW, and the claimant agreed to continue to review this. Mr Hilton agreed to draft a work plan for the claimant to give her some clarity. However, what he did provide to the claimant in respect of the job role was a copy of her job description plus a list of outstanding tenders. He also agreed to set up regular one-to-ones when she came back to help address some of her issues. She was also recommended courses run by the Trust such as change management and emotional resilience. She was advised her sick pay was due to expire on 3 January 2016.

96. On 30 November 2015 the claimant was emailed with the outcome of the investigation and it was discussed at a meeting on 14 December 2015 when the claimant said she was pleased with the outcome. In evidence the claimant said “not really pleased but relieved”. However, the notes do say she was pleased with the outcome, although she was uncomfortable that the investigation was carried out while she was still on sick leave but she had not complained about this at the time.

97. It was also agreed it would be helpful if the claimant visited the office before Christmas prior to her return to work, and it was felt that the claimant was positive and keen to return to work and Mr Hilton certainly felt they had reached a point to enable her to return.

98. On 16 December 2015 a separate meeting was held with Mr Hilton and Nicky Ashtiany-Scott from HR to discuss the outcome of the disciplinary investigation. The claimant raised some mitigating factors regarding the fact that the previous Head of Procurement had only worked at the Trust two days a week. Mr Hilton also explained at this meeting the idea of bringing the two teams together in procurement, that he would have overall responsibility and he said the claimant seemed happy with this plan.

99. He recorded this in a letter of 16 December 2015, which also recorded the outcome of the disciplinary hearing. His letter ended with:

“We have therefore discussed the outcome with a view to learning from this experience to ensure the Trust’s SFIs are followed in the future. For clarity I explained that in future if there is missing information for a tender submission the process is to seek clarification and with regards to late tendered submissions to seek a dispensation from the Head of Finance.”

100. Regarding the claimant's mitigating factors he said:

“Whilst the investigation is already concluding I am willing to consider any suggestions that will improve communications between our team members and make our processes more robust and transparent.”

101. He hoped the issue was now resolved.

102. On 17 December 2015 the claimant replied. The claimant then raised a number of issues. She said the outcome letter did not concur with the email from Rebecca Bailey and did not satisfy the questions she raised around this factious claim. (I am not sure whether she meant factitious or fictional in respect of this). She stated that:

“It is unacceptable that the trust invited these allegations made against me by the person I accused of bullying. [I think by ‘invited’ she means ‘investigated’]”

103. She complained about them waiting five months until 24 September...“conveniently one week after the bully had left on 15 September 2015”.

104. The points she made were that she was not originally responsible for the tender. It was led by Duane Williams who reported to Tracey Stockwell. She had no involvement in supervising him. Duane left the Trust after a few months and she was asked to take on the project. She also asked to see the board award document. This appeared to be relevant to the claimant as Mr Sturgeon had awarded the tender and any risks should have been recorded in that document. Why did he award the tender if the work was not correct on it? She said she was not prepared to accept the outcome of his findings. He had requested on three occasions “to search the S-drive on my emails for documented evidence to support my defence that this had not been forthcoming” and the only thing that had been shown to her was the tender receipt document for Trust HQ which was before she was responsible for the tender. None of the answers to her questions were contained in the letter (the claimant had not seen the report at this stage). She stated:

“Only a full redaction of the offending allegation will be acceptable. I am sure you understand that these allegations put a serious question mark over my employment with the Trust that I have worked for for the last six years.”

105. Mr Hilton replied on 23 December 2015, providing the claimant with the management statement of case which in effect was his report, which was not normally disclosed to individuals but he hoped it would answer her queries including the appendices although he had removed some as they were confidential interviews. He also reiterated that the investigation had not begun immediately because of the claimant's absence off sick and that he acknowledged her comment that “the dose banding tender may not have originally been allocated to you, however the email trail collected as part of the investigation [which he enclosed] confirmed that you were responsible for advising Pharmacy on the acceptance of a late tender and also in relation to the scoring of Bath ASU”. He believed the provision of the email trail negated the need to review the S-drive and if she did not feel that was the case she should please specify what documents she required them to look at. He also clarified that the risk occurred during the Alcatel period when it became apparent to Bath ASU that pricing other than that submitted by themselves had been inserted into their final template. The contract would only have been formally awarded once the Head of Procurement at the time was satisfied that their concerns had been allayed and that there was minimal risk of a formal challenge. Consequently he had answered all of her questions. She was then invited to a further health review on 13 January 2016.

106. At the health review meeting on 13 January 2016 the claimant was accompanied by her union representative. Mr Hilton expressed concerns with HR that matters had not been progressing as they would have hoped. The claimant said she was still feeling stressed through the allegations made against her but she felt the information that he had sent to her on 23 December was useful. It was Mr Hilton's evidence that the claimant agreed there was evidence she had instructed the pharmacy team to insert figures into the Bath ASU data on the financial spreadsheet and Mr Hilton said that the allegation would not be retracted. I accept Mr Hilton's evidence on this point I found him a credible witness with good recall. The claimant said in relation to a return to work her main concern was due to staffing levels she felt she could not return unless there was an increase in staffing levels, and Mr Hilton explained the current situation with a bid which could potentially result in a team of six and the combination of the two teams.

107. Ms Ashtiany-Scott informed the claimant that if she was not able to return the normal process would be to progress to a health review capability hearing which could result in the termination of her employment on the grounds of ill health. The claimant said that she would bring a Tribunal claim if that happened.

108. On 20 January 2016 the claimant emailed Mr Hilton to ask formally for various emails and documents as follows:

- (1) Intent to award letter.
- (2) De-brief letter to Bath ASU.
- (3) Copies of emails on the above subject where I copied the Head of Procurement.

- (4) Appendix of the investigation report (an email from the claimant).

109. At this stage I find the claimant was stalling for time by this stage as there was no genuine need for these documents .I find this because the claimant did not take up the opportunity to receive or recover some of them after 29 February (see below) and that she persisted in complaints after some of them were sent to her.

110. Mr Hilton replied to the 20th January letter on 26th January saying that:

“While I accept you feel there were inaccuracies in the investigation report, as discussed at length at the recent health review meeting on 13 January referring back to this information would not alter the outcome of the investigation. With regard to the bath ASU having submitted a tender via the portal, we have checked the system and can find no evidence. The outcome in the investigation was that no formal action was taken and as a consequence there is no formal disciplinary sanction on your file and no right of appeal. We have discussed the matters informally as per my recommendations as investigating officer, therefore we will not be re-opening the investigation and the matter is closed.”

111. Mr Hilton summarised the 13th January meeting in a letter of 27 January 2016. He noted that HR had stated in the meeting that no disciplinary action would be noted on her file as it had been addressed informally through management discussion but it could not be retracted. He also stated that although she had copied her email to Tracey Stockwell he felt she should have sought direct advice from the manager rather than just copying them in. Regarding the claimant stating that she believed there was evidence showing the Bath ASU tender was not submitted late, he had checked the portal and could find no evidence of a tender being uploaded by them. He recorded what had been said about the capability procedure and that the claimant had stated she would claim unfair dismissal as she felt:

“...The bullying behaviour of the interim was not appropriately managed and you held the Trust largely responsible for your stress. Kate noted that you did not submit a formal grievance and pointed out things had changed as the department was now under new management and I am based on site five days a week, therefore she stated if you wanted to you had the opportunity to return as part of a team that is now receiving further investment. We also recalled how I had already shared with you my expectation for your job role and the projects that we are currently managing as a team to try and address the anxiety you are feeling about what was expected of you. We asked you if the additional resources of the procurement team was approved would you be able to return to work, to which you replied ‘yes’ and we agreed the following actions:

- (1) Another referral to EHW, asking whether any reasonable adjustments should be considered or whether you should be considered for redeployment.
- (2) A meeting on Thursday 4 February to complete a stress risk assessment and start to plan a phased return.

(3) What the situation was regarding receiving further counselling.”

He noted that the claimant had said she was happy for the meeting to take place at International House as suggested and he sent her another copy of the stress risk assessment policy. I note he confirmed he had discussed her job role and the improvements in the staffing situation which had taken place and others which were imminent.

112. Mr Hilton made another referral to EHW and invited the claimant to a further meeting on 4 February 2016 to complete the stress risk assessment and plan a phased return to work. The claimant did not attend that meeting.

113. The claimant wrote again on 7 February 2016 stating that she:

“.....had witnesses who agree the submission was indeed received on the portal we were using at the time.”

In essence challenging the assertion the portal had been checked and asking for the documents discussed on 13th January.

114. Mr Hilton replied on 11 February 2016 that, “After discussions with HR we are of the opinion that there is no benefit in providing the requested documentation”, and he confirmed that the portal had been checked – the Bravo Solutions portal; he went on to say

“We would really like to move forward now and concentrate on getting you back to work and on strategic procurement team as detailed in the email I sent you on 3 February. Can you confirm your availability to meet on 18 February to complete the stress risk assessment and confirm if you will be attending the EHW appointment scheduled for 16 February?”

115. Whilst I did not have the email of 3rd February it contained confirmation of the approved improvement to staffing in the procurement team.

116. EHW interview went ahead and they reported that the claimant was still feeling distressed and had an adjustment disorder (mixed anxiety and depression), “and she does not feel able to return to work at present”. The doctor advised her that further medical intervention would not help and she needed to get to a point where “she feels that all investigatory, managerial and interpersonal issues were resolved. She wanted to feel valued and welcome and she need to look in detail with you at the residual risk from workplace stressors...”.

117. On 18 February 2016 the claimant replied to the letter of 11th February reiterating her belief the portal could not have been checked as she knew that the licence had run out. She expressed her disappointment with how she had been treated.

118. She stated that the documents were important to her, “especially in the light of spurious allegations that were brought against me after five months of sick leave

absence. This, Jonathan, typifies the lack of support I have received from the Trust". She also went on to say that in effect she did not believe he had checked the Bravo Solutions portal as she believed that the license had expired and therefore that this was an error. She stated that she had explained at the last EHW that within two weeks of his report she had received a devastating letter containing an allegation made by the new line manager, the same one that she had complained about bullying her:

"It would appear that no-one sought advice from EHW about the impact on my health this facious [facetious] allegation would make. I am quite shocked and appalled that HR did not have a conversation with EHW before these allegations were launched. I am also surprised they did not fully check out the credentials of this interim line manager, Gareth, along with HR at the health review meeting stating that his credentials were fully checked. If they had checked him out when I made the complaint they would have discovered that he is not qualified as we informed he was which makes quite a farce that his allegations against me were taken seriously. My doctor is unhappy and appalled at how I have been treated, particularly the failure to deal with this problem at the outset, and I feel I would have made far better process instead of the prolonged time the Trust firstly kept the bully and secondly decided to launch allegations against me by an unqualified manager which the Trust waited until a week after he had left the organisation. Every time I endeavoured to try a phased return I am left with veiled threats, firstly unsupported against the bully, secondly facetious allegations against me, and finally being told at the last health review that if I didn't give a date to return I would be fired. I have still not come to terms with this yet and I have made it clear that I do hold the Trust fully responsible for my illness. I attach the sick note the doctor gave me yesterday."

119. Mr Hilton replied on 29 February and stated that he felt the information released on 23 December was sufficient and there would be little benefit in releasing further information. The aim was to move forward and complete the stress risk assessment with a view to agreeing a return date. He had also confirmed the improvement to the procurement team. He then went on to say: "However, if this is clearly very important to you please see the attached intention to award letter you have requested". He said he did not have access to her Trust emails but had enquiries about them and they had confirmed that if she contacted Colin Owen, Information Governance Lead, specifying the timeframe and the subject of the emails, he would search for that information, or they could do it together when she came in to do the stress risk assessment. The claimant never contacted Clive Owen.

120. Regarding the Bravo Solutions portal, he said there was no error on his part. He confirmed with a colleague on 13 January who had "checked the system for me" and there were no submissions uploaded. He stated:

"We are now no longer actively using Bravo but we do have a read only licence. I have double-checked myself in the last week. There was definitely no tender submission uploaded from Bath ASU."

He went on to say:

"Whether or not the previous interim Head of Procurement was qualified or not is largely irrelevant to the investigation outcome, given that you have admitted on a

number of occasions to the allegation he made against you i.e. that you suggested to Pharmacy that they alter the financial template submitted to Bath ASU. I believe this matter has not been dealt with informally and we should draw a line under it...It was hoped that following assurances about additional staffing you would feel able to return to work as you had pointed out this was the main barrier for the health review meeting on 13 January where you stated if you had this assurance you felt you would be able to return to work.”

121. He therefore invited her again to do the stress risk assessment and invited her separately to a further health review meeting. The claimant never took up the offer to meet with Colin Owen.

122. On 3 March 2016 he wrote to her again asking her if she would attend a health review meeting on 15 March. Her trade union representative was invited to attend also.

123. On 7 March 2016 the claimant replied, resigning. She stated:

“Further to your email of 3 March lack of support from the Trust throughout my illness is unacceptable, firstly by reducing my line manager’s hours from a full-time position to two days a week put untold pressure upon me and the department for six months. When the part-time HOP left due to stress the new interim Head of Procurement who started with the Trust on 8 April 2015 publicly humiliated and intimidated me on 9 April which was the catalyst of my illness and well documented. The Trust failed to support myself and the team in keeping this interim for five months although his contract was on a weekly basis. As I was suffering from high anxiety I was too ill to commence a grievance procedure and I was assured and documented in meeting notes sent to the Deputy Director of Finance on 22 July that they would be dealing with him. I fully believed the Trust would do this, especially as they were now receiving further complaints from colleagues about the interim.

Also on hearing and well documented that the interim would finally be leaving on 15 September I attempted a phased return to duties late August to help cover a colleague’s annual leave. My request for assurances that the interim bully would not engage with me were met with a refusal and I was sent a very upsetting response. I was not made aware that this interim, upon hearing by bullying allegations, had raised a disciplinary allegation against me one week later and the Trust against its own policy kept this allegation from me and waited five months until the interim HOP had finally left the Trust on 15 September, protecting him from examination. The Trust formally wrote to me on 20 September about the allegation, summoning me to a formal investigatory meeting although I was still off on sick leave. I have made it quite clear the actual formal allegation is incorrect. I did not alter a tendered document putting the Trust at great risk. You yourself had changed this allegation from ‘alter’ to ‘advise’ the pharmacy department to use an internal calculation to assist in their findings. At no time have you produced any formal procurement rules to uphold the allegation.

Furthermore, not once has the Trust supported me in accepting the absent interim who made the allegation against me awarded this contract himself, therefore at no time was I putting the Trust at risk. As you know during the

investigation meeting you brought further charges against me that I had opened a late tender. This is incorrect as it was not my tender in the first place. It was an interim on the CIP team reporting directly to the two day a week Head of Procurement. I have felt throughout this investigation I have not been supported and I also felt my constant request for documents over a number of months has been obstructed.

Your further comments regarding the Bravo portal is most surprising given that they are password protected for obvious security reasons and the only two people who had this is myself and an ex colleague who is no longer at the Trust. This has left me feeling totally abandoned by my employers and my confidence shattered. The Trust has failed to consider the impact on my health this investigation has caused. This is illustrated by your lack of contact to the EHW department whom I have been attending throughout my illness to check if this investigation could not have waited until my return to work. After all the Trust had waited for five months until the interim had left the organisation.

I believe the Trust has made my position untenable and I am left with no alternative than to offer my notice.”

124. The claimant then brought a Tribunal claim on 7 July 2016.

The Law

Constructive Dismissal

125. An employee may lawfully resign employment with or without notice if the employer commits a repudiatory breach. Resignation can be interpreted as an election by the employee to treat himself as discharged from his contractual obligations by reason of the employer’s breach. This is known as constructive dismissal and is a species of statutory unfair dismissal by virtue of section 95(1)(c) Employment Rights Act 1996.

126. It was described in **Western Excavating (ECC) Limited v Sharpe [1978]** by Lord Denning as follows: “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”.

127. An employee must act reasonably quickly in responding to a repudiatory breach of contract otherwise s/he may be taken to have accepted the continuation of the employment contract and affirmed the contract. However, mere acceptance of salary without the performance of any duties by the employee will not necessarily be regarded as an affirmation of the contract following an employer’s repudiation. In **W E Cox Toner (International) Ltd v Crook 1981 EAT** it was said that delay by itself was not enough there either had to be an additional factor(s) or continued delay. An employee can work ‘under protest’ but must make it clear that he or she is reserving their right to accept the repudiation of the contract. The EAT also considered this matter in **Chindove v William Morrison Supermarkets Limited [2004]** which said that:

“He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue, that the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case the employee is at work then by continuing to work for a time longer than the time in which he might reasonably be expected to exercise his right he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time, all depends upon the context. Part of that context is the employee’s position.”

128. A claimant can rely on implied or express terms of the contract. Express terms can be written or oral. The claimant relied on the breach of the implied term of trust and confidence in this case as well as the duty to provide a safe working environment and to investigate a grievance.

129. In **Wood v WM Car Services (Peterborough) Limited [1982]** the Court of Appeal approved the development of the implied term of trust and confidence. It was finally given House of Lords’ approval in **Malik v BCCI** in 1997 where Lord Steyn stated that the question was whether the employer’s conduct so impacted on the employee that viewed objectively the employee could properly conclude the employer was repudiating the contract. It is not necessary to show that the employer intended to damage or destroy the relationship of trust and confidence. The court said the Tribunal should “look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it”.

130. In **Malik** the formulation is that the employer “must not conduct itself in a manner calculated and likely to destroy confidence and trust” and it is relevant to consider whether the employer’s conduct in question was “without reasonable and proper cause”. This is not the same as the range of reasonable responses test. However clearly if there was proper cause the claim will fail.

131. In proving breach an employee may pray in aid evidence of past repudiatory breaches even though he waived his right to object to them at the time. **Lewis v Motorworld Garages Limited [1985]**.

132. A failure to make adequate investigations into allegations of bullying or harassment can amount to a fundamental breach of contract – **Reed and another v Stedman EAT [1997]**.

133. Regarding breach of a suitable work environment/health and safety this was established in **Walton and Morse vs Mrs Jill Dorrington EAT (1997)**.

134. The particular incident which causes the employee to leave may in itself be insufficient to justify resignation but may amount to constructive dismissal if it is the last straw in a deteriorating relationship. This means that the final episode itself need not be a repudiatory breach of contract although there remains the causative requirement that the alleged last straw must itself contribute to the previous continuing breaches by the employer, **Waltham Forest Borough Council v Omilaju [2004] CA**, and not be an unjustified sense of grievance.

135. Therefore the claimant has to show that the matters he relies on either individually or cumulatively amounted to a breach of the implied term of trust and

confidence. He then has to establish that that breach played a part in his decision to resign (here a resignation letter maybe of evidential value but it is not determinative of what was the effective cause for the resignation) and he has to show that he has not unduly delayed or affirmed the contract.

136. A claimant can also rely on specific breaches without a continuing course of conduct however if they are in the past an argument maybe made that the claimant has either affirmed by not doing anything about it or it may found as a fact that the claimant has not resigned because of that breach given the passage of time.

137. The respondent can argue that there was a fair dismissal if constructive dismissal is found. Here the respondent relied on the cumulative performance/conduct issues evidenced in respect of the claimant.

Conclusions

(1)(a)(i) Causing the claimant to be overstretched from 2013 as a result of the department in which she worked being understaffed and no adequate changes being made.

138. Whilst I accept that this potentially could be a breach and a fundamental breach of contract, there was no evidence that the department was so overstretched as to constitute a breach of the implied term of trust and confidence as management were constantly working to improve this situation. The claimant did not have any sickness absence or bring a grievance about this matter. The claimant did not indicate any significant unhappiness with the situation until she mentioned it towards the end of her period off sick following the DS incident. In addition to it not being a breach, I find that the claimant affirmed her contract by continuing to work throughout this period without any significant protest.

(1)(a)(ii) The failure to take any or any adequate step to deal with the claimant's department being under resourced.

139. Same as above. In addition Mr Davies did make efforts to improve the situation with his amalgamation idea with Stockport but that did not succeed.

(1)(a)(iii) The behaviour towards the claimant of Don Sturgeon on or around 9 April 2016, including in a meeting attended by other members of the department, after the meeting in his room and later in the claimant's room.

140. DS's behaviour in speaking to the claimant and the team as he did was a fundamental breach of contract – matters should have been dealt with privately and diplomatically if he felt there was a better way of proceeding. He chose not to do that. However the claimant did not resign until a year later (whilst time is not everything this was a significant period of time) she acquiesced in the way the respondent dealt with the issue (see below) I find that was an affirmation in the light of the delay, the lack of complaint about the process and the acquiescence.

(1)(a)(iv) Allowing the respondent, Don Sturgeon, to a complaint of bullying made by the claimant to pursue a complaint against the claimant without giving any consideration to the motivation of the respondent, Don Sturgeon.

141. In evidence both Mr Davies and Mr Hilton stated that they did not consider that Mr Sturgeon might have been motivated by the fact that the claimant had brought a bullying allegation against him. I am afraid I cannot completely believe Mr Davies did not consider this possibility. However, I do not find it was a breach of the duty of trust and confidence to act on the complaint as there were genuine grounds for the complaint and given that the claimant said this (i.e. not having the correct information and putting in the highest price) had never happened in this context before that it was a matter which required investigation, even if it had happened before it would have required investigation to establish that fact. The respondent clearly had reasonable and proper cause to investigate.

(1)(a)(v) The failure to act upon other concerns and/or complaints raised regarding Don Sturgeon (by other employees).

142. There was no evidence this matter effected the claimants decision to resign in respect of whether this was a fundamental breach of the claimant's contract I find it was not as it was not her contract, she was not in work when it happened, she only heard about matters on a hearsay basis, it had no effect on her..

(1)(a)(vi) The lack of support provided to the claimant during her sickness absences from 10 April 2015.

143. I consider that the respondent fully supported the claimant during her sickness absence through EHW and through not putting the claimant under any pressure to return to work (at most this was only raised once the respondent took a genuine view that the barriers to her return had been removed) and not instigating the capability procedure at any stage.

(1)(a)(vi) The failure to relocate the workplace or workstation of Don Sturgeon rather than the claimant.

144. The claimant did not actually ask for this in her email of 13 August .She asked that he be instantly dismissed if he "had another outburst". The respondent in evidence stated firstly that it was not feasible to move DS in any event because Mr Sturgeon was in charge of the CIP team which was located at International House and it was simply not practical for him to work out of somewhere else even for three weeks. It was potentially a breach of the implied term of trust and confidence to expect the claimant to move rather than Mr Sturgeon. However, the claimant could simply have returned after 15 September. She had chosen to return early and therefore created this situation therefore I do not consider it was a breach of the implied term of trust and confidence in that context..

(1)(a)(vii) The failure to provide the claimant with appropriate reassurances regarding any arrangements for her return to work and/or handling of any future behaviour on the part of Don Sturgeon towards her.

145. I accept the respondent's case that it would have been inappropriate of the respondent to give such assurances to the claimant as they would be required to

look into any allegations that she subsequently made that he had behaved badly towards her. Again, it was the claimant's decision to return early that created this situation. The respondent's response was objectively reasonable and proper and the claimant's suggestion was unreasonable, for eg what if he had an outburst because of some blameworthy conduct on the claimant's part?. Therefore there was no breach of the implied term of trust and confidence.

(1)(a)(viii) The delay in raising the disciplinary allegations with the claimant.

146. I did not consider it was a breach of the implied term of trust and confidence to delay instituting the disciplinary allegations. Again the respondent acted with reasonable and proper cause. It is far more likely that pursuing a disciplinary investigation against someone who had just started sick leave in the claimant's condition would have been a breach of trust and confidence.

(1)(a)(ix) The delay in dealing with the disciplinary allegations against the claimant.

147. These were essentially the same issue. The claimant would have been far more aggrieved, in my opinion, if the respondent had sought to investigate these matters while she was off sick with workplace stress. By September it was the respondent's reasonable view that they had done everything they could to get the claimant back to work. Mr Sturgeon had left by then therefore it was difficult to understand why the claimant was not well enough to return. The respondent had to raise these allegations at some point. The only other alternative would have been raising them once she was back at work but as I accept their evidence there was now no obvious and proximate prospect of a return even though they had removed the barriers to return she had cited, it was not a beach to consider investigating these matters at this time.

(1)(a)(x) The pursuing of a flawed disciplinary case against the claimant and/or the failure to find that any other disciplinary allegations made against the claimant were unfounded.

148. The disciplinary case was flawed in that the allegations were stated too highly by HR. However, that is the nature of an investigation as until the investigation ends the employer does not really know the full extent of any misconduct or lack of misconduct, and therefore I do not consider this was a fundamental breach. Further the allegations were not unfounded in respect of the Bath ASU tender. The respondent found the boutique allegations unfounded which shows good faith and an objective investigation. In addition I have found the claimant did say she was pleased with the outcome of the investigation which leads me to conclude she did not consider the outcome a fundamental breach of contract at the time.

(1)(a)(xi) Notifying the claimant that the disciplinary case which she had to meet was that of an allegation of having deliberately altered a tender submission and then finding her guilty in respect of different allegations to those set out in the case brought against her, namely that she "did instruct pharmacy staff to insert the highest prices from other bidders in missing fields in the financial template of the Bath ASU bid" and that she had accepted a late submission.

(1)(a)(xii) Finding her guilty of having “instructed” pharmacy staff as aforesaid when the contemporaneous evidence simply referred to this having been her suggestion.

149. Taking these two together as they are essentially the same matter, I accept that it was a reasonable outcome of the disciplinary investigation to find that the claimant instructed pharmacy staff to insert the highest prices, etc., as she was the expert in procurement and they were taking her advice, so she did not offer them any further advice other than doing this. She can hardly say she was simply suggesting or advising when she was the expert and they were the client department, further she knew they had actually taken her advice. I accept Mr Hilton’s position that this is semantics, and in any event even if it had been a suggestion or advice that still would have been a diversion from the correct procurement policies.

(1)(a)(xiii) Refusing to allow the claimant to challenge the finding of misconduct and/or the outcome of the investigatory/disciplinary process.

150. It was clearly the respondent’s procedure not to allow an appeal where there was no disciplinary sanction. It might have been possible, of course, to bring a grievance but the claimant appears not to have considered this. I do not think it is a breach of trust and confidence to not allow somebody in that situation to appeal the finding of misconduct, and certainly not in this situation where the claimant had advised/suggested that the pharmacy staff should do this, she knew that they had done this as they sent the tender to her completed and at no time did she say that this was unacceptable. The respondent also continued to engage with the claimant in clarifying the investigation in any event. The claimant was fortunate on balance that no disciplinary action was taken.

(1)(a)(xiv) The threat of dismissal through the capability process.

151. Although I did not hear from Nicky Ashtiany-Scott I heard from Mr Hilton and in my view the respondent would have been failing in their duty to the claimant if they had not advised her that this was potentially the next step and that dismissal could result. They are obliged to warn a claimant of these matters. The claimant chose to see it as some sort of threat but clearly by this stage the respondent had to decide, having removed the barriers to her return and not having taken any steps under the capability procedure in the period from April, how they were going to resolve the situation and this was a logical next step. They had reasonable and proper cause for their actions.

(1)(a)(xv) Failure to disclose documents in response to the claimant’s request.

152. This is factually incorrect. The respondent agreed to disclose most of the documents to the claimant before she resigned. She did not take up the offer to meet with the person regarding the emails and given that they were under no obligation under their own policy to allow an appeal I do not see that this is a breach of the implied term of trust and confidence.

(1)(a)(xvi) Indicating to the claimant that the Bravo solutions portal had been checked in relation to the issue of a late tendered submission when access was password protected and the respondent did not have the password in order to have checked the Bravo Solutions portal.

153. Clearly at the time the claimant was on the brink of accusing Mr Hilton of lying. From his evidence to the Tribunal it is quite clear that the Bravo Solutions portal was checked and the claimant was making an unreasonable assumption in this regard, therefore this cannot be a breach of the implied term of trust and confidence. This was withdrawn during the hearing but is relevant (see below) as it was a major reason why the claimant did not trust the respondent..

(1)(a)(xvii) Failing to consider adequately or at all the impact of the respondent's continuing treatment of the claimant on her health.

154. Whilst this is quite vague it mainly refers to the respondent not consulting with EHW before launching the investigation. I think this was a breach of the implied term of trust and confidence but not a fundamental breach as they had got to an impasse in relation to this, and while she was not fit to return to work that does not mean she was not fit to engage with the investigation. Further, she had her union's advice throughout and the respondent was never advised the claimant was too unwell to engage with the investigation. In those circumstances it was not a fundamental breach.

(1)(a)(xvii) *Did the respondent breach the implied term in respect of the duty to promptly redress grievances? (relying on the matters above and the failure to address these issues adequately)*

155. The way the claimant's complaint was dealt with was considered at length in Tribunal .The respondent's view was that they were dealing with this in the informal stage as the claimant has not brought a grievance. It was pointed out to them that the bullying policy did not require the claimant to bring a grievance as it would be a nonsense if an employee was too ill to bring a grievance and consequently "the bully" would "get away with it". The respondent chose to deal with this by attempting to provide a holistic solution to all the department's problems in respect of having a permanent HOP and having a permanent increase in staff.

156. However, I do not find that the failure to proactively investigate the bullying and harassment allegations was a breach of the implied duty of trust and confidence or a Read and Stedman breach. As in the light of the bullying and harassment policy it was reasonable to believe that the informal process was being used. The claimant had raised an issue in an email, Mr Davies had dealt with it by counselling DS regarding his management style, the claimant had indicated she would bring a grievance and then had not. She was getting help from her union and communicating with the respondent, she acquiesced in how it was being dealt with. Therefore in those circumstances there was no reason to believe a formal process was required. Again, however, in addition I would find that the claimant has affirmed this by continuing to work or engage with the respondent after 9 April.

157. I have accepted the respondent's case in relation to this matter that they believed they were still in the informal process. In addition they did seek to resolve matters in a permanent and meaningful way which took 6 months but that was not an unreasonable period of time considering it required a management consultant report and the allocation of new funding.

(1)(a)(xix) *Did the respondent breach the implied term in respect of the duty to provide a suitable working environment and to take reasonable care of*

the health and safety of the claimant at work? (The claimant relies on the matters set out at paragraph 1(a) insofar as they adversely impacted on her working environment and her health and safety at work).

158. I have found that the respondent made every effort to improve the staffing of the department throughout. They did not require the claimant to return to work and put no pressure on her to do so while the matter was being resolved. I have found their actions had reasonable and proper cause. The claimant had the support of EHW throughout and CBT counselling.

159. In relation to affirmation I find that the claimant affirmed the contract by delaying too long before she resigned.

160. In deciding this I have considered the events leading up to the claimant's resignation. She acquiesced in the respondent's approach to the issue with Sturgeon, even agreeing to come back of her own volition when he had not yet left the organisation. She then complained that Mr Davies' email of 19 August had led to a collapse of her health but his email was perfectly reasonable. She then complained about the investigation but I have found the respondent had reasonable and proper cause for instigating the process and for its conclusions. The claimant then persistently asked for documents and the respondent provided her with the documents she requested. Once they had done that she would ask for something different. By 23rd December the most significant and relevant documents had been disclosed and Mr Hilton had given further information and explanation of his decision. She was advised she could see more of the further documents she was requesting on 29th February yet did nothing about it.

161. In respect of the Bravo portal she was clearly suggesting that Mr Hilton was lying about this. However, this has been in effect withdrawn during the hearing as the claimant accepted Mr Hilton's evidence on this and it is no longer relied on as a matter, yet it figured quite highly at the time in the claimant's thinking as can be seen from her resignation letter. Mr Hilton had confirmed he had checked this on 13 January and she was told this in writing on 27 January.

162. Further In the meeting of 13th January she agreed to return to work if staff levels improved, but when she was advised of this on 3rd February she did not return but raised other issues..

163. Following this the claimant reiterated her concerns but nothing new happened, other than Mr Hilton further cooperating with the claimant by providing a further requested document and offering that Colin Owen would help her find her emails. The fact that the claimant did nothing about this leads me to the conclusion on the balance of probabilities that the claimant was not genuinely concerned about the intricacies of the investigation but was simply prolonging the process and instead of following this up she chose to resign. I find the claimant was backed into a corner, she had no valid reason for not completing the Stress risk assessment and attending a further Health review meeting, Mr Sturgeon had gone, additional staff had been found and no disciplinary action was to be taken against her. She could point to no last straw, she had simply run out of options to justify her absence.

164. A combination of these factors leads me to find that there was no repudiation of the contract either singly or collectively save in respect of Mr Sturgeon's original

behaviour and in respect of that the claimant delayed far too long before resigning and undertook actions inconsistent with accepting that repudiation.

Employment Judge Feeney

Date : 4th May 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

8 May 2017

FOR THE TRIBUNAL OFFICE