



# EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms D Stead

v

Northampton General Hospital NHS  
Trust

Heard at: Cambridge

On: 27 November 2018

Before: Employment Judge Ord

## Appearances

For the Claimant: Mr Aston, Solicitor

For the Respondent: Mr M Palmer, Counsel

## JUDGMENT

1. The Claimant was unfairly dismissed.
2. There will be a 10% uplift applied to the Claimant's award to reflect the Respondent's unreasonable failure to comply with ACAS code of practice Number 1.
3. The Respondent failed to provide the claimant with a statement of her terms and conditions of employment and an award is made at the higher amount of 4 weeks' pay.
4. The issue of remedy is stayed until 4:00 pm 18 December 2018 and if no application is made to restore the matter to the lists by that time on that date, the issue of remedy will be dismissed without further order.

## REASONS

Background

1. The claimant was employed by the respondent as a sterile services technician from 21 November 2011 until 17 November 2016 when she terminated her employment with immediate effect. The claimant says that she resigned in the face of a fundamental breach of contract by the employer and thus that she was dismissed. The claimant's only claim in these proceedings is that she was unfairly dismissed.
2. The claimant commenced early conciliation on 5 December 2016, the early conciliation certificate is dated 21 December 2016 and she presented her claim form to the tribunal on 10 February 2017.
3. The claimant relies upon what she describes as unreasonable handling of the disciplinary process to which she was subjected and the two grievances which she says she raised as founding her claim for (constructive) unfair dismissal. She refers to "significant and considerable delays in dealing with those matters and the manner in which they were handled as well as the decisions, or lack of decisions reached and the impact this had on [her] and her health over a prolonged and unnecessary period, each of themselves and / or cumulatively" in her tribunal application.

#### The Hearing

4. The claimant gave evidence, as did Hayley Payne (HR Business Partner), Ben Greasley (Head of Clinical Coding), who was the investigating officer in relation to disciplinary matters and Mr Stuart Finn (Director of Estates and Facilities), who was to be the disciplining officer. Reference was made to an agreed bundle of documents. Both parties made oral closing submissions by their representatives and the claimant submitted a bundle of authorities and written submissions.

#### The Facts

5. Based on the evidence presented to me I have made the following findings of fact.
6. The claimant worked as a sterile services technician. Her role was to supply a decontamination service to operating theatres, wards and departments within the respondent NHS trust. It was a role which she was very familiar with having previously worked for another hospital trust for 11 years before joining the respondent.
7. Prior to the incident on 17 June 2016, which gave rise to this case, she had not been subject to any disciplinary action.
8. On 17 June 2016, there was an altercation between her and a colleague ('AR'). The claimant says that AR was physically threatening towards her and he in turn complained of her conduct. Two individuals witnessed part of the incident, which lasted only for a short time.

9. The claimant and AR completed their shifts. The claimant worked the following two days which were a weekend.
10. On 20 June 2016, the claimant says she spoke to the production manager who advised her to raise a formal grievance in writing in the form of a statement. The claimant duly produced a three page statement setting out her complaints regarding the behaviour of AR. That statement concluded with these words,  
  
“I feel too scared to come to work knowing (AR) is in work as I don’t feel safe being in the same place of work as him”.
11. Unbeknown to the claimant AR had written to Mr Hunt, then Head of Sterile Services, by email on 20 June complaining about the claimant.
12. On 21 June at 1:30 pm, Mr Hunt contacted Ms Payne by email forwarding the copy of AR’s statement, confirming he had received a statement from the claimant and also from one of the witnesses (‘TO’) and telling Ms Payne that (AR) is due to start his shift at 2 pm and [the claimant] states she is “frightened of him”. He asked whether, “we are going to have to suspend”.
13. Neither individual was suspended but Ms Payne determined that the actions of both the claimant and AR were of sufficient cause for concern to warrant a disciplinary investigation into both parties.
14. No action was taken to deal with the claimant’s expressed fears of working with AR who had, on her evidence, refused to take materials to an operating room, when approached walked right up to her face and raised his right arm with his fist clenched. When the claimant, on her evidence, told him to, “get out of my face” and moved away slightly, AR kept coming towards her with shoulders raised and chest puffed out, came right up to her face, again she told him to, “get the fuck out of my face”. As reported, the reply was, “or what, or what?” and he was said to be leaning towards the claimant who then called out to another colleague in the clean area to come and get AR away from her.
15. Ms Payne gave no advice to Mr Hunt other than about suspension. The claimant’s expressed fear was not being addressed at all.
16. Indeed, her evidence was that if the claimant’s complaint had been managed as a grievance then as AR’s conduct could lead to a disciplinary hearing the grievance could not be used, as it precludes considering matters as a grievance if they are dealt with under the disciplinary policy.
17. The relevant part of the policy of the grievance policy says this "this grievance procedure does not apply where action, at any stage, is being taken under the trust disciplinary policy..." And "does not apply to settling differences relating to...

- any issues dealt with under the disciplinary policy... whereby the employee should follow the appeals procedure detailed in the relevant policy
18. Ms Payne went on to say that the claimant "was not explicitly informed that her complaint was being dealt with under the trust's disciplinary policy". The claimant was aware when she received relevant letters that the incident, and her conduct, was being dealt with under the disciplinary policy but at no stage was she told of any steps at all being taken to deal with her concern about continuing to work with AR.
  19. On 23 June 2016 the claimant received a letter from Mr Hunt to say that an allegation had been made against her of "alleged inappropriate and unprofessional behaviour towards a work colleague on 17 June 2016". It enclosed a copy of the relevant disciplinary policy and was copied to Ms Jajubwska (JK) HR advisor assigned to support the investigation. The letter refers to support being available from the catering services manager who had been appointed as pastoral support and advised her that during the course of the investigation she had the right to be accompanied by a trade union representative or work colleague.
  20. On 27 June 2016 JK contacted Mr Greasley to conduct investigations. She sent him copies of the statements from the claimant, AR and TO. She confirmed the allegations against AR and the claimant were identical and that these were 2 separate investigations, one into the conduct of each of them.
  21. On 4th July claimant received 2 letters, one inviting her to attend an investigation into view into an allegation made against "a staff member" and the 2nd notifying that Mr Greasley had been appointed as investigating officer into the allegation made against the claimant and inviting her to an investigatory interview into that matter. The interviews were set for 1230 and 1300 on 14th July, respectively. Although the claimant was not made aware of this AR was to be interviewed in relation to the into the claimant at 1430 and in relation to the allegation against him at 1500. The witness TO was to be interviewed at 1530 that day and another witness (LM) at 1400 on 19th July.
  22. The notes of those interviews were duly transcribed by KJ and the notes were sent to each of those interviewed on 22nd July for their comments and/or corrections. Mr Greasley was on holiday from 26th July for 2 weeks and on his return KJ was absent on holiday. On his return Mr Greasley considered the corrections which he had received back from the claimant which he said he had "no concerns with" and those corrections/ amendments were put in the report pack. Although the report for each investigation was concluded shortly after Mr Greasley's return from holiday he did not wish to send them out until KJ had had an opportunity to see them.
  23. There were significant conflicts of evidence between what said and what AR said but each of them made admissions so that Mr Greasley considered that each had a disciplinary case to answer. On 8th September

Mr Greasley wrote to the claimant (and AR) to say that he had completed his investigation, that his recommendation was that there was a case to answer and therefore the report would be submitted to Mr Singh who would make the necessary arrangements for either an agreed outcome meeting or a disciplinary hearing. The letter to the claimant said that Mr Finn would be in contact "shortly" to confirm the arrangements.

24. Ms Payne contacted Mr Finn on 20th September to ask if he had had the opportunity to read the investigation reports and whether he wished to meet to discuss options for hearings or whether he wanted to have dates in the diary to conduct them. No answer must have been received because she again wrote to Mr Finn on the 28th September asking him to let her know when he had read the investigation reports "as I am mindful that these individuals were notified on 8th September that the reports are being passed to you for the next stage".
25. On 30 September AR resigned his position with the respondent having obtained a place at University.
26. Under the respondent's disciplinary policy once the investigating officer has submitted a report to the hearing manager an agreed outcomes meeting attended by the employee, their representative, the hearing manager and human resources representative can be considered, as in some circumstances it may be appropriate to conclude the matter without the need for a disciplinary hearing.
27. Mr Finn's evidence was that he determined that an agreed outcomes meeting was appropriate in the claimant's case. On 10 October 2016 Mr Finn wrote to Mr Hunt confirming that he was aware that AR had left employment with the trust with the intention of joining the "bank" to apply for work in the department in the future; that the claimant was absent from work and her absence was related to the incident. He asked Mr Hunt to tell AR that the investigation report would not be progressed but if the trust was asked to provide a reference for any future employment which included a request for information about any investigation or disciplinary matter the trust would have no alternative other than to disclose that at the time of his leaving there was an outstanding investigation. Mr Hunt was directed towards Ms Payne for HR support and was told that if AR did apply for bank work it would be necessary for Mr Hunt to meet him and satisfy himself that any dispute or concern between AR and the claimant had been resolved before employing him again.
28. On 28 September the claimant had been interviewed as part of the long term sickness absence process and when she was told that AR was no longer employed said that she would be able to return to work. She was then, however, told that he would be returning as a bank employee. The claimant said that she therefore felt unable to return to work for the reasons stated in her original letter of complaint. Her GP again signed her off from work.

29. In relation to the claimant Mr Finn requested Mr Hunt to conduct an agreed outcome meeting in line with the disciplinary policy to determine what, if any, sanction was appropriate and again pointed him towards Ms Payne to assist him in conducting an agreed outcomes meeting. Mr Hunt was asked to let Mr Finn know when the meeting dated been set and contact him if he required any further assistance.
30. We have heard no evidence to indicate AR was spoken to by Mr Hunt prior to him working in the Department as a bank employee but he has undertaken such work from time to time.
31. Mr Hunt did not take any further action until 4 November 2016 when he wrote to the claimant to say that it was proposed to hold an agreed outcomes meeting on 21 November 2016 and the alternative was to hold a full disciplinary hearing. It was noted that the maximum sanction at an agreed outcome meeting was "up to and including a final written warning" and that the maximum sanction which could be issued a full disciplinary hearing is "anything up to and including dismissal".
32. In the meantime, solicitors instructed by the claimant wrote to the respondent (addressed to Mr Hunt) setting out her complaints about the length of time the process was taking and the way matters were being conducted and stating "with regard to our client's grievance she has not heard anything at all since the meeting of 14 July 2016. That is over 3 months ago and almost 4 months since raising her written grievance". That letter was dated 24th October.
33. The following day by email from a conveyancing legal cashier at another firm of solicitors two letters from the claimant were sent to Mr Hunt. The first was a data subject access request under the data protection act 1998 and the second was a formal grievance which the claimant said she was raising "over the inept handling of my written grievance submitted to Gary Hunt on 21st June 2016... and the unreasonable handling of the disciplinary investigation into me for alleged inappropriate and unprofessional behaviour..."
34. On 26th October Mr Abolins, the director of facilities wrote to Mr Hunt and to Ms Payne asking Mr Hunt to confirm the date when he would be meeting the claimant and advising that AR did not sign onto the bank until the disciplinary process had been concluded. Ms Payne replied that the trust could not pursue disciplinary action against AR as he was no longer employed and that consideration needed to be given as to whether it was appropriate for him to be registered onto the bank. No reply from Mr Hunt forms part of the bundle but Mr Abolins described the position as "a bit of an impasse with the DS dimension" (DS being the claimant).
35. On 31 October 2016 Mr Hunt told Ms Payne that "AR has been working in theatres here for the last few weeks. Is on secondment from university but his placement is for several months I believe". The issue of his working with the

claimant is not mentioned and I find as a fact that it was never addressed at any stage notwithstanding that Mr Hunt, Ms Payne, and Mr Abolins were all aware of the problem and that Mr Finn had specifically given a direction to Mr Hunt as to what should happen before AR was welcomed back into the respondent's employment.

36. What Mr Hunt did do was to write to the claimant on 4 November 2016 calling her to an agreed outcome meeting or a formal disciplinary hearing. All the respondent's witnesses, including Mr Hunt, confirmed that the claimant was not facing a charge of potential gross misconduct and no-one could offer any explanation why the claimant was told that the possible outcome at any disciplinary unity might be dismissal other than to suggest that this was because respondent was using a "template letter".
37. The claimant had to decide by 5 pm on 17 November whether she wished to have a full disciplinary hearing or whether she wished to follow the agreed outcomes procedure.
38. By 17 November 2016, the claimant had heard nothing regarding the grievance submitted by her on 26 October other than to have been told on 31 October that another manager would be in touch to arrange a grievance meeting.
39. On that date she tendered her immediate resignation by email complaining that she had had nothing regarding her 2nd grievance, that it had been almost 5 months since she had raised her first grievance and she was still waiting for the outcome. Further she complained that she been told on 30th September that AR would be coming back to the hospital to do bank work, expressing the view that she had hoped he would be dismissed so that she could come back to work because she feared working with him after what he did to her and "still did".
40. Two days later she received a letter dated 16 November from the respondent inviting her to a grievance meeting on 25 November with Brian Willett, Hotel Services Manager.
41. On 21 November, Mr Hunt wrote to the claimant giving her the opportunity to withdraw her resignation and allow the trust to manage her grievance through its' processes which she declined.
42. Against that factual background the claimant brings her claim for unfair dismissal.
43. During the course of the hearing the claimant also indicated that she had not received any written statement of terms and conditions of employment from the respondent. The respondent had not provided a copy as part of disclosure in these proceedings nor had they provided a copy when the claimant made a data subject access request. On the second day of the hearing a document was produced which had been provided, according to Mr Finn whose evidence respondent relied upon

this matter, "from HR". Mr Finn said that normal practice was for two copies of the statement to be sent out to an employee, with one copy to be returned duly signed and that if no signed copy was returned this would be chased by HR. There was no evidence that any of this had been done and I find as a fact that the claimant did not receive a written statement of her terms of employment at any stage in accordance with the requirements of the Employment Rights Act.

#### The Law

44. under section 94 of the Employment Rights Act 1996, every employee has the right not to be unfairly dismissed.
45. Under s95(1)(c) an employee is dismissed for the purposes of the act if they terminate the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.
46. Under s 38 of the Employment Act 2002 in a case involving, inter-alia, an allegation of unfair dismissal if an Employment Tribunal finds in favour of the claimant and, when the proceedings were begun, the respondent was in breach of his duty to the employee to provide written terms and conditions of employment or particulars of change the tribunal must make an award of the minimum amount (two weeks' pay) to be paid by the employer and may it considers just and equitable in all the circumstances award the higher amount (four weeks' pay) instead, unless there are exceptional circumstances which would make an award under the subsection unjust or inequitable. The
47. The leading case on the subject of constructive dismissal is the wellknown authority of Western Excavating ECC Ltd v Sharp, 1978 ICR 221. The Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract i.e. a significant breach going to the root of the contract of employment showing that the employer no longer intended to be bound by one or more of the essential terms of the contract. The employee must establish that there was a fundamental breach of contract on the part of the employer, that the breach caused the employee to resign and that the employee did not delay too long before resigning thus affirming the contract and losing a right to claim constructive dismissal.
48. In Courtdals Northern Textiles Ltd v Andrew 1979 IRLR84 it was established that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.



49. Woods v WM Car Services 1981 ICR 666, further confirmed that the tribunal's function is to 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 the employee cannot be expected to put up with it.
50. Blackburn v Aldi Stores Ltd., EAT/185/12, confirmed the wholesale failure to respond to a grievance could amount to a breach of the implied term of mutual trust and confidence.
51. Bournemouth Higher Education Corporation v Buckland 2010 ICR 908, established that subsequent action by an employer cannot 'cure' a fundamental breach.

### Conclusions

52. Applying the facts found the relevant law I have reached the following conclusions.
53. The respondent on its' own admission failed to address in any way the grievance which the claimant raised relating to her future working relationship with AR.
54. She raised this in her complaint regarding the incident on 17 June 2016 which she reduced to writing at the request of her line manager promptly thereafter.
55. The respondent acted fairly and reasonably when determining that the complaints raised by AR and the claimant identified possible disciplinary action to be taken against each of them, but as Ms Payne, HR business partner, freely admitted in her evidence the outcome of those disciplinary proceedings would not address the problem which the claimant was complaining about, namely that she was fearful of returning to work with AR.
56. Whilst the respondent's conduct of the disciplinary process can be criticised in relation to the length of time the process took I do not find that that amounted to a fundamental breach of contract nor a breach of the implied term of mutual trust and confidence. The length of time from the original complaint brought by the claimant up to her resignation was 5 months. Had she pursued the option of an agreed outcomes hearing the matter would have been concluded by 21st November, 4 days before her resignation. Whilst would the disciplinary process ought properly to have taken less time I am mindful that there were two separate but parallel disciplinary investigations and processes underway as well as delay due to summer holiday absences.
57. In those circumstances whilst the respondent can be criticized for that delay it was not in breach of any express or implied term of the claimant's contract of employment and at all times the respondent conducted that disciplinary process in

circumstances and in a way which was consistent with the continuation of the contract of employment.

58. It is right to point out, however, that the respondent failed to follow its own procedures. Under the policy it was for Mr Finn to conduct an agreed outcomes meeting and there was no basis upon which he could have that requirement onto another, junior, member of staff as he did by passing it to Mr Hunt. It is concerning to note that Mr Hunt had already formed a view of the claimant on 24 June 2016 when he complained to JK about a telephone conversation he had had with the claimant who had received a note that she was being investigated describing her as being "very abrupt, to the point of being downright rude". It is further of note that Mr Finn had been told by Mr Abolins on 8 September 201, the very day when Mr Finn received investigation reports to determine how to proceed (Mr Abolin is Mr Hunt's line manager) that Mr Abolin understood that the claimant had "made some allegations about her work colleague. (true to form)..." Such correspondence can only have served to prejudice Mr Finn in his approach to the claimant.
59. Most importantly, however, the respondent failed in any way at all to deal with the claimant's complaint regarding her future working relationship with AR. They had ample opportunity to do so. Had they been intending, as was suggested during the course of the hearing, to deal with it at the conclusion of the disciplinary process they could at least have told the claimant that. There was no communication whatsoever with the claimant in relation to her grievance (not even to say that it was being dealt with as part of the disciplinary process) from the time it was submitted until the time of her resignation.
60. The claimant's second grievance raised on 25 October 2016 refers to itself as being a second grievance and raised complaint about the lack of response to the first grievance. Neither in its' acknowledgement of that document nor anywhere else did the respondent advise the claimant that they did not consider that she had raised a first grievance or that the contents of that grievance would be dealt with at the end of the disciplinary process.
61. When the claimant raised a second grievance complaining about delay in the conduct of the first grievance that ought to have sounded a siren call in the respondent's mind to ensure that they acted promptly when dealing with that grievance. Under the grievance procedure a line manager receiving a formal grievance must write to the employee "as soon as possible" to invite them to attend a meeting to discuss the grievance. By the time the claimant had resigned, as she pointed out in her email, over three weeks had passed since the respondent acknowledged the grievance and the matter had been taken no further forward.
62. By that stage the claimant was complaining of that delay, the delay in dealing with her original grievance and the fact that AR was back at work without any resolution to her initial grievance as justifying her resignation.

63. I conclude that the respondent's complete failure to deal with the claimant's original grievance regarding her inability to continue to work with AR; compounded by his return to work as a bank worker without, on the evidence presented to me, any steps at all having been taken to address his conduct on 17<sup>th</sup> June 2016, which return to work caused the claimant to remain absent from work through sickness together with the delay in dealing with the second grievance raised by the claimant amounted to a breach of the implied term of trust and confidence entitling the claimant to resign. The "final straw" was the failure to respond promptly to second grievance and I consider that to be more than an innocuous act given the circumstances of the case and the claimant's treatment up to that date. It compounded the claimant's view that her original grievance was ignored and that the second grievance was also not going to be pursued in any meaningful way.
64. I also conclude that threatening the claimant with a risk of dismissal if she pursued the outstanding matter through to a disciplinary hearing in circumstances when it had never been suggested to her that she faced, and indeed when she did not face, dismissal was also a fundamental breach of the implied term of trust confidence. It is indicative of an employer riding roughshod over the disciplinary process. It is not acceptable to say that the manager was simply using a template letter. Correspondence of this nature should be treated with care and for the respondent to advise the claimant that she ran the risk of dismissal (when on their own evidence she did not) was wholly misleading and inappropriate.
65. Whilst the respondent acted reasonably in seeking to give the claimant an opportunity to withdraw her resignation and to conclude the process at this did not cure the fundamental breach of contract caused by their failure to deal with the claimant's first grievance, their failure to deal promptly with the second grievance, the threat of dismissal when none existed and the readmission into the premises of AR as a bank worker without dealing with the claimant's first grievance (and as I have found without dealing with the incident of 17th June at all as far as he was concerned).
66. In those circumstances, the claimant was entitled to resign, without notice, on the basis of the respondent's fundamental breach of her contract of employment.
67. The claimant was dismissed and the respondent has not advanced a fair, or potentially fair, reason for dismissal. The claimant was therefore unfairly dismissed contrary to s.95 of the Employment Rights Act 1996.
68. The respondent failed to provide the claimant with written terms and conditions of employment, contrary to s.38 of the EA 2002. I have considered whether this should result in an award at the lower or higher figure. The respondent is a Hospital trust with a number of individuals working in its' human resources department. I do not find the production of an unsigned statement of terms on day 2 of a hearing (when no copy of

such particulars was in either the claimant's personnel file nor disclosed to her when she made a data subject access request) without proper explanation to be satisfactory. Whilst oversights can occur I am concerned that this was a self-serving document which had not been disclosed previously. In the circumstances an award at the higher figure of 4 weeks' pay is appropriate.

- 69. I have considered whether there should be an uplift in any award to be made to the claimant on the basis that the respondent has unreasonably failed to follow the ACAS code of practice number 1, (as per s.207A of the TULRCA 1992).
- 70. The code requires parties to grievances to raise and deal with issues promptly and this was clearly not done. However, whilst I do not find that the delays pointed to in the conduct of the disciplinary process were unreasonable, the respondent has singularly failed to take any steps at all in relation to the grievance brought by the claimant in July 2016 and did not advise if, as they now say was their intention, that they would do so at the conclusion of the disciplinary process.
- 71. I am satisfied that this amounts to an unreasonable failure to comply with the code and find that a 10% increase in the amounts to be awarded to the claimant should be made.

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Employment Judge Ord

Date: .....

21 December 2018

Sent to the parties on: .....

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For the Tribunal Office