EMPLOYMENT TRIBUNALS

Claimant: Mrs L Trapps
v
Respondent: United Lincolnshire Hospitals NHS Trust

Heard at: Nottingham **On:** 21 April 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Mr B Frew (Counsel)
For the respondent: Ms A Smith (Counsel)

RESERVED JUDGMENT

1. The claimant was constructively unfairly dismissed following her acceptance of a repudiatory breach of contract by the respondent.

2. Remedy is to be determined at a subsequent remedy hearing.

REASONS

Introduction

1. The claimant was employed by the respondent as a data protection clerk at the Grantham Hospital until her employment ended on 27 May 2021. The respondent is one of the biggest acute hospital trusts in England, serving a population over 720,000 people.

2. The claimant claims she was constructively dismissed because she was suffering from workload problems, which were not addressed by the respondent, over a period of time. The 'last straw', at the end of a series of problems relating to workload, was that the claimant says she was promised help with her workload,

continued on that understanding, and then resigned upon learning that there would be no additional assistance following adherence to flawed workload statistics.

3. The respondent asserts that the claimant resigned and left her employment simply because she chose to do so. It denies that it acted in a way which entitled the claimant to terminate her employment. It denies there were any issues with her workload and pleads that, if there was any breach of the contract of employment:

   3.1. it was not repudiatory in nature;

   3.2. the claimant waved the breach; and

   3.3. the claimant did not resign as a result of the breach.

4. The respondent's grounds of resistance also include the argument that, if the dismissal was found unfair, it alternatively relies upon capability or SOSR as potentially fair reasons for dismissal. This argument was not advanced in evidence or at the hearing. The respondent also pleaded reductions for *Polkey* and contributory conduct but these also were not pressed at the hearing.

5. The claimant was represented by Mr Bruce Frew of counsel, and gave evidence himself in support of his claim. The respondent was represented by Ms Amy Smith of counsel. The respondent's sworn witness evidence was given by Mr Keith Bainbridge (Health Records Manager at the respondent).

6. I also had access to an agreed bundle of documents which ran to some 183 pages. Page references in this document refer to the pages of that bundle.

Issues to be decided

7. There was a discussion at the outset of the hearing about the relevant issues. The issues were:

   7.1. *Did the respondent breach the term of mutual trust and confidence which is implied into the contract of employment with the claimant?*

   7.2. *Was that breach repudiatory in nature?*

      7.2.1. *Specifically, did the respondent without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between it and the claimant?*

   7.3. *Did the claimant waive any such breach?*

   7.4. *Did the claimant resign in response to the breach?*

   7.5. *If the claimant has been constructively dismissed, should any reductions to the award be applied?*

8. It was agreed that, given that the case was listed for only one day, remedy would be dealt with in a separate hearing if necessary.

Findings of fact

9. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

Background

10. The claimant began employment with the respondent on 19 December 1994 working 20 hours per week (page 36). This was increased to 28 hours per week with effect from 19 April 1999 (page 37) and then to 29.5 hours per week in 2004 (pages 38 and 39).

11. During the period relevant to her claim, the claimant worked as a data protection clerk. This involved: verifying and logging data protection requests; compiling responses from clinical records; copying notes; gaining release from clinicians; and sending completed requests. The role included logging and monitoring processes through the respondent's system and endeavouring to ensure that each request was dealt with within a 30 day time period.

12. Until the onset of the responses to the Covid-19 pandemic, the claimant was supported in her work with resource provided for 10 hours per week by her colleague Gita Modi. The claimant had three team leaders. One of those was Tina Bishop, who was involved in the relevant matters but did not give evidence for the respondent. The team leaders reported to Mr Bainbridge, who in turn reported to a Mr Parkin. Mr Bainbridge explained that Ms Bishop was unable to give evidence on behalf of the respondent because she is on long-term sick leave.

13. In March 2020, the respondent's staff who were identified as clinically vulnerable were sent to work from home. This included Mr Bainbridge and Ms Modi. The claimant says that her support from Ms Modi effectively ceased at this time because Ms Modi was unable to assist the claimant from home. Under cross examination, the claimant said that Ms Modi did not have a working laptop for some time. When challenged about this, the claimant said her understanding was based on (1) Ms Modi not being available, and (2) Ms Modi explaining as much in text messages. Additionally, the claimant explained that significant parts of the data protection clerk role required on site presence because some of the records were in hard copy and the documents needed to be collated. The claimant said that her workload increased significantly as a result of the challenging new way of working.

14. The respondent said that Ms Modi had been continuing to assist the claimant remotely using a laptop. In his witness statement, Mr Bainbridge wrote that *"whilst Gita was shielding, she continued to provide remote assistance to the data protection team by logging data protection requests and assisting with data collection"*. Under cross examination, Mr Bainbridge admitted that he was not sure that this point was true. The positive statement about what Ms Modi was doing was an assumption based on his recollection that none of the team leaders for the claimant or Ms Modi raised any issue with him about a difficulty which led him to question the assumption. Mr Bainbridge did not know whether what the claimant

said was correct or incorrect. The respondent had produced no other evidence showing support received by the claimant from Ms Modi or anyone else.

15. I prefer the claimant's evidence on this point because she is able to speak from first-hand knowledge of what happened and her account sounds credible and likely to me. I find that the claimant lost the support of Ms Modi from March 2020 and so it fell to the claimant to do all aspects of her role, rather than sharing it with someone else who assisted 10 hours per week. This led, I find, to an increase in the claimant's workload whereby she was expected to do the work of a full time member of staff on her less than full time hours.

16. In June 2020, the respondent's A&E service was transferred to another trust and so the requests for data in respect of the A&E service were no longer the responsibility of the respondent. The respondent considers that this would have led to a reduction in the claimant's work because her team would not be required to deal with A&E enquiries. Mr Bainbridge opined that this is shown by the data indicating an apparent drop in requests for access to records which the respondent produced at pages 151 and 152. The claimant disagrees, and says that this change did not serve to reduce her workload.

17. The claimant acknowledges that servicing those requests was to be done by another organisation, but said that that organisation was also operating from Grantham Hospital. This meant that there was some confusion and duplication leading to queries and conversations about which team needed to be contacted to deal with requests. As a consequence, the claimant spent additional work time dealing with those sorts of queries. Mr Bainbridge could not counter this proposition. The respondent's data capture did not include capture of such queries or work items, and so this work had not been factored into any assessment of the claimant's workload. Again, I accept the claimant's case on this point and find there was no global reduction in the claimant's already overloaded workload just because a department moved to a different organisation.

18. In July 2020, Grantham hospital was changed to a protected 'Covid green' site, meaning that staff not required to be on site were either sent to work from home or placed elsewhere. Mr Bainbridge, in his witness statement, writes: *"around this time, the claimant was given a laptop so that some of her shifts could be worked remotely. As far as I was aware the claimant worked from home just fine"*. In cross examination, Mr Bainbridge admitted that he was not sure the claimant had been given a laptop: he had not asked her about it or checked any records to confirm this assertion. He had also made no active enquiries to ascertain how well the claimant was working from home, relying on Tina Bishop or another team leader to flag concerns.

19. The claimant was visibly upset when Mr Bainbridge was answering questions about this time and the impact of switching to home working. In her live evidence, the claimant denies receiving a work laptop promptly and said she was unable to do her role at home because much of it is physical paper based. The claimant also explained that a significant portion of record gathering relied on input from other colleagues, who would hold the data in the clinical departments. It is apparent to me that medical administrators and secretaries were vital to the claimant being able to do her role efficiently, and that from the summer of 2020 they were working

off site with limited access to records. In my view, it is plain that there would also have been added delay and inefficiency caused by such an upheaval and so I accept the claimant's description about this time. The email at page 114 also gives a flavour to the confusion and clarification required about processes. The claimant says that she raised issues with her role and home working with Ms Bishop at this time, but it appears that Mr Bainbridge was either not informed or could not remember being informed. The claimant continued working, covering additional workload in Ms Modi's absence, awaiting the return of her colleague to ease her workload.

20. In November 2020, the claimant met with her team leader Ms Bishop to raise that she felt she was working under an excessive workload. The claimant explained all of her workload difficulties to Ms Bishop, described how the way she was working had to change under Covid, how she was struggling without Ms Modi's support, and how it was difficult to do her role from home. The claimant told Ms Bishop that she needed to take some leave but felt unable to take it due to the workload and so Ms Bishop arranged for the claimant to meet with Mr Bainbridge.

21. In his witness statement, Mr Bainbridge said that *"the claimant said that she was struggling with the amount of photocopying she had to do".* He said that he listened to the claimant's concerns but informed her that the respondent could only provide assistance in the form of overtime. Mr Bainbridge says he did not agree with the claimant's suggestion that data protection needed another member of staff, but he did recognise that photocopying was causing an issue. Mr Bainbridge agreed that the claimant had offered to reduce her hours by 10 to assist to recruit another member of staff, but he did not think that that would help the department. He agreed that the claimant was trying to find ways to get additional resource to support with her workload, but said that this was not possible. He said in his live evidence that he attempted to secure overtime assistance from other colleagues, but there was no evidence of this in the bundle and none could be produced during a adjournment called to allow such evidence to be found.

22. The claimant says that Mr Bainbridge did in fact agree that additional staff was needed and that he would act to secure help to support her workload. The claimant said it appeared that Mr Bainbridge had the authority to secure this and did not mention needing any further authorisation or funding. She says that she accepted Mr Bainbridge's assurance on this and that she therefore continued in her role whilst waiting for the assistance to be recruited. She says this was what she was led to believe. The claimant was very clear and forthright about this in her live evidence. There is a direct conflict of evidence about this between two people who attended the same discussion. As mentioned above, Mr Bainbridge says he did not think it would be possible to secure additional resource and he did not agree that new staff were required. I did not find Mr Bainbridge's evidence about what was said around this point to be very clear. I accept that he did not think that support could be provided, but he did not seem very confident about what he actually said to the claimant in the meeting.

23. Mr Bainbridge admits that he did not actively deny to the claimant that additional support was required or that it could be procured. In my view, having listened carefully to the live evidence in cross examination, Mr Bainbridge did nothing to dispel the claimant's view that additional staffing was required to support her. If he

had done so, then I consider that the claimant would have escalated her difficulties then. Instead, she went on leave and continued to work. Additionally, Mr Bainbridge was faced in that meeting with a struggling colleague, about whom he felt concerned and in respect of whom he wanted to help. In response, I find that he said what he needed to say for the claimant to be reassured in that meeting in the hope that the claimant's difficulties would ease. The upshot of this is that the claimant left the meeting on the understanding that she had raised an issue with excessive workload, that the issue had been accepted, and that the respondent would secure the resource required to ease that workload.

24. In the same meeting, Mr Bainbridge told the claimant should take leave and that cover would be arranged. In cross examination, he said that this should be the role of the team leaders. In the end, Mr Bainbridge said that he provided cover for the claimant's work himself. The claimant's recollection is that no cover was actually provided, and that when she returned from leave none of her work had been picked up by anyone else and so she returned to an even more significant workload. When asked what of the claimant's work he had covered, Mr Bainbridge could not recall any. He said his intention would have been to deal with urgent emails only but could not remember any. None were provided in the bundle. Consequently, I find that no cover was arranged for the claimant. None of her usual work was picked up and so the time she took as leave only served to increase her workload upon her return.

25. The claimant says that she continued to struggle on in the period following the November meeting and her return from leave. Mr Bainbridge says that he continued to try to support her when required. He pointed to pages 94, 97, 105, 107, 108, 111, 113, 125 and 132 to show instances where he responded to the claimant and/or escalated queries. These are e-mails are spread between 9 November 2020 and 24 February 2021. In those e-mails, Mr Bainbridge's entire responses are as follows:

    25.1. *"Yes please"* in response to the claimant proposing to do a task a certain way (page 94);
    25.2. *"Thanks both I'll inform Lee/Yaves"* in response to the claimant passing on a message about annual leave (page 97);
    25.3. *"Of course – enjoy your break"* in response to the claimant requesting annual leave (page 105);
    25.4. *"Yes by all means"* in response to the claimant asking if she should do something in the way requested by another department (page 107);
    25.5. *"Yes not our info to disclose"* in response to a query about A&E records (page 108);
    25.6. *"We can ask for facilities to raise a quote"* in response to a query about fire doors (page 111);
    25.7. *"I'll review with Sara next week"* in response to a query about process (page 113);
    25.8. *"Even if she did send you a cas it is not our info to share? So I can't see what else you can do. Regards"* and *"OK thank you, this is still utc activity and not ulht so not really ours to compile"* in response to a query about a case (page 125); and
    25.9. *"I hope so but I will escalate"* in response to a query about e-mail addresses (page 132).

26. In cross examination, Mr Bainbridge was challenged about whether these e-mails show any level of support for the claimant's workload and it was suggested that these few e-mails are indicative instead of a normal (if distant) management relationship. He did not agree. In my view, these e-mails cannot realistically constitute additional support for the claimant's role because that would suggest that Mr Bainbridge would otherwise have almost no interaction at all with the claimant, when he was ultimately the health records manager. Consequently, I find that no additional support was offered by the respondent in this period of time where the claimant understood additional resource was going to be procured to support her.

27. Mr Bainbridge contends in his witness statement that, following the November meeting, *"the claimant continued to work without issue"*. It became apparent in cross examination that this was another assumption based on the recollection that nobody raised any issue with him. His attitude, essentially, was that all is fine unless he understands otherwise. He did not check on the claimant. As a result, I accept the claimant's characterisation of this period of time as a 'struggle'. She says that her team leaders were aware of ongoing difficulties, but cannot be sure if those were brought to Mr Bainbridge's attention. No team leader gave any form of evidence on behalf of the respondent.

28. It is apparent that by January 2021, the claimant's team were still behind on their target to respond to all GDPR requests within the prescribed 30 day period. On 4 January 2021, Mr Bainbridge forwarded the claimant an e-mail indicating that 50% of the requests were over the time limit (page 115). On 18 January 2021, he forwarded another e-mail indicating that 51% of the requests were over the time limit (page 119). The claimant was off work with sickness absence on 17 and 18 January 2021, with what she described as a 'stress related condition' (pages 121 to 122). She did not seek a referral to Occupational Health. Neither the claimant nor Mr Bainbridge say that the respondent responded in any way to this absence, or the reason for it, on a less formal basis than to suggest an OH referral.

29. In April 2021, Ms Modi requested that she no longer work in the data protection team and wanted all of her hours to be completed with the health records team. The respondent was unable to say why the request was made, but it is clear that Ms Modi's request was granted. The claimant was not told about the change until in a meeting with Mr Bainbridge on 11 May 2021. Mr Bainbridge agrees that the claimant was upset at the news. He also told her that there would be no additional resource recruited because the statistics indicating the number of GDPR and AHRA requests were much lower than in previous years meant that there was no business case to replace Ms Modi's hours or recruit additional resource. He explained to the claimant that he needed support from finance to provide funding to the role.

30. On 13 May 2021, the claimant requested sight of the statistics mentioned two days earlier and Mr Bainbridge provided them (page 149). Those statistics relating to GDPR were at page 151, and the ones relating to AHRA were at page 152. They show logged requests for data from patients. Page 151 shows that the total GDPR requests for January to March 2020 was 94. That had fallen over the same period for 2021 to 50. Page 152 shows that the total AHRA requests for January to March 2020 was six, and that these had fallen to five over the same period. The

respondent asserts that this indicates that the claimant's workload had broadly almost halved compared to the previous year, and so no additional resource could be provided if indeed the claimant even had an excessive workload.

31. Mr Bainbridge was unequivocal about the respondent's view of the claimant's workload in light of the statistics: *"This meant that the workload was approximately 50% of the previous year"*. On 2 August 2021, after the claimant had left employment, Mr Bainbridge explained to Lee Parkin that he had decided that the claimant's role could be done in her less than full time hours based on those figures (page 175). In his words: *"Di supplied the information upon which I based my decision"*. He then sets out the statistics on page 151 and 152.

32. The claimant disputed the figures and argued that they did not represent a fair reflection of the workload. She maintained that argument to the hearing, and said that the figures do not reflect that cases were taking much longer to complete, as shown by the number which were 'overdue'. She also said that the figures did not reflect the increased difficulty outlined above in relation to being able to complete tasks in order to do the job itself. If, as it appears from the respondent's case, the claimant's workload was judged by Mr Bainbridge solely on these figures, then it does seem that those critical factors required to determine the claimant's actual workload were overlooked.

33. The claimant also says that this issue, where she was told no support would be recruited on the basis of statistics which did not capture the whole story, was the 'last straw'. She says, and I accept, that she felt very disappointed that she had not been consulted about the resourcing or Ms Modi, and that she felt she had been misled into believing that she would receive more support, not less, whilst also struggling under a workload that she found unmanageable.

34. Following the meeting, the claimant spent some time considering her position and how to respond to the respondent's decision. She says she felt she had no choice but to resign and so she tendered her resignation by letter on 20 May 2021. The letter was shown at page 155. By way of reasoning, the claimant said: *"This follows as a result of a meeting on Tuesday 11th May 2021 and the decisions already made surrounding the Data Protection Service at Grantham"*. Mr Bainbridge e-mailed in response to say that he was sorry to hear of the resignation, that he was unable to replace Ms Modi's hours without finance approval, and that the conversations were on-going and which provided lots of calculations and assurances (page 156). He also asked if the claimant would wish to undertake other roles within the department. The claimant told him that *"no other roles are required"* (page 159). When asked about this in cross examination, the claimant said that she did not wish to work for the respondent anymore after feeling that it had broken her trust in a way which caused her to resign. I accept this explanation and find that this is indeed how the claimant felt.

35. Mr Bainbridge advised the claimant that her usual notice period would be four weeks and the claimant agreed to work her notice period with an allowance to take her accrued but untaken annual leave (page 158). The claimant and Mr Bainbridge met via Microsoft Teams on 25 May 2021. In the e-mail inviting her to the meeting, Mr Bainbridge asks the claimant if they can discuss the claimant's situation and asked the claimant if she would complete a self-assessment for stress. Mr

Bainbridge confirmed that the claimant's last working day would be 27 May 2021. He repeated the offer of moving the claimant into a different role. The claimant did not change her mind and her last day on site was 27 May 2021.

36. The claimant was keen for the respondent to understand how it had treated her and how it had behaved in a way which led to her resignation. She attended an exit interview after leaving her employment on 30 June 2021. The notes from the meeting were at pages 172 to 174, and in it the claimant outlines the events that have become her case. When asked what led to her resignation, she responds:

> *"There are numerous reasons which led to my resignation, may of these centre on three fundamental reasons, namely that,*
>
> 1. *I have been treated grossly unfairly.*
> 2. *The attitude of management has been indifferent, uncaring and biased.*
> 3. *Poorly communicated to and totally exempt from involvement and inclusion in the 'apparent' review of my job role."*

Relevant law

Constructive dismissal

37. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (*Western Excavating (ECC) Ltd v Sharp [1978] QB 761*).

38. The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law. All employment contracts contain a term that *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (*Malik v BCCI SA (in Liquidation) [1998] AC 20*, as amended by *Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116*).

39. Whether or not there has been a breach to the implied term of trust and confidence is an objective question and the employer's intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (*Leeds Dental Team Ltd v Rose [2014] ICR 94*) and the employee is likely to be able to accept that repudiatory breach and terminate the employment contract (*Morrow v Safeway Stores Plc [2002] IRLR 9*).

40. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (*Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131*). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (*Garner v Grange Furnishing [1977] IRLR 206*.

41. To accept a repudiatory breach of contract and claim constructive dismissal, an employee must resign or treat the employment contract as having ended in response to the breach. It is sufficient for these purposes for the breach to have played a part in the decision to resign (*Wright v North Ayrshire Council [2014] ICR 77*). The tribunal is able to ascertain the true reason for the employee's resignation (*Weathersfield Ltd v Sargent [1999] ICR 425*).

42. When faced with a repudiatory breach of contract, an employee can choose to either accept the breach, which ends the contract, or affirm the contract and insist upon its further performance. Failure to resign or act in a way which treats the employment contract as ending risks the employee either affirming the contract or waiving a breach of the contract of employment. When considering whether a contract has been affirmed, the tribunal will look at all of the circumstances of the case (*WE Cox Turner (International) Ltd v Crook [1981] ICR 823*).

43. Employees should be careful when choosing to continue to work for a period if they intend to rely upon a repudiatory breach of contract in a constructive dismissal claim. In *Quilter Private Client Advisers Ltd v Falconer [2020] EWHC 3294 (QB)*, Calver J said, at para 121:

> *"It is undoubtedly the case that if the employee decides to accept the repudiatory breach, he must do so unambiguously and with sufficient dispatch. If his purported acceptance is delayed, he runs the risk of a court finding that his action has not been sufficient to discharge the contract. However, in my judgment it is what happens during the delay which is the critical feature: provided the employee makes unambiguously clear his objection to what has been done by the employer, he is not necessarily to be taken to have affirmed the contract by giving a short period of notice, and continuing to work and draw pay for a limited period of time ... It all depends upon the facts of the particular case whether the employee has nonetheless unambiguously accepted the repudiation of the employer and with sufficient dispatch. The length and circumstances of the delay require to be examined in each case."*

Reductions to any award for unfair dismissal

44. If a finding of unfair dismissal is made as a result of an unfair procedure, then the tribunal should consider the likelihood that the employee would have been dismissed in any case had a fair procedure been followed. The compensation to be awarded should be reduced to reflect that likelihood (*Polkey v AE Dayton Services Ltd [1987] UKHL 8)*.

45. *Section 122(2) of the Employment Rights Act 1996* provides that the tribunal should reduce the basic award to reflect any circumstances where the tribunal considers the conduct of the claimant before the dismissal makes it just and equitable to do so. By *s123(6) ERA 1996*, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. The tribunal must make a reduction where there is a finding of contributory fault (*Optikinetics Limited v Whooley [1999] ICR 984*). The reduction may be as much as 100% (*W Devis & Sons Ltd v Atkins [1977] ICR 662*).

46. When considering whether or not to make a reduction for contributory conduct, it is helpful to keep in mind guidance from *Nelson v BBC (No 2) [1980] ICR 110* which said:

    46.1. the relevant action must be culpable and blameworthy;
    46.2. it must have caused or contributed to the dismissal;
    46.3. it must be just an equitable to reduce the award by the proportion specified.

47. Broadly, it is understood that the reduction should be: (1) 100% where the employee's conduct is wholly to blame for the dismissal; (2) 75% where the employee is mostly to blame; (3) 50% where there is equal blame; and (4) 25% where the employee is partly to blame.

Discussion and conclusions

48. I have found that the claimant's workload increased as a result of the way she was required to work in response to the Covid-19 pandemic. This is as a result of processes being slower to complete, with a smaller physical presence, and with colleagues having to get used to different ways of working. Ms Modi also stopped providing the claimant with support, and the backlog in on-going cases increased as a result of the cases becoming more difficult to complete. The claimant accurately perceived this increase in workload because it was her workload, and sought to raise it with the respondent. Ms Bishop raised it with Mr Bainbridge and Mr Bainbridge took responsibility for dealing with the situation.

49. It is clear to me that Mr Bainbridge had no accurate sense of what the claimant's workload was at any of the material time. Where he was not directly involved with the claimant, his evidence was based on an assumption that his team leaders were dealing with issues and that there were no outstanding issues if he was unaware of them. Mr Bainbridge's evidence was often expressed as fact, when that evidence was actually unsupported assumption where he had made no attempt to investigate the matter at all prior to providing that evidence to the tribunal. In this case, the respondent based its assessment of the claimant's workload on statistics which recorded the number of enquiries received by her department. This conclusion is supported by Mr Bainbridge's own evidence as to why he could not provide additional support. It is also what Mr Bainbridge explains in his internal e-mail on page 175. The statistics completely ignored the reality of the situation for the claimant as outlined in the paragraph above.

50. The respondent's submissions in relation how the relevant matters did not amount to a repudiatory breach of contract were, essentially, that the excessive workload did not exist based on the figures, that someone is now coping fine without extra help, and that the claimant left because she did not like the job. The claimant says that the respondent's miscalculation about her workload and being misled about help allowed her to terminate the contract and so she did. As provided by *Tullett*, it does not matter that the respondent may have considered itself to have acted properly in line with policy.

51. I am with the claimant on her case. It is plain that a failure to appreciate and manage an excessive workload can amount to a breach to the implied term of mutual trust and confidence in an employment contract, and therefore a repudiatory breach of that contract. Here, the respondent used a partial and ultimately inaccurate means to measure the claimant's workload and then failed to put into place any support to help her with the workload she actually had. This continued even after the claimant had flagged that she felt unable to take leave and after she had time off work with a stress related illness. At the same time, I have found that Mr Bainbridge allowed the claimant to believe that he would arrange support twice, but then did not do so. The first time was when he encouraged the claimant to take leave, but then nobody covered her work. The second time was in relation to replacing Ms Modi's hours when ultimately nobody did so. I consider that that second time was the claimant's 'last straw'.

52. In my judgment, the respondent has acted in a way which is likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. The respondent offered no 'reasonable or proper cause' for acting in this way, and I cannot find any. The respondent breached the implied clause articulated by *Malik* as amended by *Varma*. I am not sure why the respondent took a one-dimensional approach to measuring the claimant's workload, but it was, in my view, a damaging error to have done so. Consequently, I consider that the respondent did breach the implied term of trust and confidence between the parties, and that the claimant was therefore entitled to terminate the employment contract between them. There was a repudiatory breach. I also consider that the claimant was justified in treating the news that Ms Modi's hours would not be replaced, justified through an erroneous workload calculation, as a last straw which prompted her resignation.

53. The respondent contends that the claimant waived any breach by (1) delaying her resignation until 20 May 2021 and (2) agreeing to work her notice. The claimant contends that her resignation was a carefully considered decision, taken after some reflection, but not with undue delay. It is apparent to me that the claimant agreed to work her notice because that is what she was told her notice period was. It is also apparent that she immediately sought to make that period as short as possible through asking to use annual leave to bring forward her last day working in the role.

54. The claimant was told on 11 May 2021 that Ms Modi was not returning and that no other support or resource could be deployed without further approvals, and that the statistics showed that there was no need for additional support or resource. The claimant had sight of the figures used as justification on 13 May 2021, which I and the claimant consider to be insufficient to justify the respondent's position. She resigned one week after that on 20 May 2021. *Crook* requires me to consider all the circumstances in the case when thinking about whether or not a delay to resign on the part of the claimant might have amounted to the claimant waiving the breach.

55. This is a case where the claimant first raised issues about her workload around a year before she eventually handed in her resignation. I have found that the claimant's workload was exacerbated six months prior to her resignation when there was no cover arranged for her when on leave, contrary to assurances she

received. She also worked for some six months under the understanding that the respondent was working to get her additional support. Four months prior to her resignation, the claimant was off work with a stress related illness. Although she declined the OH assessment upon return, it is also apparent that the respondent did nothing else to support her upon her return. This is not the sort of case where the material events happen over a short period of time, or where the breach is a single event on one day. The claimant spent some time working under what she considered to be an excessive workload, and displayed considerable trust in the respondent to keep on working in those circumstances. I do not consider, therefore, that spending less than a week considering whether or not to resign following the receipt of the statistics at page 151 and 152 represents a delay sufficient for me to find that she waived the breach. She did not do so. She chose to resign after taking an appropriate amount of time to decide what to do next.

56. The claimant's resignation letter also makes clear that the breach is not waived. She cites the reason for resignation as being what I have found to be her legitimate 'last straw'. The respondent contends that the claimant did not resign as a result of the breach, and it was put to the claimant that she resigned simply because she did not like the job. *Wright* holds that the resignation need not be entirely due to the breach. It is sufficient that the resignation is only partly in response to the breach. Here, I consider that the claimant resigned principally in response to the breach. Although there may have been other factors at play which eroded the claimant's desire to do the job, I have no hesitation in concluding that the claimant resigned for the reason she said she did in her resignation letter – because of the staffing decisions made about her team, made without her involvement, and which were contrary to assurances.

57. In my view, following the words of Calver J in *Quilter*, the fact that the claimant attended work for a week during her notice period after resignation does not mean that the claimant had not accepted the breach. It is clear why the claimant resigned. She cited the last straw in her resignation letter, even if she did not label it thus. She sought to shorten her notice period. She declined the opportunity to explore other roles. She remained consistent about her reasons for resigning in the meeting on 25 May 2021 and in the meeting after she had left. The claimant resigned in response to the repudiatory breach of contract and did not waive the breach. It follows that I find her to have been constructively dismissed.

58. I also see no reason to reduce any consequential award following consideration of *Pollkey* and the principle of contributory conduct. Although pleaded, the arguments were not pressed in the hearing. I am, though, conscious that the respondent sought to hold over arguments about mitigation until any remedy hearing, and I agreed with that approach.

59. It follows that there is to be a consequential hearing to determine remedy, and directions about that will follow this judgment.

Employment Judge Fredericks

2 July 2022

Sent to the parties on:

1 August 2022

For the Tribunal Office: