



## EMPLOYMENT TRIBUNALS

**Claimant:** Mrs C King

**Respondent:** South Western Ambulance Service NHS Foundation Trust

**Heard at:** Exeter **On:** Monday 17, Tuesday 18, Wednesday 19, Thursday 20 and Friday 21 September 2018 - In Chambers on Wednesday 3 October 2018

**Before:** Employment Judge Matthews

**Members:** Mr J Howard & Mr I Ley

**Representation:**  
**Claimant:** Ms A Hart of Counsel  
**Respondent:** Ms S Omeri of Counsel

### RESERVED UNANIMOUS JUDGMENT

1. Mrs King's claims that she was victimised by reference to section 27 of the Equality Act 2010 succeed in part.
2. Mrs King's claim of unfair constructive dismissal is dismissed.
3. The case will be listed for a remedy hearing with a time allowance of one day.

# REASONS

## INTRODUCTION

1. Mrs Carolyn King's claims were clarified and agreed at a Preliminary Hearing by telephone before Employment Judge O'Rourke on 20 January 2018. At the start and during the course of the hearing before this Tribunal the claims were further refined.
2. The parties asked for a decision on liability only as the first step.
3. Mrs King claims that she carried out a protected act or acts by reference to section 27 of the Equality Act 2010 (the "EA"). The alleged protected act or acts relied on are a grievance letter dated 22 October 2016, a grievance appeal dated 17 April 2017, an e-mail of 19 April 2017 and a letter of 3 May 2017. In relation to the protected act or acts, Mrs King says that she was subjected to detriment and this amounted to victimisation under section 27 EA. Again, during the course of the hearing, the detriments were refined to the following:
  - Inadequate investigation of her grievances by an external consultant
  - Rejection of her grievances on 7 April 2017
  - The Respondent Trust's attempt to persuade her to drop her appeal
  - The decision to delay her return from a secondment to her substantive post
  - Rejection of her grievance appeal on 11 September 2017
  - A continuing failure by the Trust to discipline Mr Steven Boucher
4. Mrs King also claims that she was unfairly constructively dismissed. Mrs King says that conduct of the Trust amounted to a fundamental breach of the implied term of trust and confidence in the employment contract entitling her to resign and treat herself as unfairly constructively dismissed. The conduct relied on is related to the alleged detriment referred to in the preceding paragraph.
5. The Trust defends the claims. As far as the victimisation claim is concerned, it raises time points going to jurisdiction, it does not concede that there was any protected act and if there was, disputes that there was any detriment. If there was detriment, the Trust says it

was not because of the protected act. Turning to the claim of unfair constructive dismissal the Trust says that there was no fundamental breach of contract and if there was, Mrs King delayed too long before resigning and thereby affirmed the contract. No real point is taken on the reason for Mrs King's resignation. Whilst the Trust pleaded that if there was a dismissal it was fair and this was restated at the hearing, that point was not pursued in evidence or argument.

6. On the first day of the hearing one of the original panel members, Mrs Wendy Richards-Wood, decided that her acquaintance with Ms Nicky Ackerley, a witness for the Trust, required her to recuse herself. The Trust was not prepared to proceed with the remaining panel of two and it was necessary to find another panel member. For that and other reasons, the Tribunal adjourned the hearing to the following day. Mr Jim Howard was subsequently empanelled.
7. Mrs King gave evidence supported by a written statement. On behalf of the Trust we heard evidence from Ms Ackerley (Human Resources Consultant), Mr Kenneth Wenman (Chief Executive of the Trust), Mr Sam Fraser (Senior HR Business Partner) and Mr Hugh Hood (at the relevant times a Non-Executive Director of the Trust). Each produced a written statement.
8. There was an agreed bundle of documentation. References in this Judgment to pages are to pages in the bundle unless otherwise specified. Ms Hart produced a chronology and cast list. One of the purposes of the chronology was to remedy the omission from Mrs King's statement of any references to documents relied on. This referencing had been specifically ordered in the case management orders. That, together with the resulting need to work through the bundle with Mrs King, was unnecessarily time consuming. Those acting for Mrs King should note for the future that case management orders are made for good reason and they are orders, not suggestions. Ms Omeri and Ms Hart handed up skeleton arguments and supplemented those with oral argument.
9. We reserved judgment to better consider the evidence and issues. The Tribunal sat on Wednesday 3 October to deliberate.

## **FACTS**

10. The Trust provides emergency and urgent care services in Cornwall, the Isles of Scilly, Devon, Dorset, Somerset, Gloucestershire, Wiltshire and the former Avon area. At the time it filed its response in these proceedings it employed some 4,000 people.

11. Mrs King was employed by the Trust from 21 November 1991 until 5 October 2017. Mrs King started as a Paramedic and worked her way up to senior management positions. At the time of her leaving the Trust's employment Mrs King was on secondment elsewhere in the Trust but her substantive post remained that of Operations Manager North and Mid-Devon. (We think that was the title. The area is often referred to simply as "North Devon"). That post had line responsibility for seven ambulance stations and some 130 staff.
12. When Mrs King started with the Trust she worked part time in patient transport out of Holsworthy. Mrs King thought that the *"attitude of some staff was demeaning and not as respectful as I had expected."* (WS5) Mrs King also mentions being referred to as a *"split ass"*. We think Mrs King means "split arse". We understand this to be a very offensive reference to a woman deriving from the female genitalia. Notwithstanding, Mrs King says that she got on with the job, which she loved.
13. After a while Mrs King transferred to a full-time patient transport job in Barnstaple. Here, Mrs King says certain male staff did not speak to her (WS7).
14. Next, Mrs King transferred to Bideford following an A & E course. Mrs King says that *"The culture was pretty terrible. Women were really classed as second class citizens."* (WS9)
15. In or around 2000, Mrs King successfully applied for a Supervisor's role in Ilfracombe. After some 5 years in that post, Mrs King was offered and took the post of acting Assistant Divisional Officer for North Devon. Mrs King says that she took this post only after "much consideration" and having discussed how bad the culture was with Mr Steve Pryor (the then Head of Operations West Division) and Mr Neil Le Chevalier (Director of Operations) (WS12). Mrs King says that bad culture was evident in the new post and describes instances of it (WS13). During 2006-2008 Mrs King says that she made formal and informal complaints. Mrs King describes the *"official"* complaints in her statement (WS15 and 16). For a snap shot of one person's view of the prevalent culture and Mrs King's contribution to improving it from 2004 onwards, Mr Alan Harness's (Paramedic) account at 109-111 is instructive. A note of caution is that it is clear that Mr Harness was very much a fan of Mrs King's.
16. Mrs King's role evolved to become Operations Manager North and Mid-Devon. Sometime in 2013 Mr Boucher (Head of Operations West Division) became Mrs King's manager. Mr Boucher's West Division comprised Cornwall and Devon, including Mrs King's North and Mid-Devon team. Apparently, Mr Boucher had six managers reporting to

him, the only female being Mrs King (WS20). Mr Boucher reported to Mr Le Chevalier.

17. Prior to December 2014 it seems that Mrs King had no issues with Mr Boucher's management of her. However, Mrs King says things changed in December 2014.
18. Mrs King had a performance meeting with Mr Boucher on 4 September 2014. From Mrs King's perspective all seemed to be well.
19. It seems that a number of further meetings between Mr Boucher followed, but there is no record of what they were about. These led to a scheduled 1:1 between the two on 10 December 2014. Mrs King tells us about this meeting and her subsequent telephone discussion later the same day with Mr Le Chevalier, in her statement (WS21-24). Mrs King says she made some notes at the time. It has not been suggested to us that these were not contemporaneous although parts of the content have been disputed by Mr Boucher and Mr Le Chevalier.
20. The notes and an associated e-mail are at 56-58. The notes record a telephone conversation with Mr Le Chevalier. Mrs King's evidence is that she made the call. Understanding the notes is complicated by the fact that Mrs King was partially recording what Mr Boucher had said to her and partially what Mr Le Chevalier subsequently said to her. Nevertheless, the following points are identifiable:
  - Mrs King was told she had been cut some slack over issues involving Mr Wayne Lee and Ms Jeni Huyton. Apparently, this was about Mrs King getting too close to staff.
  - Mrs King was told that the year and the following two years were going to be difficult and she had to be sure she was up to it. Mrs King should talk to her husband about it including the possibility of retirement.
  - There were issues over performance and sickness in North Devon.
  - Mrs King was told that they did not want to be going down the capability route in a few years' time.
  - Mr Le Chevalier had no problems with Mrs King's leadership.
21. Mr Le Chevalier indicated to Mrs King that Mr Boucher's conversation with her might have been his fault because he had asked all his

managers to speak to their reports in a similar vein about the coming couple of years. In the later investigation process Mr Le Chevalier explained that, following a merger around that time, there was a need to raise the standard of management (see 196). Mr Le Chevalier ended the call by suggesting that Mrs King have a rest and think about things.

22. On 12 December 2014 Mrs King sent the e-mail we see at 56 to Mr Boucher. Mrs King asked for a meeting to discuss concerns about her performance. That meeting did not take place. We think it was overtaken by Mr Boucher's leave and subsequent events.
23. It was put on behalf of Mrs King that Mr Boucher's raising issues with her at the 10 December meeting was a surprise. This is to some extent supported by the e-mail of 12 December. That, however, is not quite what the e-mail says. Nor is that what Mrs King told us in oral evidence. In essence, Mrs King accepted that there were some issues.
24. So much is tolerably clear. What is not clear to us is why the matters that had arisen seem to have been personalised and focussed by Mrs King on Mr Boucher. Mr Le Chevalier had as good as told Mrs King that he was responsible for what Mr Boucher had said to her on 10 December. At the time Mr Le Chevalier seems to have recognised that there was a relationship problem between Mr Boucher and Mrs King. That is why he took the steps to separate the two we shall come to. What we lack is any explanation of what he thought the problem was. It may be that it arose only from the meeting on 10 December 2014, but we do not know that to be the case.
25. In March 2015 Mr Boucher failed to complete Mrs King's performance appraisal. It is put that this was because Mrs King was a woman. As Mr Hood later established, however, Mr Boucher failed to complete any appraisals for his six managers at this time.
26. On 27 May 2015 Mrs King and Mr Boucher had a telephone conversation about problems with shift cover. Mrs King subsequently sent Mr Boucher an e-mail about this (65). Mr Boucher replied with an offer of a secondment. Mr Boucher's e-mail and Mrs King's reply (timed 13 minutes after) read (65):

*"Thanks Carol*

*Just a thought would you be interested in a month's secondment to support the ROC with some specific objectives and Colin" [Bolsom] "picking up your OM responsibilities?"*

[Reply] *"I would love to!"*

27. We know from the later investigation that Mr Le Chevalier had engineered the secondment to resolve what he saw as the *"strenuous relationship"* between Mr Boucher and Mrs King (see 198). Mrs King sees it more or less that way. Mrs King says *"It appears this was a made up role to get me away from Mr Boucher for some reason."* (WS29)
28. With hindsight, Mrs King also says that she was set up to fail by Mr Boucher and Mr Le Chevalier. Since the secondment initiative came from Mr Le Chevalier, not Mr Boucher, we think this is an example of wrongly personalising issues to Mr Boucher. It is, however, true that it became clear that Mr Ceri Smart (Head of Resourcing and to whose department Mrs King was seconded) did not welcome Mrs King's arrival. Nor did Mr Smart welcome her subsequent report (which he had to obtain from Mr Le Chevalier as Mrs King had, contrary to her assertion, not copied it to him). In fact, Mr Smart made some fairly forthright criticisms of what he saw as Mrs King's interference and disruptive effect on his team (see the fulsome criticism at 198). No formal issue was made of this by the Trust however, and we see nothing to support the assertion that Mrs King was set up to fail. In any event, there is no room for doubt that the secondment was arranged with Mrs King's wholehearted agreement.
29. Mrs King says that, after three months (presumably of the secondment to ROC – at some point the "one month" became three), she had a meeting with Mr Le Chevalier and Ms Lucy Manning (HR Business Manager) (WS30). Apparently, to Mrs King's upset, retirement was mentioned. As we read it, the later investigation, in terms, substantiated this. Following the meeting Mr Le Chevalier wrote to Mrs King on 18 November 2015 offering her a secondment to Patient Experience as a Patient Experience Manager within the Trust's Governance Department (67). The secondment was to run until 31 March 2016. Mr Le Chevalier explained that he would *"arrange to meet with you in the New Year to determine whether you will move back to your substantive role or continue with your secondment."*
30. Mrs King says about this period *"I didn't want to give up my substantive role, but also didn't want to work under Mr Boucher, as I felt he was trying to get me out of my position."* (WS31 and see, also, WS33). Again, Mrs King is personalising Mr Boucher presumably based on a conversation that was, by this time, nearly a year old. It is clear to us that it was Mr Le Chevalier who had always called the shots. For whatever reason, Mr Le Chevalier arranged matters so that

Mrs King was away from her substantive post. Subsequent events served to confirm this.

31. Mrs King's secondment was twice extended. First until 1 July 2016 (87) and subsequently until 30 September 2016. Mrs King never returned to her substantive post.
32. During this period Mrs King says she "*had very little to do with the Operations management of North Devon*"...."*except in offering some support to 2 colleagues: Alan Harness and Sandie Hillier.*" (WS32) That is not, however, how Mr Le Chevalier, Mr Boucher or Mr Colin Bolsom (who was standing in for Mrs King as Operations Manager North and Mid-Devon) saw it.
33. In 2016 Mrs King's secondment was based working out of the Trust's HQ in Exeter. On 30 June 2016 Mr Boucher saw her in the kitchen at Trust HQ and asked if he could have a word. Mrs King made a note of what happened (93-94). The note records that Mr Boucher asked Mrs King how she was getting on and what was happening. Mr Boucher appears to have agreed that Mrs King was right not to give up her substantive post in North Devon because there was no security in the secondments she was undertaking. The note beyond that is not very helpful but Mrs King summarises what happened thus (WS35):

*"He said that I have had "too much to do with a couple of staff in North Devon" and the management of North Devon was not anything to do with me now. I was not allowed to be welfare officer for a woman who sadly lost her husband."* [We deduce this is Ms Hillier]. "*I was shocked at his attitude to me and was sure he definitely wanted me out of the team.*"
34. Mr Boucher followed this up with a letter to Mrs King on 5 July 2016 requiring her to attend an informal meeting to discuss the issues (98). That meeting never took place. Rather, Mrs King met Mr Le Chevalier on 10 July 2016. Mrs King made a note (103). It appears that Mrs King told Mr Le Chevalier what had happened. Mr Le Chevalier said he would look to see if there was a permanent role coming up in Patient Experience and not to worry about the letter from Mr Boucher.
35. On 8 August 2016 Ms Hillier wrote to Mrs King (113-114). Ms Hillier had gone to see Mr Bolsom. Ms Hillier wanted to discuss why Mrs King could no longer be her Welfare Officer. Mr Bolsom had explained that Mrs King had to be replaced in the role by one of the officers at Bideford. When Ms Hillier questioned what had happened to cause the long-standing arrangement to have to be altered, Mr



Bolsom replied that Mrs King was not to be involved in operations at Bideford effective from the first week in July. That was what Mr Boucher had said.

36. We were not present when Mr Boucher met Mrs King on 30 June 2016 and we cannot provide any supplementary comment on his behaviour towards Mrs King on that occasion. What we can form a view on, however, is what underlay these events. It seems to us that the position was pretty clear. Whilst Mrs King had remained the holder of the substantive post, she had relinquished her responsibility for operations in North and Mid-Devon around a year earlier to Mr Bolsom. Clearly Mr Bolsom should be left alone to do his job and it was Mr Boucher's business to see that he was. Both sides, however, had been so eager to solve the relationship issue between Mr Boucher and Mrs King by using secondments that they had not taken time to clarify what the secondment meant for Mrs King's involvement in North Devon. The subsequent investigation by Ms Ackerley more or less reached the same conclusion.
37. Around this time, on 21 July 2016, at Mrs King's request, she had met Ms Emma Wood (Director of HR). Mrs King kept a note of the meeting (106). Mrs King gives differing explanations of what she thought the meeting was about. In her statement Mrs King says it was about her concerns over a job advert for Operational Officers that appeared to favour females (38). In her grievance to Mr Wenman on 22 October 2016 Mrs King says it was about her wider concerns over how women were treated in the Trust (see 141). In any event, Ms Wood took Mrs King to task about a text message Mrs King had sent to a work colleague, Ms Lejanne Knott, that had been used in an Employment Tribunal claim against the Trust. Mrs King apologised about the text. There was some general discussion about sexism at the Trust and Mrs King's return to her substantive role reporting to Mr Boucher.
38. The chat with Ms Wood on 21 July about sexism in the workplace was obviously part of something wider going on in the Trust, which involved Mrs King. We do not know precisely what this was but we have seen glimpses of it. In September 2016 it resulted in a meeting between Mrs King, her husband Mr King, Mr Chris Nelson (UNISON full time officer) and Mr Wenman at UNISON's offices. Mrs King tells us about this (WS39).
39. The occasional exchange about Mrs King's involvement in operations in North Devon continued. At 134 we see Mrs King asking why she was not involved in a selection day for Operations Officers in parts of that area. Mrs King characterises Mr Boucher's reply as excusing the omission as an oversight. It does not. It includes an apology but

essentially says that it is Mr Bolsom's business and not Mrs King's. It also referred to Mr Boucher's understanding that Mrs King's secondment was "*due to continue indefinitely*".

40. What triggered it is not clear to us, but on 22 October 2016 Mrs King sent a grievance letter to Mr Wenman (135-142). In her statement Mrs King focusses on Mr Boucher as the issue (WS41). That is by no means all that the letter says. It should be read for its full content. In summary it raised the following issues:

- Mrs King had been subjected to sexist remarks, bullying, harassment and victimisation for the majority of her career with the Trust. Managers had allowed this to continue.
- Specific issues involving named people in 2006 and 2008.
- The events surrounding the 10 December 2014 meeting with Mr Boucher. This includes an allegation that Mr Boucher "*treated me differently*" and "*would not look me in the eyes when talking to me.*" Mrs King describes the behaviour as bullying and harassment and writes "*I could only conclude that I was being treated this way because of my gender/sex.*"
- Mr Boucher never asked Mrs King to stand in for him (essentially shadowing a more senior role) despite her asking him for the opportunity. Male managers, however, did stand in for Mr Boucher. Mrs King also raised Mr Boucher's failure to complete her 2015 appraisal.
- Mr Boucher had set Mrs King up to fail in her secondment to ROC to bully and undermine her into leaving. This was further evidenced by Mr Boucher not including Mrs King in the selection exercise for Operations Officers.
- At the end of the ROC secondment Mr Le Chevalier had suggested to Mrs King that she consider retiring.
- Mr Boucher had prevented Mrs King from helping Ms Hillier and Mr Harness. Mrs King referred to the related conversation with Mr Boucher on 30 June 2016, which Mrs King characterised as threatening and bullying.
- Ms Wood's reaction to Mrs King at their meeting on 21 July 2016. Mrs King says that she was reprimanded for

saying that the Trust was a “*bullying sexist Organisation*” notwithstanding that Ms Wood acknowledged that there were issues in West Division which Mr Wenman and she were addressing.

- Mrs King ended her grievance in a way that perhaps best reflects the general concerns she described at the time and at the hearing:

*“I am submitting this grievance to enable the trust to address the serious concerns that I raise. It is a huge disappointment that there is a culture of sex discrimination and bullying and harassment which has been allowed to develop and grow within the trust. It is even more disappointing that this behaviour is often committed by senior managers who act with impunity.”*

41. Mr Wenman’s response was to commission Ms Ackerley as an outside consultant to look into the grievance. Ms Ackerley wrote to set her own terms of reference in a letter dated 21 November 2016 of which the first page can be seen at 152. However, rather than set out terms of reference, the letter makes an initial lay assessment of the position. Ms Ackerley wrote that she assumed that Mrs King intended to consider a claim in the Employment Tribunals and that there might be a potential case to answer if there was anything in allegations 11 to 39 of the grievance. Ms Ackerley appears to view her task as to “*determine risk*”. As will be seen from our conclusions, we think this is where things went wrong for both Mrs King and the Trust. Rather than confining her role to that of neutral investigator, we think that Ms Ackerley also had the issue of damage limitation in her mind. Nevertheless, in the letter Ms Ackerley set herself some fair objectives. Ms Ackerley writes that a decision would need to be made about certain matters:

*“whether Mrs King was subjected to the alleged behaviours: whether this was because she was female or because she previously gave evidence against the company at the Employment Tribunal;”* [Ms Ackerley knew what a protected act was] *“and whether these behaviours would have been experienced by any other person regardless of gender or employment history.”*

42. Ms Ackerley conducted interviews with Mrs King, Mr Nelson, Ms Wood, Mr Boucher, Mr Bolsom, Mr Smart and Mr Le Chevalier. There are notes but they are just that, notes. They are not easily understood. Although we have read them, we have largely relied on the parties to draw our attention to anything particularly relevant.

What we can say is that the notes reflect a thorough investigation of the issues raised in Mrs King's grievance, at least with those interviewed. Mrs King criticises Ms Ackerley for not interviewing her witnesses. Ms Ackerley had a statement from Mr Alan Harness (109-111) and a copy of Ms Hillier's letter of 8 August 2016 (113-114). Ms Ackerley did not interview either of them, forming the view that the documents spoke for themselves. When answering questions at the hearing Ms Ackerley allowed that, with hindsight, it might have been a good idea to interview at least Mr Harness. We think that was a fair concession.

43. Ms Ackerley met Mrs King and Mr Nelson on 19 December 2016. Ms Ackerley's notes are at 238a-m. We note that both Mrs King and Mr Nelson appear to have expressed the view that Mr Boucher did not look women or men in the eye.
44. On 19 January 2017 Ms Ackerley met with Ms Wood to discuss the Trust's policies and procedures. There appear to be notes at 238af-am.
45. On the same day, 19 January 2017, Ms Ackerley met Mr Le Chevalier. The notes are at 238an-at.
46. On 31 January and 22 February 2017 Ms Ackerley met Mr Boucher. The notes are at 238n-r and s-x.
47. On 22 February Ms Ackerley met Mr Bolsom. The notes are at 238y-ae. We note that Mr Bolsom expressed huge respect for Mrs King and gratitude for the support that she had given him whilst she was in post in North Devon. Once Mr Bolsom had stood in for Mrs King, however, Mr Bolsom reported that the relationship had deteriorated. Mr Bolsom went to so far as to say that Mrs King was behind a grievance lodged against him by Mr Harness and was involved in every aspect of negativity.
48. On 6 March 2017 Ms Ackerley met with Mr Smart. The notes are at 238au-az.
49. Further issues concerning Mrs King's involvement in North Devon now arose. Mrs King had been working from stations in North Devon on Fridays as part of her secondment. Whilst Ms Ackerley was conducting her investigation, Mrs King asked to work more days in North Devon for family reasons. Ms Vanessa Williams (Head of Quality) was Mrs King's temporary line manager and she readily agreed to this. Mr Bolsom, however, for reasons that we have already explored, was uncomfortable about it. This seems to have culminated in an occasion in December 2016 when the locks on the Bideford

office door had been changed and Mrs King was refused the door code. This and other incidents were seen by Mrs King as victimisation and harassment by Mr Bolsom (WS46).

50. Subsequently Mr Bolsom complained about Mrs King. Mrs King makes light of this in her statement (WS47) but the documents show a more serious side to the issue. On 20 February 2017 Mr Le Chevalier wrote to Mrs King about this (181 – we have the first page of the letter). Mr Bolsom had raised concerns about Mrs King with Mr Le Chevalier on 3 January 2017. Mrs King had been involving herself in Mr Bolsom's management decisions. Mr Le Chevalier continued:

*“Colin has been very clear, he is finding your presence very challenging, and it is therefore beginning to impact on his own health and wellbeing, as well as negatively impacting on a number of his operational staff.*

*I would therefore like to reiterate that Trust HQ is your base during your Patient Safety Manager secondment. Whilst I am happy for you to work on the occasional day from home, I would prefer that you do not work from Bideford station, as it is important for the operational management team for North Devon to be able to work together to achieve their objectives in their roles, without the potential of this being undermined or needlessly challenged by the presence of the substantive Operations manager.”*

51. Mrs King saw it differently and explained this in a letter to Mr Le Chevalier on 3 March 2017 (85-86 – the 2016 date is agreed to be wrong). We note that an e-mail from Mr Nelson on 21 March 2017 throws further light on this. In essence Mrs King was not prepared to enter into formal mediation with Mr Bolsom unless he engaged in informal discussions with her first. Nor was Mrs King prepared to stay away from the North Devon operational area. Given the experiences Mrs King was complaining of, we are surprised by this apparent lack of empathy with Mr Bolsom who clearly perceived himself as challenged by Mrs King and with his health and wellbeing an issue.
52. On 8 March 2017 (the report also has the date of 17 March at its end) Ms Ackerley delivered her report to the Trust (191-205). Within the report Ms Ackerley reproduced Mrs King's grievances in full. Against each grievance or group of grievances Ms Ackerley set out her findings. These should be referred to for their full content. A summary follows:
- Pre-2009 issues relating to sexism in North Devon had been dealt with informally and there were no formal

complaints. People had left, others had joined and the culture had changed.

- The Trust had made efforts to promote and support women in the workplace and introduce equality and diversity training for all managers.
- At the time of Mrs King's meeting with Mr Boucher on 10 December 2014 there were no recorded performance management or capability issues relating to Mrs King. Mrs King was achieving 85-95% of her targets.
- Concerning the events of and surrounding 10 December 2014, neither Mr Boucher nor Mr Le Chevalier could recall any conversation about retirement. Ms Ackerley continues: *"It is suggested that there were no capability or conduct issues formally addressed with CK. It is suggested that CK was coached by SB in understanding that her behaviour was not always conducive to seeing or supporting the corporate bigger picture. This particularly in regard to texting colleagues inappropriately about the Trust and compromising the Trust's position in employment matters. This does not amount to Harassment and bullying but rather management of a difficult situation. It is suggested that CK was good in supporting welfare issues but that following corporate processes was not viewed in a positive light by some management. There were concerns around decision making and CK involvement in welfare issues, where it is perceived the boundaries become unclear. Specifically, on the issues relating to Sandie Hillier and Wayne Lee. It is apparent that CK believed WL was not treated as she would have recommended by the Trust. On the matter of WL CK was counselled that as a manager she should put some distance between herself and the staff."*
- Although Mrs King did not stand in for Mr Boucher as Head of Operations West Division, Mrs King acted for him in championing health and wellbeing and represented him on graduate induction days, supporting graduates thereafter. Mr Boucher's failure to complete Mrs King's 2015 performance appraisal was a poor management practice.
- Although Ms Ackerley accepted that Mrs King's experience was that Mr Boucher did not make eye contact with her, this was not something Ms Ackerley

observed either personally or in the presence of other female employees of the Trust. Ms Ackerley makes no mention of Mr Nelson and Mrs King's comments that Mr Boucher did not make eye contact with anyone. Presumably this was an oversight.

- Whilst pointing out that the secondment process was not properly followed, Ms Ackerley found that Mrs King had not been coerced into the secondments. Ms Ackerley recorded Mr Smart's criticisms of Mrs King which are mentioned earlier in this Judgment. In terms, Ms Ackerley also substantiated Mrs King's assertion that Mr Le Chevalier had mentioned retirement to her at a meeting around three months after her initial secondment. Again, this is mentioned earlier in this Judgment.
- As far as Mr Boucher's meeting with Mrs King on 30 June 2016 was concerned, Ms Ackerley found that Mrs King was causing problems for Mr Bolsom. In doing so Ms Ackerley inferred that Mr Boucher had grounds for saying what he had said to Mrs King on that occasion. Ms Ackerley made no finding, however, on Mrs King's assertion that Mr Boucher's attitude was threatening, bullying and left her shaking.
- Ms Ackerley noted that Mrs King had never raised any complaint about bullying or harassment against Mr Le Chevalier, notwithstanding that he drove the secondments.
- Ms Ackerley noted the definitions of bullying and harassment in the Trust's policy on Dignity and Respect at Work (although, we think, with some inconsequential errors in punctuation): *"Bullying: This may be characterised as offensive, intimidating, malicious or insulting behaviour an abuse or misuse of power through means that undermine, humiliate denigrate, or injure the recipient. Harassment: In general, terms this is unwanted conduct related to a protected Characteristic (age, race, sex, disability, sexual orientation and religion or belief) which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading humiliating, or offensive environment for that individual in the workplace"*
- Ms Ackerley ended with a summary and some recommendations. Ms Ackerley's overall conclusion was

that there was no evidence to substantiate that the anti-harassment and bullying policy had been breached. There was no mention of discrimination, unless Ms Ackerley saw that as included in harassment. Ms Ackerley made a number of criticisms of the way things had been handled such as the lack of clear definition for the secondments.

53. It is, of course, easy to pick holes in a report of this sort and it was one of the main areas for criticism in the subsequent grievance appeal and at this hearing. Although it is clear from binding authorities that we are required to critique this report, essentially to decide whether or not it is part of an act of victimisation, we do not see that this should be a nit-picking exercise with the benefit of hindsight. Even so, in our view there were several areas of legitimate concern.

54. First was Ms Ackerley's findings (or lack of them) in relation to the events of and surrounding the meeting Mrs King had with Mr Boucher on 10 December 2014. The primary concern is about how Ms Ackerley dealt with the evidence she had. This was something that struck each of the three Tribunal members at first sight, without cross reference to each other. It is not a legal construct. Mrs King's note was the only written and contemporaneous record of what had happened. In paragraph 20 above we summarise the contents of that note. It was clear from that note that the subject of retirement had come up. Notwithstanding, Ms Ackerley dealt with this commenting that neither Mr Boucher nor Mr Le Chevalier could recall any such conversation. Ms Ackerley made no findings about the "cut some slack" and "do not want to go down the capability route" comments. A much more obvious approach would have been for Ms Ackerley to deal with Mrs King's note on a "If these things had been said, my conclusions are these" basis. This failure to approach the evidence in a measured way casts doubt on Ms Ackerley's conclusion that what happened did not amount to bullying or harassment. The alleged conduct might have been bullying, harassment and/or discrimination or it might not. However, Ms Ackerley could not make an informed decision on that unless she addressed the evidence. Ms Ackerley was not following the brief she set herself (see paragraph 41 above).

55. In addition, Ms Ackerley made no finding at all on Mrs King's assertion that she had been treated that way because of her gender/sex. To be fair to Ms Ackerley, she did address elsewhere the three specific points of failure to make eye contact, failure to complete an appraisal and standing in.

56. Second, we come to two of those specific points, Ms Ackerley's findings in relation to the non-completion of Mrs King's performance



appraisal in 2015 and the allegation that Mrs King was not chosen to stand in for Mr Boucher. These allegations by Mrs King had, although perhaps not in a straightforward way, been expressed in the context of what happened to Mrs King's male manager colleagues. Ms Ackerley did not look at what had happened to appraisals for male colleagues. Ms Ackerley did look into the issue of standing in but came up with a less than comprehensive finding.

57. Third, Ms Ackerley did not engage with Mrs King's assertion that Mr Boucher's attitude to her at the meeting on 30 June 2016 had been threatening and bullying. On the face of the grievance that, of course, was the point of Mrs King raising the issue.
58. Fourth, Ms Ackerley made no finding about whether or not Mr Boucher's letter to Mrs King on 5 July 2016 amounted, as Mrs King alleged, to a threat.
59. We do not think that any material criticism can be made of the investigatory process. We do, however, have the concerns we have outlined above about Ms Ackerley's subsequent report. Ms Ackerley tried to carry out the role of independent investigator as well as the role of advisor. It may be possible to undertake both tasks satisfactorily, but it risks the difficulties that arose here. We think the upshot was a report nuanced towards damage control. It may well be that the investigation justified the overall conclusions that the report reached but the way in which Ms Ackerley dealt with some of the evidence (or, more accurately, did not deal with it) and some of the nuancing of the findings must cast doubt on whether or not the report was thorough and fair in key areas. As an example of what we mean when we refer to nuancing we would refer to Ms Ackerley's omitting to deal with some potentially uncomfortable issues such as the alleged "cutting some slack" and Mr Boucher's demeanour at his 30 June 2016 meeting with Mrs King.
60. Ms Ackerley's report was discussed at a meeting between Mr Nelson, Mrs King, Ms Clare Melbourne (HR Business Manager), Mr Wenman and Ms Ackerley on 7 April 2017. Mrs King says she thought the report was very weak but answered some questions (WS50).
61. On 10 April 2017 Mr Wenman wrote to Mrs King summarising the outcome of the meeting on 7 April 2017, as he saw it (239-240). The letter should be referred to for its full content. It is clear to us that Mr Wenman did not give a great deal of thought to the adequacy of the report. As Mr Wenman said, he had put that in the hands of an HR professional and trusted in Ms Ackerley doing the job. That, of course, does not mean that he did not accept the Trust's

responsibility for the report. Mr Wenman's focus was on the way forward. This is reflected in his letter. The key messages were these:

- *"I gave assurances that while you would not know the specific actions taken in relation to addressing the issues substantiated through the investigation report, you would need to trust in the organisation to take appropriate action. The outcome, for you specifically, would be demonstrated through changes in behaviour and an improved relationship with Steve Boucher, Head of Operations."*
- *"We went on to discuss your substantive role as an Operations Manager and you explained you wished to return to this role from your current secondment to the Patient Experience team. Chris explained that you had already been in discussion with Neil Le Chevalier, Director of Operations, and planned to return on 01 May 2017. We discussed the practicalities of this, due to the concerns raised regarding Steve Boucher, who would be your direct line manager on your return. We discussed the option of mediation between yourself and Steve which was something you were willing to consider. We also discussed the possibility of a facilitated meeting for yourself and Steve to discuss the issues raised and to reset expectations and start to rebuild your relationship going forward."*

62. In our view these "messages" speak for themselves. The report had concluded that there had been no bullying or harassment. Mr Wenman had, nonetheless, taken on board Mrs King's perspective of her relationship with Mr Boucher and was going to do something about it. Also, Mr Wenman was not going to see Mrs King go back to her substantive post, reporting to Mr Boucher without safeguarding measures.

63. On 17 April Mrs King sent Mr Wenman an e-mail to say that she would be exercising her right to appeal against the outcome of the grievance on the grounds that the investigation was inadequate (248-249).

64. On 18 April Mr Wenman responded (247-248). The response can be referred to for its full content. It seems neutral to us. It included a request that Mrs King be specific about her grounds of appeal. Mrs King's response on 19 April was no more specific but alleged that the request for specifics was unfair treatment (247). Mr Wenman decided he should meet Mrs King to clarify what she expected to happen.

65. Mrs King says that, on 20 April 2017, she received a threatening phone call from Ms Manning demanding that she attend the Trust's Exeter HQ (WS53). Mrs King tells us how she felt in her statement (WS53 and 54). It seems that Ms Manning later apologised.
66. Mrs King, accompanied by Mr Nelson, duly met Mr Wenman and Ms Manning that day. Ms Manning took a note (265-266). Although it is not in the note, during the hearing before us Mr Wenman accepted that he said to Mrs King that they had given her everything she wanted, so why did she want to appeal. Mrs King told Mr Wenman that it had been a long road but she did not feel the outcome was enough. Mrs King added that this was not the way she wanted to end her career. (We are unsure what was meant by that but it does beg the question of whether or not Mrs King intended to return to work at this stage.) Mr Nelson clarified that the appeal had been sent in whilst he was on leave, otherwise there would have been more detail. Mr Nelson said Mrs King felt "*underwhelmed*" by the outcome, although she recognised that all requests for remedy had been addressed. Mr Wenman agreed a seven days extension of the usual timescales for clarification of the grounds of appeal.
67. Mrs King says that during this meeting it was made very clear to her that Mr Wenman was trying to persuade her against pursuing the appeal (WS55). Apart from that assertion by Mrs King there is no evidence to suggest she is right about this. The contemporaneous paperwork supports Mr Wenman's evidence before us. Mr Wenman had been surprised by Mrs King's decision to appeal because he thought agreement had been reached at the meeting on 20 April. When it was put to him, he did not accept that he had been frustrated. No doubt it was not his preferred outcome. On the face of it he was making genuine efforts to save the employment relationship. When it was clear that, notwithstanding, Mrs King wanted to appeal, Mr Wenman facilitated that process.
68. Mr Wenman confirmed the position in a letter to Mrs King on 2 May 2017 (278-279). At that time no details of the appeal had been received and Mrs King had gone on sick leave on 21 April 2017 (from which she did not return to work before her leaving date on 5 October 2017). Mrs King says that she felt Mr Wenman's letter was an attempt to avoid dealing with her appeal (WS58). On its face it was not.
69. As it happened, the details of the appeal were in hand and were set out in a letter from Mr Nelson to Mr Wenman dated the next day, 3 May 2017 (280-282). This was a somewhat unfocussed document which we will not summarise here for reasons that will become apparent.

70. On 11 May 2017 Mrs Williams (who, as previously noted, had line responsibility for Mrs King at the relevant time) wrote the letter we see at 297 to Mrs King. This letter was a subject of the later full grievance appeal, which alleged the letter to reflect an act of victimisation (see 260). It was also the object of some focus during the hearing. The thrust of the point made on Mrs King's behalf was that the letter was a unilateral and unwelcome change in the Trust's position. The change was that Mrs King was not now to be allowed to undertake the facilitated meetings which were a pre-requisite of her return to her substantive post until after the outcome of the appeal was known. However, apart from the fact that that seems sensible, it also appears from the face of the letter and the evidence that we heard from Mr Fraser that this course of action was agreed by Ms Williams and Mrs King's Welfare Officer, Ms Donna Bamford.
71. On 10 July 2017 Mr Nelson, no doubt having had time to consider the position more fully, sent in Mrs King's detailed grounds of appeal (255-264). The appeal ran to ten pages. The original grievance had consisted of eight pages (not including supporting documentation). It was obvious that matters were far from settled.
72. Again, for reasons which will become clear, we will not attempt to summarise the detailed grounds of appeal here. We note, however, the desired outcomes listed at 261-262. These were much wider than dealing with the issue of the relationship between Mrs King and Mr Boucher. They included a cultural audit of the entire Trust to address what Mrs King saw as "*a problem of epidemic proportions*" (see 263). Mrs King's appeal statement at 263-264 throws light on this. We note one detail from that statement. Mrs King writes "*At an impromptu meeting on 20<sup>th</sup> April Mr Wenman said he was going to sort things out? Well at this moment in time I can see that Mr Boucher is still in post. So again nothing has changed.*" During the course of the hearing Mrs King was asked about what she wanted as an outcome in relation to Mr Boucher. Somewhat reluctantly, Mrs King eventually agreed that she expected him to be disciplined. The comment on Mr Boucher still being in post indicates that, at the very least, Mrs King wanted the disciplinary action to include Mr Boucher being removed from his post.
73. Whilst waiting for the grievance appeal process to run its course, Mrs King was, as we have noted, off sick. The fitness for work notes referred to work related anxiety and stress. As part of sickness absence management Mrs King was referred to occupational health. Dr Antony Webb wrote a report on 21 June 2017 (329-330). This throws light on Mrs King's state of mind, although this comes as little surprise. Dr Webb commented:

*"I think her stress is situational and related to her perception of issues arising within her work. Unfortunately it appears that she has lost confidence in her employer. Chronic embitterment is a risk in these situations and therefore ongoing discussion with the aim of seeking mutually acceptable solutions to the employer and employee is advisable."....*

*"In my view her perception of the work issues are acting as a barrier to her return and I doubt she will return to work unless they can be resolved. Unfortunately medical input alone is unlikely to solve the issue. I understand that mediation has been advised by HR and I would support this approach too."*

74. The grievance appeal hearing took place on 18 July 2017. Present were Mr Hood (chairing the appeal), Mr Fraser, Ms Faye Wilderspin (HR Administrator who took the note at 351-358), Mrs King, Mr Nelson and Ms Bamford. The grievance appeal had been, in essence, a request to rehear the grievance and expand it to include a wholesale investigation of the culture in the Trust. Faced with this, Mr Hood adopted an approach of working through the grounds of appeal and identifying key points.
75. Following the appeal hearing, Mr Nelson wrote to Mr Hood on 24 August with some supplementary observations (385-6).
76. Mr Hood supervised some further investigations. On 1 September Mr Fraser had a meeting with Mr Boucher. There is a note at 395-396. Mr Fraser asked if Mr Boucher had been satisfied with Mrs King's performance in North Devon. Mr Fraser obviously had the meeting on 10 December 2014 in mind. Mr Boucher replied that he had no concerns about Mrs King's performance but her corporate awareness needed developing. Mr Boucher denied that he had suggested that Mrs King should consider her future or speak to her husband. Mr Fraser asked if Mrs King had acted up for him as other managers had. Mr Boucher said that the majority did not but one particularly experienced manager did. However, Mrs King had taken on responsibilities for health and wellbeing and graduate induction at her own request. In answer to a question from Mr Fraser, Mr Boucher expressed willingness to engage in mediation with Mrs King.
77. On 11 September 2017 Mr Hood wrote to Mrs King dismissing her appeal (403-409). The letter should be referred to for its full content. It is clear that a lot of work had gone into its preparation. Importantly, Mr Hood recorded five points that it had been agreed should be pursued (404) and set out his findings in relation to each:

*“1. Your concern that you were treated less favourably than your male Operational Manager (OM) colleagues with regard to Steve Boucher’s process for completing appraisals for OMs in the West Division, prompting of your retirement without context, and the acting up opportunities you were offered compared to your male colleagues.”*

As noted previously in this Judgment, Mr Hood had established that Mr Boucher had not completed any appraisals for his six managers in 2015. In terms, Mr Hood reported Mr Boucher’s denial that he had raised the subject of retirement at the meeting on 10 December 2014. Mr Hood also explained what Mr Boucher had said to Mr Fraser about standing in. Mr Hood summed up with the finding that there was no evidence to support that Mrs King had been treated less favourably by Mr Boucher than her male colleagues in West Division. Deliberately or not, this plugged the hole left by Ms Ackerley in her report when she failed to make a finding on whether or not there had been any discriminatory treatment at the meeting on 10 December 2014.

*“2. Your concern regarding what you felt was a longer-term trend of bullying and harassment in West Division.”*

Here Mr Hood went straight to the survey data for 2013 onwards comparing the West with the Trust average on “Percentage of staff who have experienced harassment, bullying or abuse from managers”. In short, the Trust’s trend was down as was the trend in the West and there was little difference between the two. Mr Hood’s conclusion was that good progress was being made to tackle the issue.

*“3. Your concern that there exists a culture of sexism within the Trust, and no action has been taken to address this.”*

Mr Hood listed a range of measures the Trust had taken in this area together with supporting statistical data. We will not reproduce the detail here but we record that we find it compelling. It certainly supported Mr Hood’s conclusion that, in terms, there was no culture of sexism embedded in the Trust itself.

*“4. Your concern that there is an issue regarding high turnover of female staff due to the sexist culture in West Division.”*

Again, Mr Hood answered this with statistics. For our purposes Mr Hood supplemented this by reference to 409A. The statistics supported Mr Hood's conclusion that there was no evidence of a disproportionately high percentage of female staff leaving the West Division.

*"5. Your concern that you have been prevented from returning to your substantive role as Operational Manger for North Devon."*

Mr Hood gave a detailed explanation of why he did not agree.

78. The last part of Mr Hood's letter included this:

*"In conclusion, I find that there is evidence that Steve Boucher's management lacked clarity and appropriate documentation and follow up that left you with the clear suspicion about his motivation. This is an issue for the Trust to manage. However, the evidence shows that you were treated no less favourably than male colleagues by Steve. You made personal comments about Steve but these were contradictory (you had a good relationship but then described how you could tell he had a problem with women), but there is no evidence to support this. I have arrived at the conclusion based on the evidence that there was room for you to interpret Steve's actions in the way you did because of poor management follow up, but there is no discrimination in his actions.*

*More widely, on your concerns about systematic problems in this area of the Trust, the evidence is to the contrary: that there has been steady and notable improvement from year to year and that in some respects female members of staff feel more positively about the trust than males."....*

*"I now encourage you to liaise with Sam Fraser, Senior HR Business Partner so he can work through your confidence about mediation and return to substantive role, and implement the aforementioned recommendations agreed by Ken Wenman, in order to support your return to your substantive role."*

79. On 20 September 2017 Mrs King wrote to Mr Hood (415-417). The letter can be read for its full content. There are indications in it of where the matter was going. Implied trust and confidence and

detriment were terms used. No response to the letter was forthcoming.

80. On 26 September 2017 Ms Williams wrote to Mrs King requiring her to attend a Stage 2 sickness absence meeting (435-436). This stage did not include any warning of dismissal.

81. On 4 October 2017 Mrs King sent a letter of resignation to Mr Wenman (453-454). The letter can be referred to for its full content. Given that Mrs King had decided to resign rather than re-engage, it contains no surprises and is consistent with the position Mrs King had maintained throughout. Mrs King continued to want something visible done about Mr Boucher and disbelieved the evidence that Mr Hood had produced to demonstrate that the Trust was successfully tackling any sex discrimination, bullying or harassment in the workplace.

### **APPLICABLE LAW**

82. Section 27 of the EA, so far as it is relevant, provides as follows:

#### ***“27 Victimisation***

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because-*

*(a) B does a protected act, or*

*(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act-*

*(a) bringing proceedings under this Act;”....*

*“(c) doing any other thing for the purposes of or in connection with this Act*

*(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

*(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation made, in bad faith.*

*(4) This section applies only where the person subjected to the detriment is an individual.”*

83. Section 39(4) of the EA, so far as it is relevant, provides as follows:



*“(4) An employer (A) must not victimise an employee of A’s (B)-”....*

*“(c) by dismissing B;*

*(d) by subjecting B to any other detriment.”*

84. Section 109(2) EA, so far as it is relevant, provides as follows:

***“109 Liability of employers and principals”***

*“(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.”*

85. Section 123 of the EA, so far as it is relevant, provides as follows:

***“123 Time limits***

*(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120” [we have not set out the relevant part of section 120 but it includes a complaint of victimisation under section 27 EA] “may not be brought after the end of-*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.”....*

*(3) For the purposes of this section-*

*(a) conduct extending over a period is to be treated as done at the end of the period;”*

86. Section 136 of the EA, so far as it is relevant, provides as follows:

***“136 Burden of proof***

*(1) This section applies to any proceedings relating to a contravention of this Act.*

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”....*

*“(6) A reference to a court includes a reference to-*

*(a) an employment tribunal;”*

87. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his employer. For this right to arise there must be a dismissal.

88. Section 95(1) of the ERA, so far as it is relevant, provides:

***“95 Circumstances in which an employee is dismissed***

*(1) For the purposes of this Part an employee is dismissed by his employer if”....*

*“(c) the employee terminates the contract under which he is employed (whether with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”*

89. The general principles relating to unfair constructive dismissal are well understood. An employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct 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. The breach may be actual or anticipatory. The employee in these circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once. The employee must act promptly in response to the employer’s actions (and not for some other reason, although the employer’s actions need not be the sole cause) or he risks waiving the breach and affirming the contract.

90. It is clearly established that there is implied in contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. Where a claim is founded on a breach of this implied term, the tribunal’s function is to look at the employer’s conduct as a whole and determine, objectively, if it is such that the employee cannot be expected to put up with it.

91. The burden of proving a breach of contract sufficient to support a finding of unfair constructive dismissal is on the claimant.
92. We were referred to Walker v Josiah Wedgwood & Sons Ltd [1978] ICR 744, W E Cox Toner (International) Ltd v Crook [1981] ICR 823 and [1981] IRLR 443, Aziz v Trinity Street Taxis Ltd [1986] IRLR 435, Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, BCC v Keeble [1997] IRLR 336, Nagaranjan v London Regional Transport [1999] IRLR 572, Buckland v Bournemouth University Higher Education Corporation [2001] IRLR 445, Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, Shamoon v Chief Constable of the RUC [2003] IRLR 285, Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, Nottinghamshire CC v Meikle [2004] IRLR 703, Waltham Forest v Omilaju [2005] IRLR 35, Omilaju v Waltham Forest London Borough Council [2005] ICR 481, Igen Ltd v Wong [2005] IRLR 258, St Helens Metropolitan Borough Council v Derbyshire [2007] IRLR 540, Tullett Prebon Plc v BGC Brokers LP [2011] IRLR 420, Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13/13, Leeds Dental Team Ltd v Rose [2014] IRLR 8, Deer v University of Oxford [2015] IRLR 481, Ladiende & Others v Royal Mail Group Ltd UKEAT/0197/15/D, Harpreet Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ. 978 and United First Partners Research v Carreras [2018] EWCA Civ. 323.

## **CONCLUSIONS**

### **93. The victimisation claim**

94. We will deal with this claim first since any act of victimisation will also be a fundamental breach of contract.

### **95. Time issues**

96. The issue identified by Employment Judge O'Rourke was this. Of the alleged detriments set out in paragraph 3 above the first four predate the presentation of the claim by more than three months. Those aspects of the claim are, therefore, out of time unless they are part of a continuing act by reference to section 123(3)(a) EA or time is extended under section 123(1)(b) EA.

97. In our view the alleged detriments were part of a course of conduct extending over a period. They were not a succession of unconnected events. The Trust was responsible for a continuing series of events stemming from the grievance dated 22 October 2016 and including the rejection of the grievance on 11 September 2017. The claim form was received by the Employment Tribunals on 11 December 2017.

Ignoring any extension for early conciliation, the complaint about the rejection of the grievance appeal was in time. As the first four acts complained of were part of the course of conduct extending to the rejection of the grievance appeal, the complaints about them are also in time.

98. Was there a protected act?

99. Mrs King's grievance letter of 22 October 2016 included this in relation to Mr Boucher's behaviour at their meeting on 10 December 2014 (138, paragraph 19.):

*"I could only conclude that I was being treated this way because of my gender/sex,"*

100. That was an allegation, whether or not express, that Mr Boucher (and through him the Trust) had contravened the EA. No section 27(3) EA "bad faith" point is taken and we see none. It was a protected act. If we were to be wrong about it falling within section 27(2)(d), we would see it falling within section 27(2)(c). There are many other examples in the grievance letter but we need go no further.

101. Mrs King's e-mails to Mr Wenman on 17 and 19 April 2017 (247-249) are not protected acts. They made no allegation, whether or not express, of any contravention of the EA. Nor do we see that it is a protected act within section 27(2)(c) EA. We know a low threshold must be crossed to satisfy the test. Nevertheless. Looking at the statutory wording, we cannot see anything done for the purposes of or in connection with the Act.

102. Mr Nelson's letter to Mr Wenman dated 3 May 2017 Includes this (281):

*"In attempting to resolve Carols sex discrimination" ...."grievance we have spent some time understanding what was lacking from the original report, what may have been overlooked and afford you the opportunity of addressing these prior to any escalation of Carols grievance. We would like you to consider the following:"....*

*"Carol raised that Sexism still exists,"*

103. Again, that was an allegation, whether or not express, that was made by Mr Nelson, as Mrs King's representative, that individuals (and through them the Trust) had contravened the EA. We note that the wording of the section contemplates that it is the victim who does the protected act. In this case that is, of course, Mrs King. The act,

however, is Mrs King's, albeit done through her representative, Mr Nelson. No section 27(3) EA "bad faith" point is taken and we see none. It was a protected act. If we were to be wrong about it falling within section 27(2)(d), we would see it falling within section 27(2)(c). There are other examples in the letter but we need go no further.

104. We have approached Mrs King's case on the basis that there were specific protected acts. That is by reference to section 27(1)(a) EA. It can equally be put by reference to section 27(1)(b) EA. This would be on the basis that the Trust believed, from the date of Ms Ackerley's letter of 21 November 2016, that Mrs King may bring proceedings under the Act.

105. Did the Trust subject Mrs King to a detriment or detriments because of a protected act or the protected acts?

106. The test to be applied in deciding whether or not there was a detriment or detriments is that set out in Shamoon as subsequently refined. A detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. Derbyshire clarified that the reasonable worker's view must be objectively reasonable. Distress and worry induced by an employer's honest and reasonable conduct in the course of the defence of proceedings cannot constitute detriment. We think the same principle applies in the context of a belief that Mrs King may bring proceedings. An omission to act can amount to detriment.

107. Inadequate investigation of her grievance by an external consultant

108. Here the only relevant protected act is that contained in Mrs King's grievance letter of 22 October 2016. Mr Nelson's appeal letter dated 3 May 2017 post-dated the report.

109. By reference to section 109 EA, of course, the report, although Ms Ackerley's, was also the Trust's.

110. In paragraphs 53-59 above we have described what we view as legitimate concerns about Ms Ackerley's report. Some of these were addressed by Mr Hood either entirely or in part. Even where they were addressed, however, the possibility is left open that there was detriment from the date of the report until Mr Hood put matters right.

111. In applying the test, we must look at the report and decide whether or not its findings were objectively honest and reasonable. In doing so we have in mind that an omission can amount to a detriment. Applying this test, we find that there were clear detriments within the report. These are the issues we set out in paragraphs 53-59. Those, and the nuancing (see paragraph 59) taint the report as a whole. We

do not suggest that Ms Ackerley produced a dishonest report but for the reasons we have set out, our conclusion is that it was not, judged objectively, reasonable.

112. Ms Hart raised a considerable number of criticisms of Ms Ackerley's report that we have not dealt with. In our view, some appear to have some substance and others not. We do not list or address these here because we believe that the assessment we have made of Ms Ackerley's report is sufficient to establish detriment.

113. Rejection of Mrs King's grievances on 7 April 2017

114. Again, the only relevant protected act was the grievance letter of 22 October 2016.

115. We have concluded that Ms Ackerley's report was tainted by detriment. Mr Wenman in effect, adopted that report and was responsible for it. This did not involve any fresh detriment. Mr Wenman does not seem to have expressly rejected Mrs King's grievance but he did so by implication. In applying the test to that rejection, we see no detriment. We have concluded that the report on which Mr Wenman acted was tainted by detriment. Mr Wenman accepted the Trust's responsibility for that report. Mr Wenman, however, acted in good faith on the report and his actions were honest and reasonable. If we were to be wrong about that, we deal with the issue of causation below.

116. The Respondent Trust's attempt to persuade Mrs King to drop her appeal

117. Here, both the protected acts are relevant. Our findings of fact are that there was no such attempt. It follows that there was no detriment.

118. The decision to delay Mrs King's return from a secondment to her substantive post

119. Again, both the protected acts are relevant. Our findings are that, to the extent there was any such decision by the Trust, it was made with the agreement of Mrs King's Welfare Officer and was, in any event sensible. No objective reasonable view would see it as detriment.

120. Rejection of Mrs King's grievance appeal on 11 September 2017

121. Both protected acts are relevant. Mr Hood's approach to the appeal was not to focus on criticisms of the report but on specific concerns that came out of his meeting with Mrs King and Mr Nelson. That was not the only way to handle the appeal but it was an objectively reasonable approach that appeared to have had the support of Mrs

King and Mr Nelson. Unsurprisingly, they did not agree with the outcome. Mr Hood's findings, judged objectively and reasonably, are understandable and address the issues identified. There was no detriment here.

122. A continuing failure by the Trust to discipline Mr Steven Boucher

123. Both protected acts are relevant although the second only comes into play from the date it was done, 3 May 2017. In his evidence to us Mr Wenman offered that he had concerns about Mr Boucher's conduct and, for that matter, Mr Le Chevalier's also. We think that reflected the assurance that Mr Wenman gave Mrs King in his letter of 10 April 2017 (see paragraph 61 above). The Trust did not ignore the issues with Mr Boucher but we have not seen any evidence with which the Trust could have sensibly charged Mr Boucher with a disciplinary offence. In the absence of any such evidence it was objectively reasonable not to try to discipline Mr Boucher and there can be no detriment to Mrs King in that.

124. Was the detriment because of the protected act?

125. The test to be applied here is what consciously or subconsciously motivated Ms Ackerley to subject Mrs King to the detriment. It is not necessary for the detriment to be solely because of the protected act but it must be an influence that is more than trivial.

126. The detriment we have found is in Ms Ackerley's report. The issue we must then address is was that detriment because of the protected act set out in Mrs King's grievance of 22 October 2016? On the facts we have found we think this is the only conclusion open to us. Mrs King's grievance of 22 October 2016 was not, in its entirety, a protected act. It was about bullying, harassment and discrimination. However, we know that Ms Ackerley saw the grievance as posing a risk of claims of sex discrimination and victimisation because she wrote so in her letter to Mr Wenman on 21 November 2016 (152). In the acts of commission and omission we have found to be detriments set out in paragraphs 53-59 above, there are facts from which we could decide, in the absence of any other explanation, that Ms Ackerley, consciously or subconsciously, sought to minimise the Trust's exposure to the protected act. Consciously or subconsciously, Ms Ackerley's action was a response to the protected act. We must so decide unless the Trust shows us that is not what happened. The Trust has not done so.

127. It follows, therefore that the detriments contained within the report were victimisation by reference to section 27 EA.

128. There is one other issue that we must address on the subject of victimisation. If we were to be wrong in our conclusion above that Mr Wenman's rejection of the grievance based on the report was not a detriment, we would have to go on to consider whether or not the detriment was because of the protected act. We would find that it was not. This would be so whether or not the burden of proof shifted. In our view, the primary facts establish that Mr Wenman acted as he did because he wanted to move matters forward. Mr Wenman did not want to do this because Mrs King had done a protected act. He did so because he wanted to find solutions and salvage the employment relationship. If we were to see the primary facts as shifting the burden of proof we would find that the Trust has shown us that the protected act was no part of why Mr Wenman acted as he did.

129. **The unfair constructive dismissal claim**

130. Why did Mrs King resign?

131. It has never been in real dispute that Mrs King resigned on 4 October 2017 because of a series of acts and omissions commencing with Ms Ackerley's report on 8 March 2017 and ending with the lack of a reply to her letter to Mr Hood dated 20 September 2017. It is, of course, the case that Mrs King's grievance dated 22 October 2016 related to many earlier acts and omissions. Mrs King's case however, has never been put on the basis that any act or omission prior to her grievance should now be counted as a fundamental breach of contract or part of a series of acts or omissions constituting a fundamental breach of contract.

132. Did the acts and omissions complained of, individually or cumulatively, amount to a breach or breaches of the contract of employment by the Trust going to the root of the contract of employment? In other words, was there a fundamental breach of contract entitling Mrs King to resign and treat herself as constructively dismissed?

133. The alleged breaches on which Mrs King relied were, as noted in paragraph 4 above, all related to the alleged detriments in respect of the victimisation claim. For the purposes of the unfair constructive dismissal claim, we will use the formulation in Employment Judge O'Rourke's case management order (42) as updated at the hearing before us.

134. The Way in which Mrs King's grievance of 22 October 2016 was determined.



135. This, of course, has wide scope. We turn to Ms Hart's submissions on the subject.
136. Ms Hart argues that it was reasonable for Mrs King to expect that her grievance would be adequately investigated. Ms Hart is right. There is an implied term in employment contracts that an employer will provide a procedure for dealing with an employee's grievances, as this employer did. There is also a requirement that any individual operation of that procedure will be fair. Any breach of the requirement of fairness will go to the implied term of trust and confidence.
137. Our finding is that the detriments contained within the report which concluded the investigation were victimisation by reference to section 27 EA. This constitutes a fundamental breach of the implied term of trust and confidence.
138. Ms Hart also argues that Mr Wenman's willingness to uncritically accept the report and the conclusions was a further breach. We do not agree for the same reasons as we found Mr Wenman's actions not to be an act of victimisation. We have considered whether or not there was some breach involved because Mr Wenman did not take active steps to make his own appraisal of the report, but we do not see that.
139. The way in which the grievance appeal of 17 April 2017 was determined.
140. Again, this is a very wide and non-specific allegation. We turn again to Ms Hart's argument.
141. Ms Hart says that Mr Hood failed to consider Ms Ackerley's report in the context of the criticism offered on it in the appeal process. Further, Mr Hood failed to consider the appeal in full and reached conclusions that were contrary to the evidence. Ms Hart then refers to her argument on those subjects made in respect of the victimisation claim that we have dealt with elsewhere. For the purposes of this claim our overall observation would be that the facts we have found do not support Mrs King's case in this respect. Mr Hood, in conjunction with Mrs King and Mr Nelson, settled five issues that he would deal with and we do not see that, objectively, he reached conclusions that were contrary to the evidence. There was nothing in this that came close to a fundamental breach of contract.
142. The way in which the Trust dealt with Mrs King's complaints about Mr Boucher
143. Ms Hart breaks down her argument on this potentially wide subject into three parts.

144. First, that the Trust took no action against Mr Boucher. We looked at this in the context of the victimisation claim and what we say there is relevant here. It is true that there is no evidence that the Trust has taken or will take any formal action against Mr Boucher. We have noted, however, that Mr Wenman had “marked Mr Boucher’s cards” (our phrase) and provided assurances in this respect to Mrs King. Beyond that we do not see what grounds the Trust had to act on. Mrs King did not make out her case to the Trust that Mr Boucher bullied, harassed or subjected her to any discriminatory treatment because of the protected characteristic of her sex. Objectively judged, there was nothing here that was or could contribute to a fundamental breach of contract.
145. Second, that the Trust made mediation a prerequisite for Mrs King’s return to post. Given Mrs King’s expressed point of view, we understand her point that this prerequisite might make it look like she had some share in the blame for what had happened. From the Trust’s point of view, however, it would have been a breach of duty to both Mrs King and Mr Boucher (not forgetting Mr Bolsom, although we understand that he sadly took his own life on 18 November 2017) to allow Mrs King to resume in her substantive post without taking steps to address the relationship issues. Mediation seems an objectively reasonable way forward to us. This was not a fundamental breach of contract.
146. Third, that Mr Hood failed to respond to Mrs King’s letter of 20 September 2017. Mr Hood told us that he would have acknowledged it had he seen it. It seems the decision not to respond was Ms Wood’s (432). Our observation is that an acknowledgement would have been civil but we do not see the lack of one, viewed objectively, as a contributory factor to a fundamental breach of contract. We would not have expected a substantive reply and it is plain from Mrs King’s letter that she did not either.
147. Did Mrs King affirm the contract following any breach?
148. The act of victimisation, that we have found to be the only breach of the implied term of trust and confidence, took place when Ms Ackerley’s report was delivered to Mrs King. This was on or around the meeting to discuss it on 7 April 2017. Mrs King resigned in a letter dated 4 October 2017, nearly seven months later.
149. That raises the question of whether or not Mrs King delayed too long after the breach of contract before resigning, thus affirming the contract of employment and waiving the breach.

150. In the absence of circumstances justifying the delay, a delay of seven months would lead to the conclusion that a contract of employment has been affirmed and the breach waived. Ms Hart does argue that there were special circumstances. Further, there is one other argument that is advanced on behalf of Mrs King and that is the “last straw” argument.

151. As far as special circumstances are concerned, Ms Hart asks us to consider a number in context:

- Whether or not Mrs King had made a choice in relation to the breach. In other words, was the delay caused by waiting to give the Trust an opportunity to remedy the breach? - The difficulty with this is that it does not fit the facts. When Mrs King met Mr Wenman on 7 April 2017 it was Mr Wenman’s conviction that they agreed a way forward. All the evidence points to that being the case. There is no evidence of coercion at that meeting, at which Mrs King was accompanied by her UNISON full time officer, Mr Nelson. We note that at the subsequent meeting on 23 April 2017 Mr Nelson, whilst maintaining that Mrs King felt “*underwhelmed*” by the outcome of the grievance, acknowledged that “*all requests for remedy were provided*”. It seems to us that Mrs King affirmed the contract of employment on the same day as the victimisation occurred. Mrs King’s subsequent decision to appeal the outcome of her grievance was not inconsistent with that. If we are wrong about that and Mrs King should be seen to have had a period to reflect on the report, the delay of seven months would still lead us to conclude that the contract had been affirmed after a few weeks.
- Mrs King did accept sick pay before resigning - We do not see that as having any great weight in the circumstances.
- Length of employment - In Chindove there was six weeks delay by an employee who had worked for 8-9 years. Mrs King had 27 years’ service. That does not speak to a delay of seven months.
- Personal circumstances - The resignation may well have been a dramatic life change for Mrs King. There are, however, hints that Mrs King had decided to go well before she resigned and we do not think this is particularly relevant factor.

152. We turn now to the “last straw” argument. This derives from a line of cases which establish that a course of conduct can cumulatively amount to a fundamental breach of contract even though the last straw by itself does not amount to a breach of contract. After the decision in Kaur a last straw can be relied on to revive a right to terminate even where there has been as in this case, an intervening affirmation.
153. A difficulty here is that the last straw identified at the Preliminary Hearing, the Trust’s letter of 26 September 2017, was rightly abandoned in light of Mrs King’s oral evidence. We have been referred to Mrs King’s pleadings, paragraph 12 at 16. This does not identify anything else as the last straw. One possibility is that the outcome of the appeal might be relied on as the last straw reviving the fundamental breach, being the victimisation claim. If that were so, we would not see it as a last straw. As we explained above, it was not the last act in a series of acts whose cumulative effect amounted to a breach of contract. There was one fundamental breach of contract that happened to be the first act complained of several months before. We think there was also a suggestion that Ms Wood’s decision that the Trust should not to reply to Mrs King’s letter to Mr Hood of 20 September 2017 might be a last straw. Again, this was not the last act in a series of acts whose cumulative effect amounted to a fundamental breach of contract. The Trust was not obliged to reply and Mrs King accepted that she did not expect a reply.
154. It follows that Mrs King’s claim of unfair constructive dismissal must be dismissed.
155. Dates will be offered to decide remedy in respect of the act of victimisation we have found. We have not heard argument on that subject and, cannot, therefore give any indication of what might be appropriate.

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Employment Judge Matthews

Date: 3 October 2018