EMPLOYMENT TRIBUNALS

Claimant: **Ms Caroline Chitty**

Respondent: **Princess Alexandra NHS Hospital Trust**

Heard at: **East London Hearing Centre**

On: **26 & 27 November 2019 and 11, 12 & 13 February 2020**

Before: **Employment Judge B A Elgot**

Representation

Claimant: Ms I Egan (Counsel)

Respondent: Ms E Melville (Counsel)

The Employment Judge having reserved her decision now gives judgment as follows:-

RESERVED JUDGMENT

The judgment of the Tribunal is that the claim of unfair dismissal does not succeed and is DISMISSED.

REASONS

1. In this case the Claimant makes one claim which is that she was dismissed from her job as a Band 7 Orthoptist working in the Respondent's Orthoptic and Visual Field Service (OVFS) across the three hospitals run by the Princess Alexandra Hospital NHS Trust which are Princess Alexandra, Princess Margaret, and the Herts and Essex Hospital. The pay bands for non-medical staff run from 1-9 so the Claimant was a senior member of staff.

2. The Claimant claims that her dismissal occurred in the circumstances set out in s95(1) (c) Employment Rights Act 1996 which states as follows:-

'*an employee is dismissed by his employer if…*

(c) the employees terminates the contract of employment under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct '

3. This type of dismissal has come to be known known as constructive dismissal.

4. S 95(1)(c) is the core statutory provision which has been the subject of learned interpretation in the appellate courts as further set out below. That case law is binding on this Tribunal. However it is immediately clear from the statutory language alone that the Claimant, in order to show that she has been constructively dismissed, must prove that the Respondent's conduct towards her was such that, irrespective of whether she actually resigned giving notice (in this case over four months), she would have been entitled to leave straightaway, without notice, by reason of conduct that she could not, judged reasonably, sensibly and objectively, be expected to put up with.

5. The Claimant pleads that she resigned because of a fundamental breach by the Respondent of the implied term in her contract of employment that her employer would not, without reasonable or proper cause, conduct itself in a manner calculated to or likely to destroy the relationship of mutual trust and confidence. Because the duty of mutual trust and confidence is a fundamental one then any breach of it will fatally undermine the contract of employment.

6. The Claimant does not assert any other breach of any other term, express or implied, of her contract of employment.

7. She sets out her case both in her original Claim and in the agreed List of Issues as a 'final straw' case as further analysed below.

8. The Claimant resigned by letter dated 20 April 2017 giving no reason for her resignation other than her decision to take early retirement from the NHS. That letter is at page 566 of Bundle 3. She worked for an agreed extended notice period of just over four months until 1 September 2017. On that date she completed 35 years of employment with the Respondent with which she had worked since 1 September 1982. This was, she said, a 'milestone' date for her. She was entitled to her NHS pension albeit in a reduced sum because she had not reached the age of 60 on the date of her resignation.

9. The Respondent resists the claim. The Claimant gave evidence on her own behalf and the Respondent called three witnesses as follows:-

10. Ms Dawn Savage (DS), Service Manager of Trauma and Orthopaedics who was the Claimant's manager for a short period until Ms Vidler's arrival on 4 January 2016. Ms Savage became General Manager within the Surgery and Critical Care Healthcare Group from 1 February 2016

11. Mr Ajay Sooknah (AS), General Manager of Theatres, Critical Care and CSSD at the relevant time who dealt with the 'Orthoptists formal grievance' as stated in the Cast List prepared by the Respondent.

12. Ms Natalie Vidler (NV), Service Manager for Opthalmology/Head and Neck, who was the Claimant's manager from 4 January 2016.

13. Both AS and DS were senior to NV and to the Claimant.

14. The Employment Judge, in accordance with the usual practice of the Tribunal, read only those documents brought to her attention by the parties' representatives and/or witnesses. There are three files of documents which form the agreed bundles in this case. No criticism is levelled at either party but the documents in parts appear to show an incomplete record of some correspondence and this is because much of the documentation was disclosed by the Claimant from her personal records and, due to the passage of time and the restrictions on data storage which the Respondent imposes, some documents are irretrievable by the Trust.

15. Thanks are due to both counsel for comprehensive and helpful written submissions which were delivered on 28 February 2020. This is a factually complex case.

16. There is an agreed lengthy List of Issues (the List) citing 47 matters said by the Claimant to consist of events which, either individually or taken together, amount to a fundamental breach of the implied duty of trust and confidence which the Respondent owed to her as its employee. The issue at paragraph 2 (s), part of the 'last straw' event is no longer pursued by the Claimant since she admits that she made a mistake about a meeting with Julie Matthews, Director of Operations. As a consequence Ms Matthews was not called as a witness by the Respondent. The cross examination conducted by both parties' counsel worked through the List which was useful. However because in my determination some of the issues can be dealt with very briefly and/or are repetitive and/or duplicate each other the Reasons set out below have attempted to group some of them under the main thematic headings.

17. Ms Egan's submission on behalf of the Claimant confirms that she does not now rely upon 2(xxi) or 2(m) as constituting a breach.

<u>Background Facts about the Claimant</u>

18. As stated the Claimant had long service with the Respondent. The OVFS is part of the Paediatric and Ocular Motility Ophthalmology Service. As well as clinics at the three Trust Hospitals the OVFS cover some eye casualty 'walk ins' at the Princess Alexandra Hospital. It is a busy service as the Respondent agrees. The OVFS was, at the core relevant period in this case from mid- 2014 until the Claimant's resignation on 20 April 2017 ('the relevant period'), managed by the two Band 7 Orthoptists who were the Claimant and her colleague Shazia Mirza(SM) who was on maternity leave and then had sickness absence from early November 2015 and had not returned by the time the Claimant resigned.

19. An orthoptist is a specialist eye care practitioner sometimes referred to as an 'allied health professional' (I assume for pay and grading purposes and industrial negotiations). There is an acknowledged national shortage of suitably qualified and experienced orthoptists. Orthoptists are not doctors but they investigate and diagnose visual disorders related to eye development and then assist with monitoring and managing such eye

problems as squints, misalignments of the eye, defects of binocular vision and what the lay person might call 'lazy eye' or 'double vision'. For obvious reasons much of the work is with children as their vision is developing as they grow but the Claimant also described working with adults with neurological disorder and helping eye casualty cases. She estimated that there is a 70/30 split between paediatric and adult patients.

20. The Claimant and her colleagues were not, in the relevant period, managed by clinicians but there is a Clinical Lead for the OVFS which, during the relevant period, was Priya Prakash (PP) Consultant Ophthalmologist.

21. The OVFS ran two types of clinics, some orthoptist only clinics and some doctor led clinics with an ophthalmologist, a specialist consultant or Associate Doctor, examining and treating patients. It was important to have a paediatric consultant ophthalmologist if at all possible. The clinics were originally mixed adults and paediatric patients but later the adult and paediatric patients were divided in to separate clinics. This was partly as a result of the NHS internal market, a 'payment by results' system where in effect money follows the patient and which rewards the Trust with a higher payment for paediatric cases. When clinics were mixed the lower payment for adults was applied even though children were also seen. This was a suggestion made by the Claimant which Ms Vidler followed up and implemented.

22. The Claimant, after SM went on maternity leave, had two allocated days of non-clinical time when she was not in clinics and this allocation was sustained until she resigned. The Claimant, during the relevant period, worked 0.8 of the whole time equivalent role (WTE or FTE). She did not work Wednesdays. SM was full time until she went on maternity leave. In the period before August 2014 there was also another Band 7, 0.4 WTE orthoptist Tahmina Ahmed who did not return to work after her maternity leave. The Claimant and SM also managed Visual Fields Technicians and it is accepted by the parties that the full complement of VFTs is two plus an orthoptics assistant.

23. The Claimant has suffered two periods of stress related illness during her recent employment. She was absent for two days on 26 and 27 January 2015 and then for a longer period of ten weeks between 24 April and 6 July 2015 with anxiety and depression.

Background Facts about the Respondent

24. The Respondent is a large public sector employer. It has however encountered significant structural and organisational difficulties. In October 2016 it was rated by the Care Quality Commission as an 'inadequate' Trust and placed in special measures including financial special measures. Those measures existed until March 2018.

25. There had already been a warning issued to all staff by the Chief Executive and the Chief Financial Officer on 21 September 2015, which is at page 316A, effectively declaring the Trust 'bankrupt'. In fact there is an even earlier mention of the 'hospital' being 'bankrupt' at page 93 dated 6 August 2014. Page 316A states, '*The forecast deficit has grown to £35m. This is neither acceptable nor sustainable. We must therefore take urgent and robust action to address our spiralling costs'*

26. Some of the measures (the Turnaround Challenge as it was named) in numbered paragraph 1 of the Chief Executive's Message include the requirement for Executive approval of all vacancy replacement and temporary staffing requests, a freeze on overtime for all staff and a ban on recruitment of non-clinical staff without executive sign off. In short it was going to be very difficult to get executive approval for additional staffing.

27. I am satisfied therefore that by the end of 2015 when Ms Savage was the Claimant's line manager and in very early January 2016 when Ms Vidler (a non- clinical manager) took that role, also at Band 7 pay and grade, she was tasked with 'turning around' a challenging financial and staffing situation throughout the whole of Opthalmology/Head and Neck including not only orthoptics (OVFS) but also ENT, Oral and Maxillofacial and Audiology services.

28. It is pertinent at this point to make the finding in relation to issue 2(k)(xvii) that I am satisfied that it was not a breach of the Claimant's contract of employment or part of a series of cumulative repudiatory acts for NV to tell the Claimant in December 2016 about the risk of closure of all or part of the Opthalmology service as described in paragraphs 95-97 of NV's witness statement. That discussion was not a 'threat' to the Claimant. It was an attempt to give information which NV had obtained from previous meetings with senior executive and clinical staff and to maintain awareness of the perilous situation which pertained. The Claimant asks for an update at page 545 on 9 January 2017 thus indicating that she did not feel that this was a personal threat. In cross examination the Claimant conceded that she should have been kept informed and she was not pursuing any argument that this was wrong. Ms Egan's submission at paragraph 120 confirms the Claimant's position

29. In addition to the general challenge faced by the Trust the Opthalmology Department faced extreme difficulties in recruiting a permanent full time consultant paediatric ophthalmologist to replace Mr Vempali (himself only working 0.8) who retired at the end of December 2015. The parties agree that there is a national shortage of opthalmologists, especially with the paediatric speciality, coupled with an increased demand for hospital eye services The importance of having such a doctor in Opthalmology on a permanent basis was that only with a definite appointment to this post could doctor-led paediatric clinics, including in OVFS, be properly planned particularly for the purposes of seeing *new* patients in the medium to long term. A locum consultant might be in place but his or her departure on short notice could cause the abrupt cancellation of these clinics with all the frustration and distress which that caused to patients and to the conscientious staff looking after them, of whom the Claimant, I have no doubt, was one.

30. When Mr Vempali retired the Respondent had a series of locum consultants. NV described it as a '*very different world'* once Mr Vempali had gone at the end of 2015. He was not finally replaced until August 2018. When the Claimant resigned on 20 April 2017 it was only a few days after the resignation of one of those locum doctors, Mr Chan, who it had been hoped would take the permanent post but who instead took up a job at the Lister Hospital. This result made her, she states, feel '*desperate*' for the future of paediatric ophthalmology at the Trust and for the efficient running of the OVFS clinics into the future

31. I am grateful to Ms Melville for addressing in her submissions at paragraphs 12-13 the case of Malik v Bank of Credit and Commerce International SA 1997 IRLR 462 which makes it clear that the structural and institutional actions of an employer can, even if not directed at him/her personally, still have such a drastic effect on the individual employee's contract of employment that those actions may amount to a breach of the individual employment contract. However I find that the Respondent's inability to successfully recruit a successor to Mr Vempali was not due to any endemic fault of the Trust or any individual manager within it. In Malik the Bank was found to be operating in a corrupt, venal and fraudulent manner as a result of deliberate decisions made by those who ran the Bank. It is not the same situation in this case. I am aware that the motives of a Respondent are immaterial if a fundamental or repudiatory breach occurs and precipitates a constructive dismissal which the Respondent never wanted or intended. However this is a different point to the conclusion I reach which is that the over-arching way in which the Trust was organised and run during the relevant period was not, in the particular aspects identified by the Claimant, of itself a breach of her individual employment contract. There is no evidence in this case of reckless incompetence by the Trust or any of its staff or, for example, any evidence of deliberately running down services, undermining and intimidating staff, profiteering or asset stripping, or any conduct of that nature. I make further detailed findings below.

32. I also find that the Respondent has not sought in the evidence of its witnesses or in any document I have seen to 'justify' any breach of the Claimant's employment contract by reference to the Trust's financial difficulties. This is not an issue in this case.

33. I therefore make no finding that the failure to recruit a new permanent paediatric consultant was a breach of the Claimant's contract of employment and in particular it was not a breach of the implied duty of confidence and trust which the Respondent owed to her. By reference to issue number 2 (q) I find no evidence of breach. I am satisfied that the Respondent took conscientious and robust steps to recruit a replacement for Mr Vempali but found it very difficult to do so. The Claimant suggested that the Respondent had been negligent in failing to convene a quorate panel of seven for the possible recruitment of Mr Chan but there was no substantive evidence that this was the case or indeed that Mr Chan took another job because his original interview date was postponed. A new permanent consultant was not eventually appointed until August 2018 thus illustrating the recruitment difficulties.

34. I accept the evidence of the Respondent's witnesses, particularly NV, that in the absence of a permanent consultant and with little immediate prospect of a suitable replacement it was difficult and complex work to plan clinic timetables and to assess the requirement for allied health professionals such as orthoptists to support those clinics.

35. The Claimant also had an inordinate number of non- clinical line managers and more senior leaders during the period from August 2014 to April 2017 when she resigned. There was a high turnover of senior staff, some were just temporary or 'acting up', and this must have been frustrating and difficult for her. Her service managers were James Cooper, Carol Allgrove (interim) Pauline Clugston (for a few months) Mhairi McPherson (interim), Dawn Savage (for a short period) and finally Natalie Vidler about whom she

vehemently complained that she had to tell her everything again from scratch in January 2016. NV agrees that she took up her post, which rather awkwardly involved a Band 7 managing another Band 7, with a determination to begin learning, basic step by basic step, from the clinical staff about what they did, how they ran their particular service and what difficulties they were encountering. She had no such prior knowledge or expertise. It would also be fair to say that NV had the important task of budgetary control given the situation the Trust was in. Again, in this less than ideal situation, I make no finding that the organisation of the Respondent contained endemic features which were in themselves a breach or a potential breach of the Claimant's contract of employment.

The law

36. I accept and adopt the up to date analysis of the law relating to constructive dismissal which is set out by Ms Melville at paragraphs 3-23 of her written submissions and by Ms Egan at paragraphs 1-13 and therefore I do not need to recite the well- known case law again in these written reasons. There are however certain principles which are particularly relevant to this case and which have specifically influenced my judgment as follows:-

A) The failure to properly investigate and deal with an employee's complaints and offer redress can be a repudiatory breach of the employment contract as can a failure by an employer to comply with and complete its own grievance process.

B) I agree with Ms Melville's submission at paragraph 4 that there is no suggestion in this case that the Respondent has set out to destroy or seriously damage the relationship of trust and confidence and I refer to my findings above.

B) I have reminded myself that the objective test of repudiatory breach places a significant burden on the employee to demonstrate that there has been action taken against her by her employer which goes to the root of the employment relationship and shows a fundamental intention to effectively break or breach or repudiate the contract of employment. I borrow and adapt the quote from Mummery LJ in Leach v Officer of Communications 2012 IRLR 839 because its wording is simple and clear – '*it [constructive dismissal] is not a convenient label to stick on any situation in which the [employee]feels let down by the [employer]'*

37. OVFS omitted from an 'upgrade' in 2014

I refer to issue 2(b) in the List which states that there was '*a management error in 2014 whereby OVFS were omitted from an upgrade to R's Opthalmology Service'*. The Claimant complains that a document prepared in 2014 by her then Service Manager James Cooper omitted the OVFS from any calculations of 'capacity required to meet growth' when other parts of the Opthalmology service were included. It is not clear whether this omission was a deliberate decision i.e.to develop the orthoptics service at a later date, or an incompetent mistake, but this is a dispute of fact which I need not resolve. This Growth Proposal document and the upgrade which was reported, for example, at page 91 was produced in very different circumstances than those which pertained at the time of the Claimant's resignation in 2017.

In 2014 the Respondent was taking a different direction and seeking to solve some of its financial woes by expanding services and obtaining extra income from that expansion in Opthalmology. This would have a 'knock on' effect of generating more work for OVFS which in turn would have to demonstrate the income it could produce if it were given additional resources. Mr Cooper makes it clear in his email to the Claimant at page 94 that she only has to ask if she needs him to book an agency orthoptist to run clinics. Thus Ms Mirza became heavily involved, in response to Mr Cooper's request for 'local intelligence' in his email at page 90, in producing a separate Growth Proposal for Orthoptics which provided for an ambitious increase in staffing, for example, from 2.4 to 6 Orthoptists. That document was not finalised by the time Mr Cooper left as he confirms at page 101C and 101D.

I am satisfied that whether for good business planning reasons or incompetent omission there was no breach of the Claimant's contract of employment when Orthoptics was not included in the original Growth Proposal for Opthalmology document written by Mr Cooper. Such strategic changes were taking place on a wide scale across Opthalmology, the Trust and the NHS and there is insufficient evidence of fault or neglect which impinged directly on the Claimant and resulted in any fracture by the Respondent of the relationship of trust and confidence. In any event arrangements to produce a separate Proposal for the future of the Orthoptics Service were quickly implemented and the work began with input from Ms Mirza.

There was no breach of the Claimant's employment contract in relation to issue 2 (b). Mr Cooper's faintly apologetic emails on the subject are insufficient evidence of any breach; they merely acknowledge that more work needs to be done to make the argument for growth and service development in OVFS going forward. The Claimant interprets his email at page 93 as acknowledging 'staff shortages' for at least the last ten years whereas in fact the wording is '*developing your own service which is the problem that you have had for the last 10 years'.* Development of the OVFS service in 2014 primarily involved income generation.

Issue 2(g) may also be dealt with under this heading. The Claimant alleges that it was a breach or part of a series of breaches for her then manager Paula Clugston to say at a meeting on 18 June 2015 (there are no notes of this meeting but it is summarised in the Claimant's email on page 156 D) that the incomplete OVFS Growth Proposal should be replaced by an independent review/business case. The Claimant did not agree with this suggestion although in her later oral evidence she conceded that it was explained to her that this might be a better option to support a request for further resources. Moreover there is a clear managerial prerogative to suggest reasonable changes in strategy and direction so long as these are not oppressive to employees. There is no evidence that this change of approach would be so highly detrimental to the Claimant as to amount to a repudiatory act. Eventually Michael Catling, a more senior manager as Head of Operations, Surgery and Critical Care, agreed that an independent review was appropriate when he initially responded to the Claimant's grievances in July 2015.

38. Understaffing of OVFS

In these Reasons I have amalgamated the issues on the List at 2 (a), 2(i), 2(h)(ii) and (iv), and 2 (xiv) and 2(xv), 2(p). This is because each of these issues involves the Claimant's central contention that there were either insufficient staff in OVFS or that the staff that were available were not suitable or were not what she was promised in terms of resource

for the work that needed doing. She says that these staffing problems were causative of her resignation and amounted to constructive dismissal'

In relation to the period between 2003 and 2014 it is not possible to extract from the evidence any sufficiently accurate statistics for the ratio of orthoptists employed as compared to patients treated and draw any conclusions. There is a dispute between the parties as to the figures which I decline to resolve since the data is incomplete. In 2003 there were, according to the Claimant, 3 WTE orthoptists (the Respondent does not have this historical information) and in 2014 there were 2.2 including the Claimant (0.8), Ms Mirza full time and Ms Tahmina Ahmed(0.4) who went on maternity leave in August 2014 and did not return to work thereafter. However there was locum cover (Sachi) for this 0.4 post as confirmed in the Claimant's time line at page 649 and in her oral evidence on Day 1 including cover by Mr Abid Minhas who eventually obtained a permanent Band 7 post in June 2017. There is also reference to locum cover from another orthoptist Catherine Stewart around this time. At page 447 there is a suggestion from the Claimant that Ms Stewart was suitable to be allocated to cover SM's maternity leave.

39. The decrease in staffing and the subsequent apparent understaffing in terms of the number of orthoptists available to see an increasing number of patients in the eleven years between 2003 and 2014 was a matter of concern not only for the Claimant but for her managers and paragraph 16 of Ms Egan's submissions provides a useful summary of some of those assessments in 2014 and 2015. Each expresses a determination to take steps to remedy the situation. For example Mr Hammond at page 368 which is an Authority to Invest (ATI) form dated 19 October 2015 goes on to seek authorised funds for three fixed term appointments at bands 5-6. The Respondent sought to remedy the situation.

There was no breach of the duty of mutual trust and confidence in that the Respondent refused to acknowledge the Claimant's concerns, deliberately or negligently ran down the OVFS service or took no steps to obtain help for her.

40. The Claimant was much opposed to any resource offered to her which consisted of 'agency' locums or self- employed locums who could, at that time, offer services via their own limited companies. She ideally wanted the consistency of fixed term locums which would require approved funding in advance. The Respondent, for reasons of financial insecurity and because of the fluctuation in availability of a suitable consultant to attend doctor-led clinics which were subject to last minute cancellation and re-scheduling, utilised more temporary locums and gave robust and viable management reasons for this choice. There was a difference of opinion between the two parties in this case about this temporary staffing but the Respondent did take steps over the entire relevant period to cover clinics and I find there was no breach of the Claimant's employment contract in '*continuing to use unsuitable agency workers instead of appointing fixed term locums'* . Several of those locums were known to the Claimant because orthoptics is a small profession and she certainly recognised several of them as 'suitable'.

The Claimant did not agree with this method and there were sometimes problems with scheduling the locum support as, for example, is recorded on page 232B but the Respondent did not thereby take any steps to repudiate her contract of employment. In fact at page 232B on 29 July 2015 Ms Allgrove states that '*the backlog is almost cleared now'.* There is no copy of the Claimant's response to that assertion, if any.

The Claimant continued to work on conscientiously and did not end her employment or even expressly identify any anticipatory breach of her own contract of employment which resulted from the understaffing which she identified. She affirmed her contractual relationship with the Respondent by doing so between 2003 and 2014 and thereafter.

41. The Claimant was not expected or forced to work overtime. Where there were no suitable doctors or OVFS staff to run clinics they were cancelled, pages 228A and 460A-B are examples of this action. The Claimant was not expected to over-work and take personal responsibility to fill all the gaps. At page 153A the Respondent sought to discourage new orthoptic referrals from GPs in order to take pressure off the service in June 2015.

In January 2016 following Mr Vempali's retirement it is clear from page 657, an extract from the Claimant's own timeline prepared for the purposes of these tribunal proceedings, that there was ' *a greatly reduced clinical workload due to no doctors'.*

42. The Claimant as a senior health care professional was understandably concerned about cancellations, delayed follow up of patients especially children and long waiting lists which she flagged up in emails although she rarely used the specified system to alert her managers to risk. That system for incident reporting is called Datix and is designed to flag up identifiable risks to patients, staff and visitors so that there is a central record of these serious matters. There is a wide definition of 'incident' in the Respondent's Incident Reporting Procedure at page 663S. It is for example relevant that although at page 118 on 13 February 2015 the Claimant refers to '*children losing vision whilst on the review list'* she did not identify specific individual cases and enter them on Datix or use any other incident reporting mechanism. An entry on Datix obviously means yet more paperwork and time but I take note of the fact that if the Claimant had considered the situation in February 2015 to be so serious that there was a potential or actual breach of her own contract of employment, for example by reason of overwork, she might have formally recorded these risks to herself and especially to patients.

43. Issue 2(d) states that there was a failure of the Respondent to address the concerns raised in that 13 February 2015 email at page 118.

An orthoptic assistant post was created to run the OVFS booking system. This took some time because of the financial constraints upon recruitment which meant that Executive approval was required. At page 107 the Claimant concedes in correspondence with Carol Allgrove *'I do know how difficult it is at the moment'.* The post was approved and filled by Mr Paul Radley in July 2015 at Orthoptic Assistant Band 3. It also appears that the Claimant and SM were allocated a full week of additional non-clinical time to sort out the OVFS online waiting list and locate follow up appointments that had been lost in the new COSMIC system. This was clearly a difficult and onerous task and the errors with COSMIC should never have happened but it is not the case that the Claimant's concerns about the waiting lists and the knock on effect of the errors were not addressed as Ms Allgrove's response at the top of page 117 confirms '*it would be great to get your clinics sorted so much as I don't want to lose activity if it sorts it out once and for all we will have to bite the bullet and do it'.*

44. Eventually the Respondent had to employ external consultants to solve the hospital-wide problems.

45. In June 2015 Ms Clugston sent out a circular to all members of the Claimant's professional body BIOS asking for help with the orthoptic service in West Essex in an attempt to recruit locum orthoptists to run the clinics that were being cancelled at Princess Alexandra Hospital and elsewhere. The Claimant received a copy as part of this general mail shot. She characteristically did not interpret it as any kind of attempt to assist her or the orthoptic service by seeking temporary staff. Instead she felt affronted that it was an implied criticism of her personally because she was absent through sickness at the time. However I am satisfied that this communication was initiated in an attempt to improve staffing levels and it is an example of attempts being made by the Respondent to relieve the pressures on the OVFS. As such it is also indicative of specific action taken to prevent any breach of the duty of mutual trust and confidence rather than to repudiate the Claimant's employment contract.

46. In July 2015 in response to both an individual and collective grievance at stage 1 (informal stage) Mr Michael Catling produced proposals to try to improve the OVFS staffing levels. At a senior level he also undertook to try to assist the Claimant in her employment and maintain the relationship of trust and confidence insofar as staffing levels were concerned. The conduct of the grievances is dealt with in more detail below. However it is the result at stage 1 which is significant because, as set out in Mr Catling's emails dated 10 and 31 July 2015, it shows an ongoing concern and effort to get more staff for the OVFS with the ever present proviso that this is subject to Trust approval.

47. In his outcome letter of 10 July 2015 at page 218 Mr Catling states conditionally- '*I agree that the service will need investment in new staff. We discussed how we might gain Trust approval for new investment*' and sets out the proposals adequately summarised in the List at 2(h). He took immediate action by writing to the Chief Operating Officer Ms Stephanie Lawton.

48. On 31st July 2015 after a follow up meeting requested by SM Mr Catling wrote again at pages 233-235 to give an update on the steps being taken to seek approval in the short term to advertise three fixed term locum posts for 12 months, to increase the number of visual fields technicians and to support the idea of an independent external review in the longer term if terms of reference could be drafted by his interim successor Richard Hammond. At page 235F Ms McPherson confirms she is following up the 'business case' in August 2015.

49. Thus in 2015 the Trust's managers did seek approval to '*recruit 3 fixed term Orthoptic locums for 1 year as an emergency measure'.* The Claimant was not ignored or recklessly neglected in response to her understaffing concerns and there was no breach of her individual contract of employment even though the approval was not eventually obtained. Meanwhile she continued to affirm her employment contract by remaining at work.

50. I agree with Ms Melville's submission at paragraph 111 in relation to issue 2 (h) (iv). It cannot be a breach of the Claimant's employment contract for the Respondent to allegedly fail to carry out a job evaluation for another employee (Sue Mayes) no matter how close the working relationship was between the Claimant and the Visual Field Technicians in OVFS.

51. The Claimant alleges, by reference to issue 2 (h) (iv) and (v), that she was not consulted by Ms Vidler about the approval of two permanent Band 5 Orthoptic posts, that Ms Vidler had no understanding of the different banding levels and that it was a fundamental breach (or part of a series of breaches) of the implied duty of trust and confidence for NV to allegedly say '*you will look a fool if you don't want these posts'.* There is little documentation about this episode save the Claimant's email dated 20 September 2016 at page 238-9 which explains why she believes this proposal is unsuitable and reiterates a request for an external independent review of the Orthoptics service. If there was a reply from NV then it is not in the bundle presumably for the reasons I identify above. Ms Vidler's evidence at paragraphs 88-91 of her witness statement is that she did not suggest the recruitment of two new Band 5 orthoptists at all but only asked the Claimant if this was what she wanted whereupon the Claimant made it plain that she required three Band 7s (which was the eventual outcome). No advertisements for these Band 5 posts were placed and I am satisfied that it was not a breach of contract for Ms Vidler to attempt to clarify with the Claimant what she was ideally looking for in terms of staffing. It was not presented as a fait accompli and even if NV had, which she denies, used such phraseology it was at worst clumsy and tactless advice rather than a disrespectful insult amounting to a breach.

52. At page 553 of the bundle the Claimant's appraisal in February 2017 records (in NV's handwriting as the appraiser) that the Claimant's goal/ career aim is four Orthoptists in the OVFS. It is not, as the Claimant suggests in paragraph 89 of her witness statement, recorded as NV's assessment of the number needed. At that time there were 1.8 Orthoptists (the Claimant at 0.8 plus Mr Abid covering full time for Ms Mirza's continuing absence) and other regular agency cover with approval being obtained, through Ms Vidler's efforts, in February 2017 for appointment of a third Band 7 Orthoptist (total 2.8) which the Claimant described in an email as '*brilliant*'. She continued to work without absence until she resigned on 20 April 2017 and thereafter worked her notice until 1 September 2017.

53. The original suggestion by Mr Catling during the grievance process was therefore, at least in part, ultimately fulfilled. The Claimant states at paragraph 36 (b) of her witness statement that the main agreements from the July 2015 meetings with Mr Catling were to seek approval for three fixed term locums- one was to replace Tahmina Ahmed (0.4), secondly to appoint cover for Ms Mirza's maternity leave which was eventually fulfilled by the appointment of Abid Minhas, and to have one extra full time permanent orthoptist to absorb increased capacity in Opthalmology. That new permanent Band 7 appointment (not an emergency locum) did eventually occur after approval in February 2017.

54. I am conscious that there was a delay in appointing Mr Minhas to cover Ms Mirza's maternity leave. She departed on maternity leave in early November 2015 and Mr Minhas did not take over as the fixed term locum cover until March 2016 although there was some agency locum cover including Mr Minhas himself and Mansha Singh. For example at page 470A in an email dated 28 January 2016 the Claimant suggests booking Mansha to cover some clinics *'for the next two weeks'*. The Claimant does not claim in the List of Issues or in her ET1 Claim that this late appointment of maternity cover was a breach or part of a series of breaches of her contract of employment. For the record I am sure from the limited correspondence I have seen (mostly the Claimant's documents) that Ms Savage and Ms Vidler did their best to get this maternity cover in place but were frustrated by the actual or perceived necessity for Executive/Board/Trust approvals. The Claimant was not left on her own during this period; she was supported by temporary locum cover.

55. When Ms Vidler arrived in January 2016 I am satisfied that she quickly formed an intention to assist with the staffing levels in Orthoptics and ultimately increase the staffing resource and she did recruit locums to do clinical work and attend clinics and see patients. Mansha Singh was already working as a locum from time to time and Ms Vidler increased her hours and recruited Diana Owen. The Claimant was thus freed up to do two days in clinics and two days of non- clinical administrative work, such as preparing rotas and booking in staff, which did not involve direct patient contact or running clinics at all. I accept Ms Vidler's evidence that, even in the face of the long waiting lists about which the Claimant was concerned, Ms Chitty never had to give up or swap her non-working day (Wednesday) or surrender any of her quite generous allocation of non-clinical time which amounted to half her working week. At page 552 of the bundle the Claimant confirms in her February 2017 appraisal document ' *I have had less time to dedicate to direct patient care, a lot of which I've had to delegate to locum staff'.* Her comment accurately summarises the situation in 2016-2017 when she was allocated additional non-clinical time to cover the absent Ms Mirza's administrative tasks and there was locum cover for the clinics. For this reason I cannot agree that the Respondent was in breach of the Claimant's contract of employment. It did not neglect the staffing of the OVFS although it was not staffed as the Claimant would have ideally wanted it. The generalised assertion by the Claimant in the List of issues at 2k (xvi) that NV '*repeatedly put pressure on the C to increase capacity and frequently reduced C's non-clinical time to achieve this'* is not supported by the evidence.

56. Ms Vidler's evidence was that two of the locums whom she facilitated for the OVFS, Diana Owen and Mansha Singh were contracted almost like 'full time and permanent staff' to the Respondent to work in OVFS whenever they were available on a rolling six month basis. I am satisfied that she explained these arrangements to the Claimant and consulted with her as described in paragraph 54 of NV's statement. At paragraph 85 of NV's statement she says that these two individual locums were specifically requested by name by the Claimant and that evidence was not challenged in cross examination. I have not seen a copy of any agency contract or contract for services which might assist in establishing the exact terms on which these locums were appointed. Often a locum need only give one week's notice that she could not work the following week and indeed there were times when Ms Owen worked elsewhere in Ireland and could not provide cover. NV said she believed it was six weeks' notice because there was a six week rota. The Claimant was concerned about the reliability, week on week, of this cover and it is understandable that she viewed these arrangements as much less satisfactory than a permanent appointment (which NV secured in February 2017) or fixed term locums (for which no funding was approved). The Claimant did not complain as to the competency of Ms Owen whom she knew to be an experienced orthoptist. Manshu Singh was a less successful appointment for conduct/probity rather than capability reasons and she left in early 2017.

57. Ms Vidler concludes in her oral evidence that by Spring 2016, in her opinion, the OVFS had a higher complement of orthoptists, permanent and locums, '*better than they had ever had'* because the Claimant was working WTE 0.8, Mr Minhas was working full time to cover for SM and there were two 'full time 'locums making 3.8 WTE. I do not agree that the temporary locums were sufficiently reliable and ever-present to qualify as full time permanent equivalents but they did provide an expert useful resource for a significant amount of clinical work. Ms Vidler gave convincing oral evidence that she was obliged to 'rob Peter to pay Paul '(my phrase) by 'flexing' the separate budgets for which she was

responsible so as to get orthoptic staff for OVFS. She was prepared to risk criticism for doing this so that she could support the OVFS.

58. Finally I refer to issue 2 (p) which is the claim that the Respondent frequently delayed paying one of the locum orthoptists, Diana Owen, '*for long periods such that she refused to do more sessions until they did [pay], leaving the C with an even higher workload and more pressure on the service'*. Ms Owen did not give evidence. There is no documentary evidence in the bundle which shows the number of days/weeks Ms Owen was absent working in Ireland. She worked, prior to the IR35 Inland Revenue rule changes effective from 6 April 2017, as a self- employed locum not via an agency. It is clear that any unfortunate delay in paying her arose after the IR35 changes and for a reason which was not any deliberate or negligent failure of the Trust in withholding payment. I find that there is no evidence of any such delays prior to April 2017. Therefore if, as the Claimant says in her email dated 8 June 2017, this was causing staffing problems then these were not problems which precipitated her resignation. She had already resigned on 20 April.

59. In conclusion I find that throughout the period 2014 until the Claimant's resignation in April 2017 there were efforts made, some more successful than others, to solve her staffing difficulties and that certainly in 2016 and by early 2017, in the face of continuing structural and operational difficulties, the situation had improved considerably for the OVFS . The Claimant herself said that at the time of her resignation there were two VFTs (Mr Beckwith and Ms Rigalsford) and the *'situation was much improved'* It was not optimal and these were not the Claimant's preferred solutions but the Respondent did not abandon her and '*destroy*' the service as she states in paragraph 154 of her witness statement. The OVFS was able to function, with operational adjustments such as locum staff, prohibition on new patients and tight budgetary restraints and to survive. NV believes it is now functioning well. I find that sufficient assistance and support around staffing was given to the Claimant so as to maintain the Respondent's obligation of trust and confidence towards her.

60. The Claimant's allegation that even with the recruitment of a new full time Band 7 post after February 2017 there would still be inadequate staffing is not understood. If she had not resigned then there would have been 2.8 orthoptists on the establishment plus any locums whose services were retained. This was very nearly the number (3) who were employed in 2003 which the Claimant described as a 'safe' level of staffing.

The Claimant's sickness absence

61. With reference to issue 2 (c), the Claimant was absent with stress related symptoms on 26 and 27 January 2015. Her then manager Carol Allgrove sent her an email on the second day of her sickness which is at page 112 of the bundle. I do not find this email which sets out some ways in which Ms Allgrove is planning to improve the orthoptics service to be a breach of the duty of trust and confidence. I read the email as a response to the Claimant's statements about the pressures and problems at work and it is an attempt to explain what future steps might be taken to relieve the situation.

62. The Claimant misread it as putting more pressure on her when in fact it was an attempt to discuss ways to relieve pressure; and it contains appropriate sympathetic enquiries about her health. It is not clear whether the Claimant had a return to work

interview and there is no record of one in the bundle. Certainly the Claimant does not seem to have responded in writing to Ms Allgrove's offer of a '*catch up if you have time'.*

63. The Claimant had no long history of mental health impairment so far as can be ascertained from the evidence but she did then have a much longer period of sick leave between 24 April and 6 July 2015. Neither the ET1 Claim nor the List of issues at 2 (e) and (f) refers to any events of alleged breach which occurred during the course of the Claimant's illness with anxiety and depression but only refer to the Respondent's failures of care upon her return. I reiterate that I do not have nor do I assume any jurisdiction to deal with issues which are neither pleaded nor form part of the List.

64. First the Claimant complains that following this extended sick leave the Respondent '*told her to use the Grievance Procedure to address her concerns'.* Those concerns are set out in a long email written by the Claimant whilst off sick. It is at pages 135-138 dated 11 May 2015 and it predominantly addresses the Claimant's continuing concern about understaffing, poor working conditions, departmental communication errors and the business plan going forwards, describing the department as '*on the verge of collapse'.* I am certain that the decision of the Chief of Workforce and OD, Gloria Barber, to deal with this type of complaint under the Respondent's Grievance Policy was a rational and proper approach and no breach of duty occurred in this respect. I note that she uses the phrase '*in the first instance'* and she does not exclude any parallel investigation of the causes of the Claimant's sickness or of steps that might be taken to improve her welfare. In other words a two pronged approach could be taken.

65. Mr Catling wrote back to the Claimant on 12 May at page 143 to arrange a meeting under Stage 1 (Informal Stage) of the Respondent's Grievance Policy (which starts at page 687) and the Claimant did not object to this course of action in her reply at page 148. The first meeting did not in fact take place until 7 July 2015, because the Claimant said she was too unwell to attend, by which time it had become amalgamated into a joint grievance which was joined by Shazia Mirza and Sue Mayes (VFT).- see page 171. It remained at the Stage 1 Informal Stage.

66. In May 2015 Ms Allgrove was replaced as the Claimant's manager by Ms Paula Clugston with whom she did manage to meet, on 18th June 2015, during her sickness absence period despite not being well enough to pursue her grievance meeting with Mr Catling. I find that although Ms Clugston did not originally think it appropriate to meet whilst the Claimant was on sick leave she offered support by eventually agreeing to an informal one to one meeting prior to the Claimant's return to work.

67. The Claimant has pleaded at paragraph 59 of her ET1 Claim (page 30) that '*the events mentioned above form part of a series of acts the cumulative effect of which amounted to a fundamental breach of her contract of employment.'*

68. One of the events she mentions is that she was issued with a stage 1 attendance management warning on 9 July 2015 (page 199) following a meeting on the first day of her return to work which was 6 July. The Claimant had Ms Mayes as her companion at that meeting. The outcome letter at page 199 confirms that the decision maker Ms Clugston had seen and considered the content of an Occupational Health Report dated 19 June 2015 which was prepared after a face to face consultation with the Claimant

69. The Claimant unsuccessfully appealed the outcome but again the conduct and outcome of that appeal is not something I am asked to determine by reference to the Grounds of Claim or the List of Issues.

70. I am satisfied that Ms Clugston complied with the Respondent's Attendance Management Policy which begins at page 664 in that she appropriately identified the reasons for absence and took into account the recommendations of the OH practitioner at pages 164-5 whereupon she set out in six bullet points the support which would be offered to the Claimant. She also issued a stage 1 attendance warning to last for 12 months. No doubt this was extremely unwelcome to the Claimant given her stated levels of anxiety and stress but there was no breach of the Trust Policy about long term absence and the warning was accompanied by specific proposals for future support of the Claimant to prevent further absence.

71. I agree with the submissions of Ms Melville at paragraphs 74-79 of her written argument.

72. The Claimant had no further significant sickness absence and therefore her stage 1 warning expired in early July 2016. I have therefore only examined whether there was any fundamental failure by the Respondent to follow the OH advice during the period July 2015 – July 2016 not least because it is necessary to place some limits on the complexity of the Claimant's allegations over the relevant period.

73. The OH Report recommends '*it would be helpful for line Manager to meet with her from time to time to make sure that she is coping and her workload is manageable'* (my emphasis). Ms Clugston agreed on 6 July 2015 to '*arrange weekly 1-1s and regular team meetings'.* Ms Clugston was not a witness in this case, she left the Trust on 23rd August 2015 seven weeks after the attendance management meeting, and there are no notes of meetings which have been disclosed by either party. Ms Clugston's response to the Claimant's request on 21 July 2015 (page 232) for a 1-1 is not in the bundle. It is therefore difficult to ascertain how many weekly meetings took place with Ms Clugston. The Claimant certainly met with her twice, when she came back to work and when she ended her phased return. There were at least three meetings with Shazia Mirza as the Claimant states at page 232. SM was the joint manager of OVFS with the Claimant and obviously would be the sole manager for a greater number of days during the Claimant's phased return. There were team meetings as the Claimant confirmed on 7 September 2015 in her attendance appeal hearing on page 238 and there is also reference to weekly 1-1s but the wording is unclear. It may mean weekly 1-1s within the team rather than between the Claimant and her manager.

74. Ms McPherson did make attempts to have regular meetings with the Claimant as the correspondence on pages 235F and 235I suggest. The bundle does not contain the Claimant's replies and there are no documents to show postponed or cancelled meetings with Ms McPherson so that it is safe to conclude that these meetings went ahead at least fortnightly.

75. The Claimant herself missed her first appointment with Ms Savage as pages 389-390 confirm. Ms Savage thereafter met with her, she sent a schedule of meeting requests at pages 393-396 and when she could not help but cancel meetings the Claimant responded cordially and with understanding and/or was unable herself to attend any rescheduled dates. I refer to the example at pages 456-456B. The Claimant herself states

at page 445 when writing to Mr Sooknah *'I meet with Dawn at 11.30 so any time before that [Monday am] is ok with me'*. This suggests that regular meetings took place when possible. If the meeting schedule occasionally went awry for reasons of holidays, other absences or time constraints these were not sufficient interruptions to amount to any neglect or ostracism of the Claimant which might qualify as a breach or part of a series of breaches of her employment contract.

76. It is the nature of a busy working relationship between a manager and a senior colleague that meetings are occasionally and unavoidably re-arranged or even cancelled. The Claimant was not ignored or neglected in such a way as to amount to a breach of the contract of employment.

77. Issues 2(n) and (o) refer specifically to a failure by Ms Savage to meet with the Claimant 'since December 2015' and on 13 June 2016. Ms Savage managed the Claimant in parallel with the interim management arrangements with Ms McPherson in 2015 and then was promoted in December 2015 and handed over to NV. In June 2016 she was senior to Ms Vidler. I deal below with the involvement of Ms Savage in the grievance process at the end of 2015 to which issue 2(n) relates. What is certain is that once NV arrived in January 2016 it was her obligation to meet with the Claimant weekly and not that of Ms Savage. Mr Gleed's email at page 524 (second paragraph) confirms this.

78. On 31 May 2016 the Claimant raised concerns in an email at page 527 of the bundle. She was particularly concerned about the timetabling of sessions attended by 'casual' locums and she was responding angrily to an email sent to her by NV on page 530 suggesting that the locums had nothing to do when she saw them on 25 May. Mr James Gleed, Interim Director of Operations Surgery Health Group, who was sent both emails replied that he was asking Ms Savage '*to meet with you as soon as possible to go through all of the issues you and Natalie have raised*' (my emphasis). The Claimant replies '*I'm not sure that yet another meeting with Dawn will be helpful but am willing to do anything you advise'.* Ms Savage wrote to the Claimant at 11.09 am on 13 June to suggest '*any day except today'.* The Claimant suggested Tuesday 14 June and received no reply. In her oral evidence Ms Savage could not remember why this was the case or indeed why the Claimant had not pursued the matter in the absence of a reply. The Claimant said in her oral evidence that she '*chose not to*' even though Ms Savage's office is not geographically far away. This looks like an oversight or an incident of mis-communication which was not causative of the Claimant's resignation because she did not follow it up at the time. The correspondence in the bundles does contain several examples of complaints raised by the Claimant with different colleagues and managers which she then simply gives up on; this may be one of those occasions. For example she did not reply to Mrs Prakash's email at page 464 suggesting a meeting in early January 2016 in response to the Claimant's email of 7 January suggesting a stop to further paediatric ophthalmology cases.

79. The Claimant's work space including her personal office was supplied with a mobile air conditioning unit during the summer of 2015 as recommended by OH and the Claimant confirmed in her oral evidence that she does not complain that this *'minor issue'* is a breach.

80. It is difficult to understand the Claimant's contention that there was a failure to give her a phased return to work (issue 2(f)(ii) because the arrangements described in the fifth

bullet point on page 199 were implemented. The Respondent also had in place another locum from an agency- Helen Collett.

In her oral evidence the Claimant confirmed that there was only one clinic during her phased return which she *'had to work'* on a Thursday which was '*the most stressful clinic'.* This is a reference to her email exchange with Ms Clugston at page 232 from which it is clear that no pressure at all is placed upon the Claimant to cover this clinic and Ms Clugston only asks her to arrange for Ms Collett to cover. It is the Claimant herself who replies *'I now have no choice but to cover Thursday'*. This was not the case because Ms Clugston had already written to her to confirm that she would *'cancel clinics where necessary'* and in any event the Claimant could have asked Helen Collett to cover.

In addition I note Ms Clugston's offer of an impromptu meeting at page 232 *'give me a call when you're in and free and I will come over'.* This is evidence that the Claimant was not neglected. There is no evidence as to whether she took up the offer of a meeting.

I find that the Claimant has not made out her case that this part of the Occupational Health advice was not adhered to.

81. Stress risk assessment

The Claimant agreed in her oral evidence that she did have a stress risk assessment (SRA) on 6 July 2015. The document is at page 663A-B and seems to be an incomplete copy because it is undated, there is no signature page and no list of agreed actions. It is a rather odd document which is headed 'return to work questionnaire' but the parties are agreed that this is the SRA carried out in response to the OH advice. The complaint in the List in issue 2 (f) (iii) is that the SRA was *'not followed up'*.

The Claimant agrees that an Orthoptics Assistant was appointed to help with bookings.

In other respects it is impossible for me to ascertain whether the SRA recommendations were followed up because I have seen no copy of them. Insofar as the Claimant asks for *'adequate staffing levels'* I refer to my detailed findings above in relation to the efforts the Respondent made to staff the Orthoptics department. Insofar as she asks for managers to consult and work with her I refer to my findings in this Judgment in relation to the meetings and support arranged for the Claimant by her various line managers and the findings set out below in relation to the Claimant's working relationship with Ms Vidler.

My conclusion is that the Claimant has not made out her case that the SRA was not followed up.

I also reiterate that she continued to affirm the employment relationship by continuing to work for the Respondent for another 21 months until 20 April 2017 with over four months' notice until 1 September 2017.

82. Meetings with Ms Vidler.

The List states at 2(h)(xxii) that NV '*failed to provide adequate management support for C in that she only attended 7 of the regular fortnightly meetings she was meant to have with C in the twelve months prior to the C's resignation'.*

The relevant period is therefore April 2016 until April 2017. The parties agree that the wording should read *'weekly then fortnightly meetings'.*

The evidence about the number of meetings the Claimant had with her new manager Ms Vidler is sparse. I am not able to conclude that seven is the correct number of meetings which were held and nor am I able to substitute any alternative number. It was agreed at first that the Claimant and NV would meet weekly and, although the Claimant denied this in cross-examination, it was later agreed to change this to a fortnightly meeting at the end of 2016 (as the wording quoted above from the List of Issues suggests).

The Claimant told me she kept a diary of the occasions when NV failed to attend meetings but that diary was not disclosed in any format nor was there disclosure of the Claimant's electronic diary or calendar. NV agrees that for reasons of annual leave, Bank holidays, other absence or hospital bed availability emergencies (Opal 3) there may have been some omissions. Management support can of course be provided by other means than face to face 1-1s and the Claimant was in frequent email contact with NV as page 523 illustrates.

At page 523 she sends operational suggestions to NV because they have been unable to meet on 6 June 2016 for some un-stated reason. I am satisfied that there were sufficient interactions both formal and informal between the Claimant and NV.

Their relationship was somewhat strained and less than optimal as I describe below but there is again insufficient evidence that it was broken in such a way that the Claimant was seriously un-supported. In other sections of these Reasons I describe the support given by NV in terms of staffing and budget allocation. Certainly the Claimant felt able to work with NV for a total of over 18 months if the notice period is taken into account and 15 months in the period leading up to her resignation.

83. <u>The Grievances</u>

I have described above how the Claimant's first grievance dated 11 May 2015 became joined into a joint informal grievance at Stage 1 of the Trust's Grievance Policy. There were two meetings, at which a trade union representative (Waida Forman) attended on 7 and 20 July 2015 attended by the Claimant, Ms Mirza and Ms Mayes.

The grievance outcome at this stage is communicated by means of Mr Catling's two letters dated 10 July (pages 217-9) and 31 July 2015 (pages 233-5).

Issue 2(h) is worded as follows:-

'*That R failed to keep to agreements set out in Michael Catling's letter of 31 July 2015 following a joint informal grievance by C and her colleagues, namely:*

(ii) To seek approval to recruit 3 fixed term Orthoptic locums for 1 year as an emergency measure'

It is clear that the attempts made by Mr Catling and Ms Savage and several other senior managers including Finance and HR staff to '*seek approval*' for temporary staff were ultimately unsuccessful in obtaining funding for two out of the three fixed term emergency locums. Eventually approval was obtained on 17 November 2015 (page 447) for the Band

6 post for maternity cover (Mr Abid filled this post). By reference to issue 2(h)(ii) I conclude that the Respondent did not fail to '*seek approval'* albeit without success and it did not breach the Claimant's contract of employment in this respect.

84. It is unnecessary for me to set out in this Judgment the long and complex steps which were followed between July 2015 and approximately January 2016 in attempts to obtain Executive approval for this emergency staffing and the money to fund it. The Executive Panel failed to approve all three of the posts for financial reasons but the Respondent did attempt to 'obtain approval' and thereafter it implemented different temporary staffing measures. I reiterate that there was the additional difficulty, when it came to recruiting fixed term posts, that by December 2015 Mr Vempali had retired and there was no successor appointed.

It is possible to pinpoint an early moment at which it became clear that all of the three 'emergency 'locums could not be funded. This is the email dated 26 October 2015 (page 403) from the Finance Manager Mandy Marendaz to Dawn Savage which costs out the proposal as requiring an additional £56,000 '*for which there is no funding' (*second email at page 437). Both emails are pessimistic in tone in the context of the Chief Executive's message to all staff on 21 September 2015 at page 316.

Ms Marendaz invites Ms Savage to submit *'to complete the whole picture'* additional activity data that the additional posts could generate, plus any non-pay costs, in order to obtain Authority to Invest (ATI). There is no response from Mrs Savage in the bundle of documents and she does not recall how she responded to page 403 or the reminder at page 437. It is not possible to make any finding as to whether the information which she allegedly omitted to send would have made any difference; given the pessimism of those emails and the fact that the additional investment is 40% of the current annual budget of £130,000 I judge that it is unlikely.

In any event there was a final decision taken by the relevant 'Panel' not to approve the total investment.

85. I find that other staffing arrangements consisting of adequate and suitable temporary agency and self-employed orthoptists were put in place to assist the Claimant and the OVFS as I have described above and eventually an additional permanent Band 7 orthoptist was recruited as approved in February 2017 at which point the visual fields technicians were also up to a full complement. I repeat that this was not the kind of staffing support which the Claimant wanted but her disagreement with this strategy and the way that Opthalmology was organised is not conclusive evidence that she was constructively dismissed. I have stated my reasoning above.

86. Issue 2 (h) (i) refers to the failure to '*arrange an independent external review of the service'.* No independent review of OVFS was ever commissioned but the Claimant did not initially favour that suggestion in any event. In fact, after Mr Catling left the Trust his successor Richard Hammond seems to have decided that an independent review was unnecessary and informed the Claimant of this reasonable managerial change of mind. The Claimant's comprehensive timeline at page 653 records that Mr Hammond sought to persuade her that '*we'd [internally] have better knowledge of the department and insight of what was needed'.* The Claimant may not have agreed with this change of approach but it

is not a repudiatory breach for her senior manager to adopt a different tactic in these circumstances.

So far as the Growth Proposal to which Ms Mirza contributed or any other type of internal review is concerned I decline to enter into the debate between the parties as to whose responsibility it was to produce income generation data or whose fault it was that the relevant data was not produced. Mr Sooknah's oral evidence made much of the fact that the Claimant or her colleagues could have easily obtained benchmarking data which might have supported their request for additional staffing but any alleged failures to do this benchmarking are irrelevant to this case.

87. Failure to complete the grievance process and notify an outcome.

The Claimant does not complain in the List of Issues that there was a fundamental breach of contract when the Respondent failed to properly investigate or deal with her stage 2 formal grievance or notify her of any outcome or redress at that stag

I conclude that this issue is however within my power to determine because in the Grounds of Claim the Claimant states at paragraph 19 that '*she had no response from any of the Respondent's Managers'* when Marcelle Michail, the Clinical Director asked Ms Savage to arrange a meeting suggested by Mr Sooknah at page 462 who writes to Ms Savage, Mr Hammond and Mr Michail (the most senior of the three)

'I was allocated to investigate the grievance but this seems to have become a more management issue of service provision (sic). Can we arrange a meeting as a matter of urgency to discuss options next week' (my emphasis)

The email is dated 19 December 2015.

I believe that this is the same meeting in December 2015 referred to in issue 2 (j) in the List and that the meeting in January 2016 also mentioned under that heading is part of this grievance process. I refer to page 461 which is an email dated 7 January 2016 in which the Claimant is asking that the meeting be arranged urgently. No such meeting was arranged and no such meeting took place.

I am able to deal with this issue briefly.

On 5 October 2015 in an email written by Ms Mirza at page 336 the Claimant and her colleagues escalated their grievance to the formal Stage 2 described in the Respondent's Grievance Policy at page 691 of the bundle. It was allocated to Mr Sooknah to act as the decision maker at this stage. He met with the Claimant, Ms Mirza and Ms Forman and sent them an 'update' letter dated 10 November 2015 which is at page 443. It contains useful information and asks for additional data but it is not a resolution of the grievance. No notes of that meeting were kept despite the requirement to keep notes and distribute copies which is at paragraph 5.7 of the Policy.

There was an appointment for a second meeting with Mr Sooknah on 16 November 2015 which he says the Claimant failed to attend. In paragraph 21 of his witness statement he says he expected to see her on that date but did not chase because he was waiting for information he had asked her to produce. In failing to even attempt to re-arrange this

meeting I find that the Respondent did not comply with the spirit and principles ('reasonable timescale') of its own Grievance Policy.

When Mr Sooknah next heard from the Claimant on 15 December almost a month later he, in effect, abandoned stage 2 of the Claimant's grievance as an intractable structural problem which he could not solve. He relied on the wording at the foot of page 691 which says '*the line manager shall refer the grievance to a higher/appropriate level of management if the grievance is outside the manager's line of authority'* He did not decide upon any one of the three possible outcomes set out in paragraph 5.6 on page 692. No reasons for this decision were given to the Claimant.

By referring the grievance to higher management as a '*management issue of service provision*' responsibility passed from Mr Sooknah and he had no further involvement. He said in his evidence *'it was not my responsibility anymore'.*

88. No meeting with any of the managers contacted by Mr Sooknah was arranged or took place. Mrs Prakash, to whom the Claimant's 7 January 2016 email was copied, did make a vague suggestion of a meeting '*I'm in the Unit whole day on Monday, shall meet if others are available'*(page 464) was not picked up and no firm appointments to meet were made. Mrs Prakash was not one of the three higher managers to whom Mr Sooknah had referred the stage 2 grievance in the first place.

Ms Savage says in her witness statement at paragraph 40 that she *'passed everything over to [Natalie Vidler*]' in early January and did not attend the meeting suggested by Mrs Prakash because '*there was no need'.* She says at paragraph 46 of her witness statement *'It was entirely down to Ms Chitty to raise the issues with her new manager so that they could be resolved'.* I do not agree. I find that she thus abdicated her responsibility for the Claimant's stage 2 grievance.

I am satisfied that the Respondent never reached a resolution of the joint grievance and never communicated any such decision to the Claimant and her colleagues. It is axiomatic that even had the outcome been a decision to entirely reject the grievance and take no further steps to resolve it this should have been clearly and unequivocally stated in writing, not least to allow for the possibility of further appeal at stage 3 to a senior Appeal Panel.

This failure is a serious and fundamental breach of the Claimant's contract of employment and I urge the Respondent to ensure that its procedures are corrected in future cases. In Ms Chitty's case it did not comply with its own Policy and I agree with Ms Egan's submission at paragraph 73 that '*the Respondent collectively washed its hands of her grievance [at stage 2*]'

89. However I am certain that by the time the Claimant first met Ms Vidler on 11 January 2016 she was made painfully aware that her grievance was going nowhere. Ms Vidler had not even heard of its existence. Paragraph 5 of NV's witness statement states ' *I was not able to discuss any issues to do with the grievance because this was the first time that I had heard about this and I had no knowledge of what issues might have been raised*'. I note that the Grievance Policy refers to an escalation to a higher level of management. Ms Vidler did not fall within this category so Mr Sooknah could not have appropriately escalated resolution of this matter to her. She was a Band 7.

Ms Savage then told NV not to take any action. Ms Vidler's evidence is that *' Ms Savage said to me that I should not worry about it because it was all sorted and I did not need to discuss the grievance with Ms Chitty'* (paragraph 6 of NV's witness statement. Counsel for the Respondent urges me in her written submissions to believe NV as an 'impressive witness'. I therefore conclude that Ms Vidler's recollection of this particular conversation is accurate even where it conflicts with the evidence of Ms Savage.

The Claimant received no reply to her email dated 11 January 2016 at page 465 asking '*which manager will now be dealing with our formal grievance issues?'* At paragraph 44 of her witness statement Ms Savage refers to this email but does not say what she said or did in response.

90. At this point, by mid- January 2016, I am certain that the Claimant could have resigned as a result of this obvious fracture of the employment relationship amounting to a breach of contract.

Instead she continued working and affirmed that contractual relationship. She did occasionally make reference in correspondence to the issues raised in the grievance but she can have had no realistic expectation that the stage 2 grievance would be adjudicated upon by anyone in the Trust or that she would receive formal notification of the grievance outcome. I have seen no email or letter from her in which she asks for a formal written outcome from Mr Sooknah or any of the three senior managers to whom he deferred. She never deprecated her loss of the opportunity of a Stage 3 appeal. She also let it drift and was diverted by the other actual and perceived day to day problems of working in OVFS with no permanent consultant, with temporary locum staff, and with all her supervisory, administrative and clinical duties to get on with.

The Claimant's evidence is that she continued to struggle and that there were *'ongoing issues which had already been escalated.to senior management level'* but she did not regard the relationship of trust and confidence to be so damaged that she was forced to resign. She waited a further fifteen months plus a lengthy period of notice by which date she had in law affirmed the contract of employment. As a result her claim of unfair constructive dismissal cannot succeed.

91. <u>The Claimant's working relationship with Ms Vidler January 2016-April 2017</u>

By reference to the List of Issues the remaining issues are at 2 (k) and the sub-issues listed thereunder. I have dealt with (xiv),(xv),(xvi),(xvii),(xxii) above.

I am able to merge issues 2(k) (iv),(v),(vi),(vii),(viii),(x),(xi),(xix) and (xxi) under a general theme relating to the working relationship between the Claimant and Ms Vidler. The Claimant perceived them to have an abrasive and unsuccessful working relationship almost from day one. She described NV's '*management style as difficult and unsupportive'* and said in her witness statement '*her approach was to deny there were any problems so couldn't work with me to resolve them'* (paragraph 60) Ms Vidler described their relationship as mostly cordial person to person. She said that the challenging tone of some of the Claimant's emails did not reflect their day to day interaction. There was a clear difference of perception.

In general I found Ms Vidler's evidence to be robust, pragmatic and matter of fact. She gave evidence that her aims were to progress the development of the OVFS in the most

efficient, cost-effective way under the pressure of the Trust's significant institutional problems. I am satisfied that the Claimant resented the control of her NHS managers 'with *no clinical knowledge or experience'.* She much preferred the regime under which she previously worked with a clinical manager and she said that almost no changes in the course of her long career had been for the better; she voiced the opinion that her expertise, long experience and clinical knowledge was frequently ignored even though she *'knew how it should be'*.

The Claimant did not feel (issue iv) that she received sufficient appreciation, reassurance and sympathy and Ms Vidler's manner may have been a little too business-like, even brusque, for the Claimant but this is not a breach of contract. This difference of approach between the two women was a recipe for a rather fractious and strained working relationship but the Claimant must prove that Ms Vidler's treatment of her was, taken singly or together, sufficiently intolerable as to precipitate her resignation.

It must also be said that NV disagreed with the Claimant's perception of how badly OVFS was doing. That disagreement was not wholly unreasonable.

The reference in the List at issue (iv) to an email dated 17 June 2017 is mis-typed. It should refer to the email of 17 June 2016 at page 536-7. It is a complaint about lack of VFTs and the possible delay in arranging interviews for new VFT staff. In this case it is the Claimant's email timed at 16:48 which is combative.

I agree with the analysis set out in Ms Melville's written submission paragraphs 142-147 which it is unnecessary to repeat here.

92. I find that there is no evidence in the documents or from any witness that Ms Vidler 'bullied' the Claimant (issue (v)). There is no proof of any serious single episode or of any sustained campaign of coercion, abuse of power or intimidation. There is no proof of any incident or incidents which would fall within the Trust's own definition of bullying at page 686D of the bundle. This serious allegation is not made out. The examples set out in paragraph 66 of the Claimant's witness statement are examples of situations in which the Claimant disagreed with NV. They are not examples of bullying. The Claimant never took advantage of the Trust's anti-bullying protocols or made any complaint under the Dignity at Work Policy despite the fact that she had trade union representation to assist her. In her oral evidence she described any such steps as pointless because she had '*no faith in the process*' but she in fact never tested the procedures.

The Claimant was unable to bring any witness to attest to any incident of Ms Vidler '<u>often</u> *raising her voice'* (my emphasis) in the Claimant's office so that it could be heard by patients and the VFTs. In her post-resignation email sent to Ms Matthews on 9 May 2017(page 576) the Claimant says that NV '*raised her voice'* when the Claimant refused to participate in interviews for the new Band 7 Orthoptist. I was not taken to any evidence about what either party did as a result of this complaint. I decline to infer that, even if there was a heightened dispute between the Claimant and NV over this one issue, it is an indication of NV '*often*' raising her voice prior to the Claimant's resignation.

The Claimant's alleges that NV '*often denied things that had been said or reported I'd said things that I hadn't'* (issue xix) or 'pressurised

These rather generalised complaints are un-particularised. The Claimant has not produced specific examples or adduced any focussed evidence from a witness or in the documentation which proves these allegations. Similarly she was unable to give specific examples where she was '*mis-represented'.* The Claimant told me she kept her own notes of her informal catch ups with NV but left them behind when she left her employment.

93. The Claimant says in paragraph 119 of her witness statement that she '*felt as though she did not have a manager'* and was frequently ignored. I have made findings above regarding the incomplete nature of the documents because it is clear that there are email chains where replies and responses are potentially omitted and a clear picture cannot be obtained. Page 571A pointing out that patients were not notified of cancelled clinics is an example.

Conversely the Claimant also says that she was *'micro-managed'* by NV (issues x and xi). There is some contradiction in the Claimant's assertions. The only example, which is dated post-resignation is in relation to the return to work interview for Mr Beckwith, one of the VFTs. I find the email at page 591 dated 31 May 2017 to be entirely appropriate and non-offensive and in any event it cannot have contributed to the Claimant's decision to resign on 20 April.

At page 557-8 there is an email exchange with Ms Vidler which the Claimant herself described in cross examination as '*I was on my knees hence the childishness'.* She was responding to Respondent's counsel's description of the email as a '*childish spat'* in March 2017. In the circumstances in which the Claimant herself agrees that this was not bullying but, at worst, a lack of empathy and a 'spat' then it cannot amount to an incident amounting to a fundamental breach of the implied duty of trust and confidence.

94. Issue 2(k)(i) The management of the temporary locums

The Claimant alleges that NV put pressure on her to take on '*the management of the agency locums who C had expressed concerns about'.* This is the only specific example of '*additional responsibilities'* forced upon the Claimant. It is clear that the Claimant refused to take on any management of the locums as she states on page 465D on 15 January 2016 and I find she was not pressurised to do so. She did undertake all the timetabling and rotas for OVFS clinics as she had always done and as a consequence she had to timetable orthoptic cover even if it involved using a type of staff with which she disagreed. She undertook this task in her two days of non-clinical time in accordance with her usual working practice over many years and there is no evidence that she was required to do extra work in this respect.

NV undertook the task of sourcing and booking the locum staff and told me that she had notified Mansha Singh and Diana Owen that they could work whenever they were available almost as if they were full time permanent staff. She would find the money from somewhere to pay them.

95. Issue 2 (k)(ii) (iii) Change to clinic templates and 'booking clinics without staff to cover.

The Claimant booked all the orthoptist only clinics and NV booked the locums to assist her. If there was no locum cover available the Claimant cancelled the clinics and said

'*sometimes I'd see extra patients'.* NV booked all clinics where there was a doctor available to lead a joint doctor/orthoptist clinic, she placed them on a central booking system and she arranged locum cover if necessary and the Claimant did the rota in advance. That rota was sometimes unavoidably subject to change and NV would cancel the clinics if it had to be done.

The Claimant alleges that Ms Vidler, '*changed agreed safe clinic templates to dangerous levels such as a clinic for a maximum of 18 children being changed to 34'*

The evidence from both parties regarding clinic templates was labyrinthine and complex. However it is common ground that NV only tried to change the clinic templates for doctor-led clinics. The template sets out how many patients can be seen in a particular clinic per half day or day. I find that there was no 'agreed' or national standard and that the template was flexed according to circumstances and resources.

She continued to permit the Claimant to organise and run the orthoptist only clinics without 'interference'.

Ms Vidler wanted to ensure that the maximum efficiency was extracted from the doctor-led clinics insofar as that was compatible with patient care; that was part of her job. Each half day clinic ran for four hours (8 hours per day). I was convinced by the Respondent's evidence that not each patient needed to see an orthoptist although the Claimant liked to talk to and reassure every patient and/or parent. At page 540A the Claimant identifies that there are older children '*who do not need to see us'*

The Claimant vehemently objected to template changes which sought to increase the number of patients seen by doctors/orthoptists per joint session. She specifically objected to a proposal to increase a clinic from 18 to 34 children in clinic SK7P.

The Claimant and NV disagreed about the time necessary to see new and follow up patients. The Claimant was insistent that it took 20-30 minutes. NV assessed the timing as 10-20 minutes based on new guidelines of 15-20 minutes from the Royal College of Opthalmologists. I do not have the expertise to resolve that dispute.

However Ms Vidler is certain and I accept her evidence that she always agreed doctor-led clinic templates with the relevant consultant/associate doctor and/ or with the Clinical Lead Mrs Prakash. The Claimant's assertion in paragraph 63 that no other clinicians were involved in any discussion with NV does not seem to be accurate. There are some complaints and queries from the doctors including Mr Jas Grewal and Mrs Prakash herself. There is no notification from any doctor that the templates were changed to '*ridiculous*' or *'dangerous levels'.* The relevant emails are at pages 540 E-H but the email stream is clearly incomplete and I am obliged to conclude that these complaints/queries were eventually resolved at clinical meetings such as those mentioned in this correspondence.

In any event Ms Vidler quite promptly reduced the patient numbers on the template from 34 to 30 in June 2016 and by 15 September 2016 she asks for the template for clinic SK7P to be 10 new patients and ten follow ups (page 540B). The Claimant suggests 20-21 in the morning for SK7P in her email at page 540 on 23 September 2016 timed at 17:55 thus suggesting that by this point, seven months before she resigns, she has agreed the model template albeit with a few suggested tweaks.

The changes to the doctor-led clinic templates with which the Claimant initially disagreed vociferously were adapted and ultimately 'ironed out'. This issue was therefore not, on the evidence, causative of the Claimant's resignation.

96. The Claimant revives this dispute in February 2017 in the wording of issue 2 (k) (xx) where she says NV '*In February 2017 continued to overbook paediatric clinics to unsafe levels and did not respond to requests to change them'.* She has not identified any specific examples. In cross examination Ms Melville took her to one example which was identified by Respondent's counsel herself and not by the Claimant. The Claimant said that page 551 E dated 6 February 2017 is '*just an example'* but was unable to identify others in February 2017.It is unclear whether Mrs Prakash responded because the email chain which was disclosed by the Claimant is incomplete.

97. Issue 2(k) (xii)

This is an allegation that NV breached the mutual duty of trust and confidence when she *'emailed C and copied 2 higher managers on 25 May 2016 complaining that locum orthoptists [and VFT] were doing nothing and that this did not promote a department that is understaffed'*

I am satisfied that Ms Vidler's message at page 530 was not intended to convey that the locums should never have been booked for that session. She convincingly explained that even if there were no patients to see there was plenty of work they could have been getting on with. She makes a legitimate point that there was plenty of staffing for this particular session. It is not a response to the entirety of the Claimant's staffing concerns.

Ms Mayes the VFT went home early and the Claimant explains why at page 527.

Ms Vidler sent the rather irritable response to the Claimant's email, also copied to several higher managers, at the foot of page 530 in which the Claimant refers to 'unsafe' clinics with insufficient orthoptic cover. NV's evidence was that she had originally sent the response only to the Claimant but then re-sent it to include Mr Gleed and Ms Matthews. This was a defensive move borne out of NV's perception that she was '*constantly scrutinised about finances'* and needed to justify the locum resources she was putting in to OVFS.

First, this incident was almost one year before the Claimant resigned despite the fact that she describes herself as *'despairing'* and says it is *'just about the straw that broke the camel's back'* Secondly the Claimant had refused to manage the agency locums' work. She could therefore have courteously replied to reiterate that this was the case.

There was in this instance no evidence of a breach of contract.

98. Issue xiii is no longer an issue. The claimant agreed in her oral evidence under cross examination that there was *'nothing wrong'* with being asked to enter her overtime or TOIL hours in a different way and she '*stopped doing it'.*

99. The OVF Budget

There was a lengthy cross examination on this subject around issue 2 (k) (xviii) that NV '*made changes to the OVFS budget without consultation with C'.*

First, I find that Ms Vidler was the overall Service Manager for the Opthalmology budget or cost centre including OVFS under the Trust's Scheme of Delegation. It was her responsibility to 'bid' for the annual budget allocation, monitor it and make it balance. The Claimant has spending authorisation out of the Orthopics budget up to a maximum of £2500. She is an authorised signatory up to that spending level as is clear from page 663C of the bundle. That document seems to be dated 'month 12' in 2015/16. It is headed New Scheme of Delegation and therefore may have been introduced once the Trust went in to financial special measure. Ms Vidler is the authorised signatory for Orthoptics for any amount over £2500 up to £9,999.

I therefore cannot agree that there was any obligation for NV to consult with the Claimant about the overall OVFS budget. The Claimant was unable in cross examination to specify what she meant about '*staff being moved into my budget'* or NV trying to make the OVFS budget *'look overspent in order to run down Orthoptics'.* If any such over-spending had occurred it would have reflected badly on Ms Vidler herself in failing to control costs for which she was responsible.

I do not find that this allegation is proven or that this issue was causative of the Claimant's decision to resign.

100. Continuing Professional Training and Development (CPD).

The Claimant was obliged to undertake CPD in order to maintain her professional registration which is re-validated every two years and her professional body undertakes random checks (approximately 10%). The Claimant's next validation was due in August 2017. In common with many such professional CPD arrangements there is a wide range of activity which can qualify including self-reflection and home study as well as training others. The activity must be pro-active.

Under cross examination the Claimant agreed that at the date of her resignation she was not up to date with her CPD and it was *'a factor why I gave up'.* She said she had no time even to keep her personal written CPD record which is her responsibility. No such record was disclosed.

I cannot agree that *'C was not able to take any study or CPD leave since November 2015'* as a result of the Respondent's actions; it was not made *'impossible'* for her to achieve her CPD. Page 217 of the bundle which is an email from Mr Catling dated 10 July 2015 (part of the stage 1 grievance response) makes it clear that the Claimant has a Study Leave Allowance and asks for 6 weeks' notice of any courses or conferences she wishes to attend. His email makes it clear that *'I would expect the team to be pro-active in identifying opportunities'*. The Claimant by her own admission never booked to attend a course or conference.

The email does not say that the Claimant must give six weeks' notice of reflective CPD such as professional reading or study and there is therefore no reason why she should stop doing that activity.

At page 392 Ms Savage's email dated 21 October 2015 does not prevent the Claimant taking CPD sessions of any kind. It merely asks for a courteous notification if she is not going to attend work for a rostered clinical duty but instead decides to take a reflective CPD session at home. It makes it clear that there are no pre-arranged rostered study or CPD sessions but that these must be taken as study leave with prior notification. I do not find any of that information to be unreasonable or oppressive.

The Claimant did not attend the monthly audit sessions referred to by Mr Catling which probably would have counted as CPD.

101. The Last Straw

Again I am grateful to counsel for their respective summaries of the law and the two leading cases of Omilaju v Waltham Forest LBC [2005] IRLR 35 and Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 which deal comprehensively with the principle that there can be a cumulative effect of individual and discrete actions taken by an employer which, in themselves and taken separately, are not fundamental breaches but when added together can undermine and break the relationship. These are called 'final straw' cases and the Claimant both pleads her case as a final straw case and has agreed a List of Issues which sets out such a narrative.

A last straw incident prior to an employee's resignation can revive all or some of the previous breaches of contract committed by the employer even if the employee has, prior to the last straw, put up with the employer's conduct, has 'soldiered on' and has affirmed the existence and validity of the employment relationship.

102. On behalf of the Respondent Ms Melville argues that the last straw relied upon by the Claimant, which is issue 2(r) in the List is 'utterly trivial' /'entirely innocuous' to quote the phraseology in Omilaju and Kaur respectively. Her argument therefore is that this last straw incident just cannot reactivate any previous breaches of the implied term of mutual trust and confidence.

Issue 2(r) is phrased '*That R failed to properly respond to concerns about patient safety raised by C on 30 March 2017 in an email to Ms Vidler and Priya Prakash, Clinical Lead of the Eye Unit'*

103. My findings and conclusions are as follows:-

The Claimant wrote an email timed at 19.42 in the evening and dated Thursday 30 March 2017 addressed to Priya Prakash and Natalie Vidler. It is at page 560A and expresses three main concerns:-

That Mr Chan, the locum paediatric/ocular mobility consultant is leaving the Respondent to take up a job at the Lister Hospital and the Claimant believes him to be '*the only possible candidate for the permanent Consultant's post*'. She expresses concern about how safe and effective care can be delivered to patients after Mr Chan's departure.

She says orthoptic (and paediatric optometry) staffing levels are inadequate and will remain so even after a new Band 7 Orthoptist is appointed.

She says that there are an increasing number of children waiting for follow up appointments who cannot be seen within an acceptable time frame and supports the concerns about booking appointments which are expressed in an email on page 562B by Paul Radley the Orthoptics booking assistant.

104. The Claimant raised no Datix about these issues nor did she place her concerns on a risk register. She lodged no grievance.

It was an inopportune time to raise these issues since Ms Vidler was on holiday from Friday 31 March and then for the next two weeks and the Claimant was booked to be on holiday from 10th to 20th April 2017 so that she was unable to attend a suggested meeting date with PP and Julie Matthews, the Operations Director substituting for NV, on 10th April (page 563).(In fact Ms Matthews could not make that date either).

The Respondent did respond because the Claimant did receive a prompt and courteous response from Ms Savage, who was copied in, by way of an email timed at 08:19 first thing in the morning on the following day Friday 31 March 2017 informing her of NV's absence, promising to '*catch up with Priya on Monday'* and stating *'if you have concerns that the service is not safe these need to be logged on the Risk register/Datixed'.* There was therefore a prompt and concerned response from a senior manager. Thereafter Mrs Prakash responded with a suggested meeting date to fix an 'action plan' and tried to include Ms Matthews. The Claimant said in her oral evidence '*yes she did the right thing'.*

105. The email chain may be incomplete but it seems that the Claimant did not express any urgency for the meeting to take place before 10 April and departed on her pre-booked leave.

106. Upon her return she resigned by means of the handwritten letter addressed to NV at page 566 which is dated 20 April 2017. That letter makes no reference to any last straw consisting of an inadequate response to her 30 March email. Instead she says *'I've made the decision to take early retirement'* and gives over four months' notice. I make findings below about the reasons for the Claimant's resignation.

107. I hesitate to use the words 'trivial' or innocuous' about any of the concerns and complaints raised by the Claimant in her 30 March 2017 email. It is however accurate to say, in my determination, that the last straw just did not happen. The nature of the last straw is clearly expressed in terms of a failure of proper response. The ET1 Claim at paragraph 48 states '*The Respondent failed to properly respond to these concerns. She received no response until 6 April'.* This statement is inaccurate because a response was sent by Ms Savage on 31 March.

108. I cannot agree, for the reasons stated above, that in April 2017 the Claimant was receiving 'no support' as she states in paragraph 132 of her witness statement. Post-resignation she did write to Ms Matthews repeating her previous concerns in the first four paragraphs of page 577 but again stating her opinion *'I feel I can no longer work in a department where both patients and staff are at risk. I've reluctantly taken the decision to take early retirement and handed my notice in two weeks ago.'* Neither in this email nor in her exit interview with HR (Sandra Small) on pages 582-584 did the Claimant say that she had been constructively dismissed. Indeed in her email to Ivan Fawcett on page 589B

dated 30 May 2018, over a year after her resignation, she refers to a much later decision to take a tribunal case because after leaving work (September 2017) *'I 've not been able to let it go'.*

109. The alleged last straw did not therefore have the legal effect of reviving previous historical breaches which have been affirmed and it is not in and of itself a breach. I also find, as stated below, that it was not the cause of the Claimant's resignation.

The reason for resignation

110. The Claimant gives no reason for her resignation in her letter terminating her employment with notice. She had raised no formal or informal grievance under the Respondent's Grievance or Dignity at Work Policies since 2015. She is required to prove that the effective cause of her resignation was the repudiatory conduct of the Respondent as she has described it in these proceedings.

111. There is no need in law to prove that this conduct was the only or sole cause of her resignation. There can be a number of causes in combination which will precipitate a resignation but in order to succeed in a constructive dismissal claim like this one the Claimant must show that the operative or effective cause was her treatment by her employer.

112. I am certain that the Claimant wanted early retirement on her pension after a long NHS career at the end of which, for the last three or four years at least, she had begun to feel frustrated, de-motivated, fed up and exhausted. She said in her oral evidence that *'it was a blow'* that Mr Chan did not stay so that she could hand over responsibility to him. She was certainly disillusioned with the way the Trust was organised and run mostly by non-clinical managers and she wanted a calmer and less stressful work environment and lifestyle hence her expressed desire to work somewhere less demanding. I am satisfied that she did express such ambitions, however vaguely, to NV in conversation and that she did indicate that she was in a financial position to retire.

113. At page 589B in an email dated 30 May 2018 to a previous colleague Mr Ivan Fawcett the Claimant writes *'the plan was to have a few months off to re-charge my batteries before finding something a bit less stressful but my health has not been too great since leaving and I had to have my gall bladder removed last month so I'm now thinking of my time off as maybe extending to a gap year'.* I find that this letter accurately reflects the Claimant's state of mind in the Spring and Summer of 2017.

114. In her appraisal, completed mainly in the Claimant's handwriting, on page 554 dated 27 February 2017 she expressed a desire to attend a Preparation for Retirement course. The same appraisal refers to '*frustration, stress and ill health'* but not to any sense of being forced out.

115. In addition the Claimant was '*worried*' (her word in cross examination) that she was not up to date with her continuing professional development requirements and her professional registration was at risk and this was another factor in her decision to resign.

116. In all the circumstances of this case, even if I am wrong that the Respondent did not fundamentally breach the Claimant's contract of employment in any aspect save for its

failure to properly complete the grievance procedure and adjudicate upon the grievance, and,

117. Even if I am incorrect in my conclusion that the Claimant affirmed the contract of employment because she continued to remain at work and acted in ways which were inconsistent with any intention on her part to treat her employment at an end, and

118. Even if my conclusions are faulty in relation to the existence of the alleged last straw I nonetheless am satisfied that the reason that the Claimant left her employment on over four months' notice was that she eventually decided to take the personal step, and it was a big step, to leave her job of 35 years with the only employer she had ever worked for, because she just did not like the way the Trust was running its hospitals and least of all its Opthalmology services which, in her view, were severely deficient compared to how they had previously functioned during the earlier history of her employment.

119. She did not like her job anymore and she decided to leave it. She could take her pension in full, maintain a reasonable income and look for a part time job which interested her but would not be so all consuming. Once she knew that there was an end in sight she was able to fairly pragmatically carry on and work an extended notice period both to help out her colleagues, continue to care for her patients consistently and to get to the 35 year mark even though this made no difference to her pension entitlement.

120. In addition the Claimant had a tense and strained working relationship with her manager Natalie Vidler towards whom she has expressed personal antipathy. Again I have found that none of Ms Vidler's conduct towards the Claimant was repudiatory and Ms Vidler was under considerable work pressures of her own. However this non empathetic relationship, as the Claimant perceived it, did contribute to the Claimant's decision to take early retirement.

121. This is an understandable and personal decision but it is not the same as being forced out by the intolerable conduct of an employer which gives its employee no real choice but to leave because its actions indicate a repudiatory intention not to comply with the fundamental obligations of an employer towards a member of its staff. I find that the actions of the Trust were not therefore the effective cause of the Claimant's resignation.

Post resignation matters

122. There is a great deal of post resignation correspondence in the bundle to which I have not been referred by either party or counsel.

123. On 27 April 2017, one week after the Claimant's resignation, NV in consultation with PP made the decision to stop all new paediatric referrals until a new consultant could be appointed. It is possible that this action plan would have been discussed with the Claimant in response to the concerns in her 30 March email if she had attended a meeting convened by PP and not already resigned.

124. After the Claimant's resignation she was replaced by a full time (not 0.8) Band 7 orthoptist Ms Anastasia Lawrence who started work in late September 2017 (page 610), Mr Abid Minhas was appointed to the new Band 7 post full time effective 1 June 2017. SM was still off sick but her band 7 post remains on the establishment and is 'backfilled' by a

Band 6 maternity locum (this was the locum post Mr Minhas had before he was appointed to a permanent job). The OVFS has apparently survived.

125. In all the circumstances of this case the claim of unfair dismissal does not succeed and is dismissed.

Employment Judge B A Elgot
Date: 7 April 2020