



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Wendy Gilbert

**Respondent:** Integrated Care 24 Limited

**Heard at:** London South Tribunal **On:** 19<sup>th</sup> February 2021 **by:** CVP

**Before:** **Employment Judge Clarke (sitting alone)**

## **Representation**

Claimant: Ms W Gilbert (in person)

Respondent: Mr J Boyd (Counsel)

## **RESERVED JUDGMENT ON LIABILITY**

- (1) The complaint of constructive unfair dismissal is not well-founded. This means that the Claimant was not unfairly dismissed by the Respondent.

## **REASONS**

### **Introduction**

1. The Claimant was employed by the Respondent. She resigned with immediate effect on 13<sup>th</sup> February 2020, which resignation was formally accepted by the Respondent on 17<sup>th</sup> February 2020. She notified ACAS under the early conciliation procedure on 19<sup>th</sup> March 2020. The ACAS certificate was issued on 25<sup>th</sup> March 2020.
2. By a claim received on 27<sup>th</sup> March 2020 the Claimant seeks compensation for constructive unfair dismissal and holiday pay.
3. The Respondent resists the claim denying that the Claimant was dismissed or that the Respondent was in breach of the Claimant's contract of employment and asserting that he Claimant had voluntarily resigned.

4. Following discussions between the parties, they reached an agreement in respect of unpaid holiday such that the Respondent would pay the Claimant a further £48.02. Accordingly, I need not consider this matter further and I have not done so.
5. The case was listed for a 1 day final hearing by CVP to deal with both merits and quantum. At the outset of the hearing, it was apparent that it was unlikely that there would be sufficient time for evidence, submission, judgment and remedy and I indicated that I would hear evidence and submissions in respect of liability only and reserve judgement.

### **The Evidence**

6. At the Hearing, the Claimant represented herself and gave sworn evidence.
7. The Respondent was represented by Counsel, Mr James Boyd, who called sworn evidence from Tracy Wickham, Operations Manager and Jo Turner, Associate Locality Director of Quality.
8. I was also referred to, and considered, witness statements from each witness who gave oral evidence and documents contained in a bundle comprising 275 pages. Throughout this judgment, text in bold within square brackets refer to the pages of the trial bundle.
9. I also listened to the audio recordings of 2 telephone conversations which took place between the Claimant and Tracy Wickham on 10<sup>th</sup> February 2020, **[transcripts: 176-177 and 178-179 respectively]**.
10. At the conclusion of the evidence both the Claimant and Mr Boyd (on behalf of the Respondent) made brief oral submissions.

### **The Issues for the Tribunal**

11. Although the Claimant's ET1, Schedule of Loss and witness statement make a claim for a redundancy payment, the Claimant was not in fact made redundant, nor was she eligible for a redundancy payment. It is agreed between the parties that by the time that the Respondent company made a number of its work force redundant at the end of March 2020, the Claimant's employment had already come to an end. I therefore treated this aspect of the claim not as a claim for a redundancy payment but as a matter to be considered when determining the amount of any compensation that may be due for unfair dismissal in the event that I make such a finding.
12. The list of issues in respect of liability for constructive unfair dismissal was agreed between the parties before the commencement of evidence as follows:
  - (1) Did the Respondent breach either the implied term of trust and confidence or the implied term to ensure that the Claimant's workplace was safe by

- failing to put in place such measures as were at the time reasonable to guard against the risk of the Claimant or others contracting coronavirus?
- (2) Did the Respondent breach the implied term of trust and confidence by raising the issue of potential disciplinary proceedings in relation to the Claimant not attending her contracted shift on 10<sup>th</sup> February 2020?
  - (3) If so, was any such breach either alone or taken cumulatively sufficiently serious as to justify the Claimant in treating her contract of employment as being at an end?
  - (4) If so, did C resign in response to any such breach?
13. The Claimant confirmed that she did not wish to change the Schedule of Loss [29] in any way.

### **Relevant Findings of Fact**

14. There was no dispute between the parties about the majority of the facts. Where relevant dispute did occur, I have indicated and made my own findings as to what occurred.
15. The Respondent is a not-for-profit organisation providing out of hospital health and care services (including, at the relevant time, NHS 111 Service).
16. The Claimant entered into the Respondent's employ by way of a TUPE transfer. The start date of her continuous employment was 24<sup>th</sup> February 2004. Her employment terminated on 12<sup>th</sup> or 13<sup>th</sup> February 2020 by way of her resignation.
17. The Claimant's role, job description and hours of work had varied during the course of her continuous employment but in 2020 her primary role was as a patient facing receptionist at one of 3 base sites: The Royal Sussex Hospital in Brighton, The Princess Royal Hospital in Haywards Heath and Worthing Hospital.
18. Although most attendees of the clinics at which she worked were pre-booked and triaged by phone, on any given shift there were also one or two "walk-in" patients who had not been in contact with the clinic prior to their attendance. At Royal Sussex Hospital the layout was such that there was no restriction on entry and the first point of contact for these patients would be with the Claimant. At Hayward's Heath there was an intercom system that enabled the receptionists speak to walk-in callers remotely before having face-to face contact, although it was not impossible that an occasional patient may have walked in from another adjoining part of the hospital.
19. At each site was an IPC box containing personal protective and sanitising equipment. This was usually used by clinicians but was available for any staff to access if required. The Respondent also had an extensive Infection Control Policy and Procedure including an Infectious Disease Isolation SOP last reviewed and amended on 26<sup>th</sup> November 2019 [84 -132].

20. The backdrop to the Claimant's resignation was the emergence of the coronavirus pandemic. From January 2020 onwards this was a developing and fast changing situation.
21. The circumstances in which the Claimant came to resign were as follows:
22. On 24<sup>th</sup> January 2020 the Respondent circulated an e-mail advising staff of an alert from Public Health England regarding the Wuhan novel coronavirus, providing a flowchart regarding management of suspected cases and telling staff working on bases to be aware as to where personal protective equipment (PPE) was kept and of the isolation procedures for the base [190-195].
23. On 31<sup>st</sup> January 2020 the Chief Medical Officer produced an Alert regarding Novel Coronavirus [167-168]. In response, the Respondent circulated information relating to this in a further e-mail to staff with a revised flowchart as an update to the previous one [196- 199].
24. On 3<sup>rd</sup> February 2020 the Respondent's circulated a further e-mail to staff with updated guidance [200-201].
25. The Claimant received these alerts and flowcharts.
26. On Monday 3<sup>rd</sup> and Tuesday 4<sup>th</sup> February 2020, the Claimant worked shifts at Royal Sussex County Hospital. During those shifts she handled a total of 3 calls from students at Sussex University concerned about Coronavirus. She did not have any physical contact with these students, and they did not attend the Hospital.
27. On Thursday 6<sup>th</sup> February 2020 the BBC reported that a Brighton Businessman had been diagnosed with Covid 19 and had been linked to 11 other cases,
28. On Saturday 8<sup>th</sup> February 2020 the Respondent circulated to staff updated guidance on dealing with the novel coronavirus as a result of the Department of Health and Social Care and Public Health England updating their guidance. This essentially provided triaging advice to identify patients who might be potentially infected with coronavirus and the steps to be taken in respect of those identified as potentially infected coronavirus callers (which included keeping them out of hospital or face-to-face healthcare settings so far as possible) [204-215].
29. That evening, the Claimant worked a shift at the 111 Out of Hours clinic at Worthing Hospital. She was worried about the unconcerned attitude of hospital staff there (not employees of the Respondent) but secured their co-operation in setting up an isolation room and process. She was however unable to locate any face masks, although she did not access the IPC box.
30. On Sunday 9<sup>th</sup> February 2020 the Claimant worked a shift as a receptionist at Worthing Hospital. Masks were available. She spent much of the evening in close proximity to a doctor who was a partner at County Oak Medical Centre.

31. On Monday 10<sup>th</sup> February 2020 the Claimant was due to work an evening shift at the Royal Sussex hospital. The morning BBC news reported that County Oak Medical Centre had been closed for a deep clean due to a doctor there being diagnosed with coronavirus. The doctor was not named.
32. The Respondent circulated a further e-mail with updates on coronavirus procedures [202].
33. The Claimant was concerned and contacted Christine Mannering, the Respondent's rota manager, who advised that there was nothing to worry about but arranged for Tracy Wickham, the Respondent's operations manager to call her.
34. During 2 telephone conversations [Transcripts:176-179] Tracy Wickham provided reassurance to the Claimant and advised that Public Health England were dealing with the situation and would contact anyone who needed to be contacted.
35. During the first call the Claimant stated “.. I really don't think I want to work this evening I'm afraid too much of a worry at the moment”. When asked whether she was saying that she didn't want to work until coronavirus has gone she said “Well just, well no I'm not saying that I'm just saying that this particular incident ..... I don't feel that inclined to embark on anything until it's a lot clearer in the next day or two ..... I prefer not to work under the circumstances this evening until the County Oaks situation becomes clearer”.
36. During the second call Tracy Wickham advised the Claimant that she had spoken to Public Health England and that the BBC reports were wrong. The Claimant indicated (and maintained in evidence before me) that she preferred to believe the BBC report rather than the information provided by her employers that had been obtained from Public Health England. At the end of the call, Ms Wickham asked the Claimant to call Jo Turner, the quality director, who could explain in more depth and the Claimant agreed to do so. The Claimant was also advised that she might face a disciplinary meeting.
37. There was a dispute between the parties as to whether the anticipated call between the Claimant and Jo Turner took place. The Claimant says that it did not. The Respondent says that it did. Jo Turner gave detailed evidence as to what was discussed during the call, including information about the specific situation, explanations as to how COVID was transmitted, relevant policies that were in place, and reassurance that all staff had access to appropriate PPE. Tracy Wickham gave evidence that Jo Turner was in the same room with her when she (Ms Wickham) spoke to the Claimant and that immediately after that call ended Jo Turner took a call, had a conversation, then told Ms Wickham that she had been speaking to the Claimant.
38. I prefer the evidence of the Respondent's witnesses and I find that it this call did take place.

39. This is because the Respondent's witnesses corroborated each other and I found them to be clear, straightforward, consistent, and credible in the way that they gave their evidence. Jo Turner's evidence was detailed, and it likely that she had merely misremembered who she spoke to as she told me that she did not have any similar conversations with anyone else around this time. Tracy Wickham was careful to tell me that she could not confirm from what she directly heard that it was the Claimant to whom Jo Turner was speaking. I can identify no reason why either witness would have lied about this call.
40. By contrast the Claimant's bare denial that the call took place contradicts her undisputed agreement with Tracy Wickham that she would make the call. Her explanation for failing to do so, that she did not generally make phonecalls and didn't think it necessary to do so, did not ring true. Making numerous phonecalls to various people was an inherent part of her job, as described by her. Further, the purpose of the call was to provide the Claimant with further relevant information which the Claimant, on her own admission, was keen to obtain. I find it inherently unlikely that the Claimant would have agreed to make the call if she had no intention of doing so or that, in the circumstances, she would have disobeyed a direct request from her employer to make the call.
41. Later that day (10<sup>th</sup> February), a further e-mail was sent by the Respondent to staff regarding the County Oak Medical Centre [216]. That e-mail confirmed that the Respondent had liaised with the Deputy Director of Primary Community Care for Brighton and Hove CCG who had advised that no positive coronavirus results had been received and that the practice had been closed due to an operational health and safety incident meaning that a deep clean is required. It also provided reassurance and gave general advice regarding coronavirus transmission stating that the most effective control measures were good handwashing. I note that it was accepted by the Claimant in her oral evidence that there might be operational health and safety incidents unconnected with Coronavirus which could cause a clinic to be closed for a deep clean.
42. The Claimant did not attend her scheduled shift on 10<sup>th</sup> February 2020 though she was not unwell. She told me that she had decided to self-isolate despite not being required to do so by any government or other guidance and there being no confirmation that the doctor from County Oak Medical Centre that she had worked with on 9<sup>th</sup> February had either been diagnosed with coronavirus or had any potential exposure to coronavirus.
43. On 11<sup>th</sup> February 2020 the Respondent uploaded an operational update letter on coronavirus preparations to the intranet as a clinical announcement for all staff [174-175]. This document was available for the Claimant to access. Also on 11<sup>th</sup> February, a memo was circulated to all staff providing links to government advice and reminding them to take precautionary measures including asking about travel history and using IPC boxes for PPE [181].
44. The news that day reported that an A and E doctor at Worthing hospital had tested positive for coronavirus.

45. In response to additional information received, the Respondent sent a further e-mail to staff on 12<sup>th</sup> February 2020 [185]. This confirmed that there had been no new confirmed cases and that the message from Public Health England was to carry on as usual unless contacted by Public Health England and specifically advised otherwise.
46. On 12<sup>th</sup> February 2020 at 13:29 the Claimant sent a text to Chris Mannering (the Respondent's rota manager) stating "...Just to let you know I shall not be returning to work for Ic24 and that you will need to cover my shifts ..." [171] and a further one to Jo Turner stating ""...Just to let you know I shall not be returning to work for Ic24..."[237].
47. She followed this up with an e-mail on 13<sup>th</sup> February 2020 which simply stated "Further to my telephone conversation with Tracy Wickham on 10<sup>th</sup> February and subsequent communications with Jo Turner and Christine Mannering on Wednesday 12<sup>th</sup> February, I should like to resign from my post as receptionist within the IC24 organisation with immediate effect. I apologise for the lack of proper notice."
48. The Claimant says in her witness statement on page 9 (para 20) that she did not voluntarily resign but was asked to send a letter of resignation. Having reviewed the relevant documents and heard from the witnesses I am satisfied that no pressure was placed on the Claimant to resign and that she did so voluntarily. The request by text from Jo Turner on 13<sup>th</sup> February 2020 for a letter of resignation [237] was merely a request for the Claimant to put into a more formal format the resignation already communicated to the Respondent by her texts of 12<sup>th</sup> February 2020.
49. At no time before resigning did the Claimant complain to the Respondent about any issue with the policies or protocol documents produced by the Respondent, procedures at work or PPE availability nor make suggestions as to what measures, processes or equipment should be in place. She also did not raise any concern that the Respondent was not taking the Coronavirus situation sufficiently seriously or otherwise indicate that she had concerns about these matters.
50. During her evidence, the Claimant raised a number of issues about the degree of responsibility of the receptionist and the availability of senior management out of hours. I did not find these matters particularly helpful in determining the issues that I need to decide.
51. The Claimant also suggested that flowchart documents produced by Respondent did not make sense, and or were withdrawn almost immediately. The Respondent's witnesses denied that this was the case.
52. I accept the evidence of the Respondent's witnesses that the documents were not 'scrapped' but revised as matters developed. This is supported by the text of the documents themselves.
53. I am also satisfied that the Respondent took the coronavirus pandemic seriously and was working behind the scenes to follow government guidance, protect and



inform its staff, ensure that information, guidance and appropriate PPE was available to all staff members and adapt to the situation as it developed. This is amply demonstrated by those documents detailed above, and further internal memo's and e-mails that I was referred to as well as a substantial Coronavirus Guidance document published by the Respondent on 14<sup>th</sup> February 2020, shortly after the Claimant's resignation [138-152]. I accept however that the Claimant was not directly privy to all of its efforts.

54. In a letter written to the Respondent on 27<sup>th</sup> February 2020, subsequent to her resignation, the Claimant set out a number of the events referred to above and said "I found the above series of events quite stressful and did not want to be on the "front line: for my remaining 5/6 weeks as nothing seemed to be organised and there was no obvious back up." The reference to the remaining 5/6 weeks was a reference to the fact that the Claimant expected to be made redundant at the end of March 2020 as a result of the Respondent losing its NHS 111 contract [271-272].

### Relevant Law and Conclusions

55. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.
56. The Claimant must show that he was dismissed by the Respondent under section 95. Where there is no express dismissal, then the Claimant needs to establish a constructive dismissal. Section 95(1) states that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:  
"(c) the employee terminates the contract 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."
57. *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221* set out the approach to be taken when considering whether there has been a constructive dismissal:  
"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."
58. In order to claim a constructive dismissal, the employee must therefore show that:  
(i) there was a fundamental breach of contract on the part of the employer;  
(ii) the employer's breach caused the employee to resign; and  
(iii) the employee did not lose the right to claim constructive dismissal by delaying too long before resigning and thus affirming the contract.
59. Whether there has been a repudiatory breach is an objective test, the employer's subjective intention is irrelevant: *Leeds Dental Team Ltd -v- Rose 2014 ICR 94, EAT.*



60. A fundamental breach may either be a one-off breach or a course of conduct on the employer's part which cumulatively amounted to a fundamental breach (providing that the final act adds something to the breach: *Omilaju v Waltham Forest LBC* [2005] IRLR 35 CA).
61. In *Woods -v- WM Car Service (Peterborough) Ltd* [1981] ICR 666, EAT it was said "The Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it". An employee is not therefore justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.
62. Where an employer breaches the implied terms as to trust and confidence that is inevitably fundamental: *Morrow -v- Safeway Stores plc* [2002] IRLR 9, EAT. However, the Employment Appeal Tribunal has held, in *Croft v Consignia plc* [2002] IRLR 851, that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. It is for the Tribunal to determine the gravity of any suggested breach of the implied term. In other words, whether a breach is fundamental is essentially a question of fact and degree.
63. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue. Whether an employee left employment in response to his/her employer's breach of contract is essentially a question of fact for the Tribunal.
64. If there is another reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, a tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation. However, the employer's breach will be an effective cause of the resignation if it is one of a number of reasons contributing to the decision to resign, it need not be the only effective cause. As Mr Justice Elias, then President of the EAT, stated in *Abbycars (West Horndon) Ltd v Ford* EAT 0472/07, 'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon'.
65. The Court of Appeal in *Kaur -v- Leeds Teaching Hospitals NHS Trust* 2019 ICR 1, offered guidance to tribunals, suggesting that it will normally be sufficient for the Tribunal to ask itself:
- (i) what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
  - (ii) has he or she affirmed the contract since that act?
  - (iii) if not, was that act (or omission) by itself a repudiatory breach of contract?
  - (iv) if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

(v) did the employee resign in response (or partly in response) to that breach?

66. If an employee has been dismissed, either constructively or expressly, then the Tribunal must go on to consider the fairness of the dismissal.
67. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see *Berriman v Delabole Slate Ltd 1985 ICR 546 CA*. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness; see *Derby City Council v Marshall 1979 ICR 731 EAT*.

***Was there a fundamental breach of contract by the Respondent?***

68. The Claimant did not state, either in her ET1 or her witness statement which terms of her contract of employment the Respondent had breached. Nor was she able to articulate which terms the Respondent had breached when asked directly during her oral evidence. I bear in mind however that the Claimant was unrepresented.
69. In her oral evidence the Claimant told me that she did not think that the Respondent was taking the coronavirus situation seriously enough and she didn't think her workplace was safe. Her witness statement, at pages 10-11 referred to sections 44 and 100 of the Employment Rights Act 1996, the Health and Safety at Work etc Act 1974, and the Respondent's General Policy Statement and Health and Safety Policy Procedures. I therefore considered the Claimant to be alleging a breach of the terms which are implied into all employment contracts that the employer:
- (i) shall take all reasonably practical steps to provide a safe system of work; and
  - (ii) shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee - *Malik v BCCI [1997] IRLR 462, 1997 ICR 606, HL*.
70. The breach alleged by the Claimant is a failure of the Respondent to take the coronavirus situation sufficiently seriously or react appropriately to it rather than any positive act on the Respondent's part.
71. When pressed to specify what the Respondent could and/or should have done prior to her resignation the only suggestions the Claimant offered were to shut down the clinics, make them socially distanced, and to keep the receptionists away from the patients and/or to do "...whatever they put in place eventually.." (which was not specified). She was unable to specify clearly what practical steps other than closing clinics the Respondent could or should have done in February 2020 to demonstrate that they were taking the situation seriously or to create a work environment that she would have perceived as having reduced the risk posed by the virus to an acceptable level. In fact, in her evidence when asked what more

the Respondent could or should have done to ensure her health and safety at that time she responded "I don't think I want to comment on that".

72. I am mindful that the events that this case concerns took place in early 2020 in an unprecedented and novel situation that was developing rapidly and which subsequently continued to develop into a serious worldwide pandemic which has led to lockdowns, substantial economic damage, a near overwhelming of the NHS and the loss of many thousands of lives. However, I must consider this case in the context of the position as at the time of the Claimant's resignation, not in light of subsequent events and knowledge. The extent and magnitude of the risk from coronavirus that we are now all too aware of was not clear then. In the second week of February 2020 it was mostly business as usual in the UK and no national lockdown was in place or anticipated. It was not until over a month later that a lockdown was imposed in the UK. Even then, mask wearing was not advised and indeed masks were not considered to be particularly beneficial in preventing the spread of infection to uninfected persons until much later still. Although the virus had been discovered in the Brighton area as a result of super spreader, there was little or no evidence that the virus was circulating widely in the general population.
73. I do not consider that it would have been reasonable or practicable for the Respondent to have adopted the measures suggested by the Claimant in February 2020. Shutting the clinics would not have been an option. Similarly, keeping receptionists away from patients defeats the purpose of the job and the Claimant could not elaborate as to how it could have been achieved, particularly as the Respondent was not in control of the premises on which their staff worked.
74. I heard no evidence that suggested that the Respondent had failed to follow the government guidance extant at the time. The Respondent did not fail to act. It provided PPE and placed no restrictions on its use. It produced and disseminated information and guidance. It put in place policies aimed at identify any risk before patients were seen, preventing patients who appeared to pose a risk attending clinics and immediately isolating any walk-in patient (until reviewed by a clinician wearing PPE) without engaging in extensive conversation or obtaining booking details. Further, it updated and revised that guidance as the situation developed.
75. Although I accept the Claimant's point that the measures did not wholly eliminate any risk of infection and the receptionist, being the first point of contact for walk-in patients was the person most at risk, I take the view that it was not practically possible to eliminate all risk and that the measures taken at that time were appropriate and reasonable in light of the available knowledge.
76. For the reasons set out above, I conclude that the Respondent could not be considered to have acted or failed to act in a manner which, viewed objectively, was calculated or likely to seriously damage or destroy the necessary relationship of trust and confidence. I therefore find that the Respondent did not breach the implied term as to trust and confidence. I also find that the Respondent promptly adopted all reasonable measures which were appropriate to the general understanding and state of knowledge at the time in order to provide a safe system of work and did not breach the implied term relating to the provision of a safe place of work either.

77. The transcript and audio tape of the second conversation between the Claimant and Tracy Wickham on 10<sup>th</sup> February 2020 [179] indicates that at the end of that conversation Ms Wickham had stated “Erm but obviously if we’re taking you out of the shift then it may involve a disciplinary meeting.” Further, the Claimant told me that she “..did not think that it was helpful...” for the Respondent to raise the possibility of a disciplinary meeting in what was, in her view, an extremely dangerous situation.
78. I therefore also considered whether this action of the Respondent could have amounted to a fundamental breach of the Claimant’s employment contract and in particular the implied terms as to trust and confidence. I find that it did not.
79. This is because having read the transcript and heard the audio tape of the conversation between the Claimant and Tracy Whickham, I do not consider the information to have been delivered by way of a threat. I found it to be an advisory comment as to what a possible course of action by the Respondent might be, in the event of the Claimant failing to turn up for a scheduled shift of work when she was not unwell or required to self-isolate. This warning was delivered by way of an afterthought at the end of the conversation and neither expressed nor implied any inevitability that the Claimant would be subjected to disciplinary action. It should not have come as a surprise to the Claimant but as the reminder, that I find that it clearly was, that the Respondent had a clear absence management policy which indicated that unauthorised absence without good cause is a serious disciplinary matter.
80. I am therefore satisfied that there was no fundament breach of contract by the Respondent such as would justify or entitle the Claimant to treat herself as dismissed arising from this statement.

***Did the Claimant resign in response to a breach of contract by the Respondent?***

81. Even if I am wrong about my conclusions that there had been no conduct or failure to act by the Respondent which amounted to a fundamental breach of contract such as would entitle the Claimant to terminate her contract of employment, I am satisfied that any breach by the Respondent was not an operative or effective cause of the Claimant’s resignation.
82. I find that the Respondent’s conduct (or failure to act) was not an operative or effective cause of the Claimant’s resignation as a result of the unequivocal evidence given by the Claimant herself and the Claimant’s inability to point clearly to any realistic or practical steps her employer could have taken to satisfy her that it was safe for her to return to work.
83. At page 14 (para 5 and 6) of her witness statement where she stated “As a 111 base Receptionist working in a patient-facing situation and at all times in close proximity to the patients, I felt extremely vulnerable .... I had watched the progress of the virus since December 2019 and considered the situation would become highly dangerous for front-line staff”.

84. In response to being asked in oral evidence what the Respondent had done to cause her to resign, the Claimant stated that it was “..nothing my employer did, it was an escalation of the virus. I thought it was a very dangerous situation if you are a receptionist running a 111 clinic..”. She also told me that whilst she presumed that certain things had been put in place by the Respondent over time, there was nothing the Respondent could have done at that stage that would have led her to remain within the business. At other points she told me “I decided working in clinics was too dangerous” and “I knew I didn’t want to go back to a dangerous situation”.
85. I therefore find that the real and sole reason for the Claimant’s resignation was that she considered the coronavirus situation to be inherently dangerous and she did not wish to work in an environment which required her to interact face-to-face with others, particularly the general public as she felt that she was in extreme danger in that position. I have concluded that there was nothing that the Respondent could reasonably have done to mitigate the risk that the Claimant perceived her job to entail to a point where the Claimant would have been happy to return to work and continue with her employment.
86. I also observe that if I am wrong about whether the conversation between the Claimant and Jo Turner in fact took place on 10<sup>th</sup> February 2020, and the Claimant did not in fact call Ms Turner, I would have considered this further evidence that the Claimant neither wanted nor needed further information as she had already made her mind up that she did not want to work in her job during the pandemic and nothing employer said or did could or would have changed her position and it would not have altered my conclusions on the substantive issues.

### ***Conclusion***

87. For the reasons set out above, I find that the Claimant was not unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

Employment Judge Clarke  
Date: 20<sup>th</sup> March 2021

