



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Hargreaves

Respondent: Lancashire Teaching Hospitals NHS Foundation Trust

Heard at: Manchester

On: 4, 5 and 6 March 2020
30 and 31 March 2021
26 May 2021

Before: Employment Judge Leach

REPRESENTATION:

Claimant: Mr Brochwicz-Lewinski, Counsel

Respondent: Ms M R Levene, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of constructive unfair dismissal fails.

REASONS

Introduction

1. The claimant was an employee of the respondent NHS Trust for over 25 years and, from 2014 the claimant was its Operations Director.
2. The claimant gave notice of resignation from her employment on 16 April 2018 and her employment terminated at the end of a six-month notice period, in October 2018.
3. The claimant claims that the circumstances which caused her to resign were such that she was constructively dismissed and she brings a claim of unfair dismissal under Section 98 Employment Rights Act 1996 (ERA).

The Hearing

4. The hearing of this case commenced on 4 March 2020. Unfortunately, the time estimate of three days was insufficient and further hearing dates had to be listed. We were then hit by the Covid 19 pandemic. This resulted in a

significant delay to the continuation of the hearing. We were able to conclude the evidence over two dates on 30 and 31 March 2021. The evidence was concluded by CVP to which both parties consented.

5. Such a delay in the hearing dates of a part heard hearing is very unfortunate. However, the circumstances of the pandemic are extraordinary and have had a huge impact on listings of hearings. The progress of this case is also a reminder of the importance of providing accurate time estimates for hearings. On resumption, in March 2021, time was taken to review the relevant materials and notes and to ensure memories were refreshed. I am satisfied that a fair hearing has taken place.
6. In March 2020, I heard evidence from the following:
 - 6.1 Helen Cobb (HC), previously the respondent's Director of Transformation and (at the time she provided evidence) Finance Director of the Clinical Scientific Services at Lancashire University Foundation Trust;
 - 6.2 The claimant herself;
 - 6.3 Karen Partington (KP) the respondent's Chief Executive Officer;
7. On 30 and 31 March 2021 I heard evidence from:
 - 7.1 Paul Havey (PH), who was at the time of the claimant's employment the Finance Director and Deputy Chief Executive of the respondent (currently Financial Advisor for Lancashire and South Cumbria Integrated Care System);
 - 7.2 Sue Musson (SM), currently Chair of Liverpool University Hospitals NHS Foundation Trust and previously Chair of the respondent trust;
 - 7.3 Karen Swindley (KS), Strategy Workforce and Education Director at the respondent trust.
8. Ms Levene and Mr Lewinski provided me with helpful and detailed written submission documents, and we went through their submissions on the 26 May 2021.
9. I was provided with a bundle of documents with pages numbered up to 684. References below to page numbers are to this bundle.
10. The hearing days in March 2021 and May 2021 were held via CVP. The connections of the Tribunal, counsel and witnesses were all good.

The Issues

11. These were identified at the Case Management Hearing on 15 August 2019 and were agreed as appropriate issues in this case with some minor amendments agreed by the parties at the start of the hearing.
 - 10.1 Was the respondent in breach of the term of trust and confidence implied into the claimant's contract of employment?

- 10.2 Was the breach a repudiatory breach going to the root of the contract?
 - 10.3 Did the claimant resign in response to the breach?
 - 10.4 Did she waive the breach by waiting too long to resign or for some other reasons?
12. As for what the claimant alleges constituted a breach of the implied term, these were identified in the further particulars document dated 28 August 2019 (pages 48-50). I list these below:-
- 11.1 On 15 December 2017 the Chief Executive confronted and criticised the Claimant in connection with the overnight performance of the emergency department when there had been a series of four-hour breaches. This criticism was made in an unacceptable and hostile manner in the presence of the Claimant's colleagues namely the Finance, Nursing and the Workforce Directors.
 - 11.2 On 15 December 2017, in the meeting referred to in point 1 above, the Chief Executive Officer subsequently left the meeting. However, the Finance Director then continued with publicly criticising and belittling the Claimant in the presence of her colleagues. The Chief Executive was so incensed that she had to leave the meeting, which led to the Claimant feeling humiliated.
 - 11.3 On 8 January 2018, the Claimant shared at an Executive Team Away Day to address matters raised in a letter from NHSI. She highlighted that she felt isolated in dealing with the operational agenda. Despite raising this issue and her concerns, she received no support whatsoever.
 - 11.4 On 5 April, a board meeting was held. Prior to the meeting, the Chief Executive Officer spoke directly to the Claimant. The Chief Executive Officer further highlighted concerns in connection with performance. The Claimant believed these criticisms were unjustified and had repeatedly indicated this to the Chief Executive Officer. Nevertheless, within the board meeting itself, both the Chief Executive Officer and Finance Director openly criticised the Claimant in connection with operational effectiveness, thereby undermining her in the presence of the Board.
 - 11.5 Further, within the board meeting of 5 April 2018, the Claimant had prepared a presentation to highlight the challenges in connection with operational performance. This had taken some considerable time and yet the Claimant was advised that the presentation should not be given to the meeting, causing great upset to the Claimant, depriving her of the opportunity to address the criticism detailed in 4 above
 - 11.6 On 6 April 2018, an email was sent from the Chair of the Trust to all the Board Executives and non-executives. This email unfairly criticised the Claimant. The Claimant asked the Chief Executive Officer to explain why this had not been discussed with her beforehand and how

it had been sent to the whole board when it contained inaccuracies. The Chief Executive Officer refused to acknowledge her concerns.

- 11.7 On 9 April 2018, the Executive Team Away Day had been scheduled to prepare for the review meeting with NHSi . The Chief Executive Officer and Finance Director were due to attend but failed to do so- the CEO stated that they were not required as the issues were operational performance which was not their domain. Following this meeting, the Claimant spoke at length with the Chief Executive in connection with her concerns and the lack of support shown to the Claimant.
 - 11.8 On 13 April, a meeting was held to go through the presentation that had been prepared for a further meeting to be held on 18 April to the NHSi. The Chief Executive Officer again criticised the Claimant. She had prepared a presentation to deal with matters and yet, the Chief Executive Officer criticised that presentation in the presence of others.
 - 11.9 Immediately following that meeting, the Claimant became aware that the Finance Director had spoken to Helen Cobb Director of transformation and confirmed that he believed that the Claimant should resign.
13. The claimant alleges that the matters raised in allegations 1-9 support the her position that she had been unfairly singled out by KP and PH as the main cause of financial problems suffered by the respondent in order that they were able to deflect responsibility for those problems away from them and on to the claimant. In her evidence (para 22 of her witness statement) the claimant describes her decision to resign as follows:-

“I reached my decision to tender my resignation based on a combination of factors but the key issue was that I believed there had been a move away from collective responsibility for the performance of the Trust amongst the senior management team and that the CEO and DCEO/FD had deliberately sought to attribute responsibility for the increased deficit on operational effectiveness.”

Findings of Fact

The claimant's role as Operations Director.

14. The claimant's career in the NHS is impressive. She initially trained as a nurse at Lancaster Royal Infirmary, moved to the respondent trust in 1992, worked in various operational and management roles within the respondent and progressed to Operations Director in 2014.
15. The role of Operations Director is a significant and challenging one. The claimant had responsibility for a lot of the respondent's activities and particularly its delivery of healthcare services. The claimant had support of a number of divisional and deputy directors in key areas such as medicine and nursing, but even so these areas all fell within her portfolio.
16. The bundle of documents did not contain any role description or similar. The contract of employment confirms that the claimant is directly responsible to

the respondent's Chief Executive (clause 4.4). The claimant was a member of and also accountable to the Trust Board as a whole.

The Respondent

17. The respondent is a large NHS Trust providing clinical care in and around Preston, Chorley and South Ribble.
18. As a Foundation Trust, the respondent operates independently but is subject to significant regulatory review and scrutiny. It has been under a process known as "enhanced observations" or "enhanced oversight" since 2015. In February 2017 it was threatened with being placed into a process called "financial special measures" (special measures) although that ultimately did not happen. The respondent was therefore under close scrutiny from an organisation called NHS Improvement (NHSI) from 2015 up to and beyond the claimant's resignation.
19. At all relevant times the Chief Executive of the Trust was Karen Partington (KP) and the Chair was Sue Musson (SM).
20. Paul Havey (PH) was the Deputy Chief Executive. The claimant had worked with PH for many years. Both the claimant and PH agree that he had been an informal mentor for the claimant over a number of years. PH is challenging to work with at times. For example, I accept the evidence of KS that she would be upset sometimes in meetings with PH. At all times up to December 2017 the working relationship between the claimant and PH was good.
21. I heard significant amounts of evidence of events between 15 December 2017 and the claimant's resignation. Inevitably my focus in reaching and setting out these findings of fact has been on the events listed above under "Issues" that the claimant has set out and that she claims support her case that she was singled out and that amount to a fundamental breach of contract of employment. My findings on each are below.

Events of 15 December 2017 (relevant to allegation 1 and 2)

22. KP held short morning meetings/briefings for members of the executive team. These were held around 8.30 am. The executive team were all based along the same corridor with offices at Preston Hospital. Therefore, executives did not need to leave their usual place of work in order to attend.
23. A meeting took place on the morning of 15 December 2017. The previous evening the respondent trust missed its accident and emergency (A and E) admission targets even though there had been 40 or so available beds. KP had been made aware of this by logging onto the respondent's systems late in the evening on 14 December 2017.
24. Each night, one of the members of the executive team was on call. On the night in question the executive on call was Gail Naylor (GN), Nursing Director. Emails were exchanged between KP and the claimant's deputy Faith Button (FB) early in the morning of 15 December 2017. The claimant did not see these emails before she attended work that morning and as the claimant was not on call either, she was unaware of the issue before attending work.

25. The claimant was a little late that morning having gone to the gym before work. It was well known that the claimant would go to the gym sometimes in the mornings and arrive a little later than 8.30am. This was not an issue for the respondent given the long hours that the claimant spent working. On this particular morning, the claimant arrived at about 8.40am. The morning briefing had already started.
26. It was also a Christmas Jumper day and the claimant was participating, wearing a Christmas jumper.
27. I accept the claimant was told by secretaries in the office that KP was “on the war path” or something similar, but the claimant was not aware of the issue causing this, let alone any detail of the issue. As with so many activities at the Trust, the functioning of the A and E department fell within the claimant’s responsibility.
28. The claimant entered the meeting late. She entered the room in a friendly manner, greeting everyone with a smile, wearing the Christmas jumper. KP did not react well. She was already frustrated at the overnight performance of A and E and because the performance fell within the claimant’s responsibility, she considered the claimant was responsible and made her feelings known. KP was so annoyed that she had to leave the room to calm down.
29. PH was also at the meeting and wanted answers; why had the target time been missed? He sided with KP in the sense that he did not show any sympathy to the claimant even though she had been “ambushed” by KP’s challenge.
30. In her evidence KP described the claimant as having been jovial and laughing when coming into the meeting and seeking comments about her Christmas jumper. I do not accept this evidence. I have heard evidence from various witnesses about the claimant’s dedication and professionalism and I do not find that in some way slipped or was absent at this meeting. Although the claimant had been made aware that KP was not in good spirits, she did not know that this was anything to do with her or the performance of areas within her responsibility. She entered the room smiling and in a friendly manner. She cannot be criticised for this but at the time it was received badly by KP because of the issue being dealt with. KP and PH looked to the claimant for answers, but it was unreasonable to expect the claimant to have those answers immediately. When the claimant had been made aware of the issue, she undertook some investigations to report back to her executive colleagues later that day.
31. In her evidence KP says “*I do not consider that I overstepped the mark during the meeting*”. I find that she did. Her behaviour towards the claimant at this meeting was different to how it had been at any previous stage of their working relationship.
32. KP recognised that she needed to apologise, and she did so by voice mail and text message. I note the following at page 488:-

“Hi Suzanne – have left you a voice message to apologise for this morning. I don’t want to go into the weekend with you or me feeling miserable. I do apologise and I hope you have a good weekend. K x”

33. PH sided with KP who had overstepped the mark. He did not by his own behaviour “overstep the mark.” In his capacity as deputy CEO he supported the position taken by the CEO.

Executive away day meeting of 8 January 2019

34. I heard evidence from 3 attendees - being the claimant, PH and KS. I also considered the following documents:-
- a. Agenda at page 111
 - b. Action points arising from the meeting – pages 121-122.
35. The claimant’s evidence is that she believed there had been a change in culture amongst the respondent’s executive as members of the executive team were looking to allocate blame to other members of the team, that colleagues shared her views and so she raised the concerns at this away day.
36. The evidence from KS is that a review was discussed but this was not due to concerns raised about a blame culture (no such concerns having been raised) but rather due to concerns about why the Executive team did not seem to be able to work together to achieve sustained improvements in performance.
37. PH’s recollection of this meeting was not as good but it supported KS’s recollection.
38. The action points at page 121 also support KS’s recollection. They include actions to *“focus on how we collectively work together to improve our effectiveness as a team”* and *“create a stronger identity as a team”*
39. I prefer the evidence of KS. Had issues of a blame culture been raised it would have been noted and the meeting would have been memorable for this reason. It was not noted and neither KS nor PH (whose evidence I accept – that his recollection of this meeting was not good) had no recollection of blame culture having been raised.

Meeting with NHS Improvement on 25 January 2018

40. As noted above, the respondent Trust remained under enhanced oversight and as part of this regime, met regularly with NHSI. One such meeting took place in Manchester on 25 January 2018.
41. This meeting followed a letter from KP to NHSI dated 15 January 2018 (page 119). By this letter KP informed NHSI of an increase in the respondent’s forecasted deficit for that financial year, from 19.1 million to 42 million. The letter also summarised the reasons for this. Additional detail enclosed with the letter and provided to NHSI was not within the bundle.
42. The forecast and the issues raised in the letter had been discussed in a board meeting that had been held a few days earlier than the letter. The claimant

was aware of the reasons being put forward for the reforecasting. Those reasons included a loss or reduction of income from local authority funding (called improved better care funding) and expected efficiencies or savings from a cost improvement programme not being met. KP also gave evidence (which I accept) that other contributing factors were an overspend on staffing costs (too many agency staff were being engaged, the costs for which were greater than the costs of direct employment) and there had been a reduction in elective surgery activities which meant that the income obtained from such activities was lower than forecast.

43. KP, PH and SM attended the meeting with NHSI on 25 January 2018. SM's preparatory notes are at page 123.
44. SM emailed KP and PH on the morning of the 26 January 2018. I note the following comments in this email:-
- 43.1 That SM proposed the messages from the session should be highlighted with clinical/managerial leads *"not that we can promise a quick fix, but perhaps we could give a more robust, considered answer to the challenge around the big strategic ideas that the Board has for addressing the financial position."*
- 43.2 That SM considered that the trust had shown to NHSI that it was willing to work out of the problems *"but we need to beef up the detail around how and when."*
- 44 A letter from the respondent (SM) to NHSI followed the meeting and is at pages 127-8. I note the following:
- 44.1 That SM informed NHSI of *"a discussion with several leaders in the Trust today to identify what we can do to improve both our financial and operational grip, at pace, in order to deliver improved performance as outlined in the discussion."*
- 44.2 The respondent decided to establish an internal turnaround team and that team would focus on delivery of
- 44.2.1 *achieving grip on the medical workforce expenditure and job plans*
- 44.2.2 *the efficient closure of escalation beds*
- 44.2.3 *re-establishment of the elective programme at pace*
- 44.2.4 *rationalisation and reduction in support services*
- 44.2.5 *evaluation of the rapid introduction of a nursing bank here such as the banks at University Hospitals North Midlands and Wigan, delivering significant savings on agency spend*
- 44.3 That SM informed NHSI that the respondent would provide further detail on opportunities in the respondent's continuous

improvement plan and attempt to move improvement schemes forward to realise benefits at the earliest opportunity.

44.4 The work of the internal turnaround team would include

44.4.1 a structural review to improve accountability and reporting

44.4.2 the development of escalation plans to improve site management and bed management.

44.5 That the respondent would continue working to improve “*the urgent and emergency care pathway.*”

45 These proposed measures were presented and discussed at a meeting of the respondent’s executives and senior managers on 29 January 2018.

46 The respondent promised NHSI it would carry out these improvements. Although the claimant did not attend the meeting with NHSI, she was aware of the respondent’s response and action plan as set out in SM’s letter of 26 January 2018. There was a focus on improvements to operational activities. The claimant did not raise any disagreement.

The improvement plan/action plan

47 By letter dated 2 February 2018, SM provided further detail to NHSI which included the following:

“Now, following the appointment of our new Director of Improvement and Head of Continuous Improvement, we have undertaken a comprehensive review and analysis of how the systems and processes are working across the whole health economy, using Statistical Process Control (SPC) charts.

This approach has clearly illustrated where improvement needs to be targeted. For example, data analysis, utilising SPC charts has demonstrated a 5% loss in accident and emergency performance occurred at the time of the introduction of the new streaming processes with the establishment of 'Go To Doc'. Without redesigning the streaming and triage system at the front door to recover that 5%, it is statistically not possible to achieve a performance higher than 87.2% without special cause variation. The detailed process mapping that has now been undertaken, with support from ECIP, has demonstrated where the targeted improvement work needs to be focused to deliver the required improvements, and this is being tested (on a small scale at first) from Monday, 5 February 2018 with system partners.

We have also worked collaboratively with system partners to improve the integrated discharge service which is now delivering improvements in both the DToC and stranded patient metric, both of which will support the closure of escalation beds. Additionally we have a full value stream analysis planned across the whole health economy to redesign urgent and emergency care pathways in early May 2018 to ensure the development of a sustainable model. We are utilising the ECIP sustainability model to support this work.”

- 48 At page 145 is a table which summarises the improvement plan. It lists 11 areas for review and improvement. The majority of these areas fell within the claimant's wide portfolio. The table lists the executive leads for improvements in each of the 11 areas. These were divided amongst the executive. The claimant was not tasked with each area that fell within the portfolio of operations.
- 49 The improvement plan as described by SM in her letter of 2 February 2018 and as summarised in the table at 145 was a plan which the respondent put together and took forward as a genuine attempt to engage in an improvement process. The claimant accepted this when questioned and further accepted that the areas identified were all areas that required improvement.
- 50 I also find that the improvement plan was put together as a response to (and an attempt to address) issues of poor financial performance.

NHSI's email of 29 March 2018.

- 51 This email is at pages 173 and also at 280. It raises further concerns including a concern about a forecasted deficit of £51 million for the next (2018/19) financial year. The following comments are also made by NHSI

"In addition, having been assured that the savings plan would be ready to deliver from 1 April 2018, it is now unclear whether the schemes underpinning that plan will actually come to fruition.

Given the significant deterioration in this financial year, and the scale of the planned deficit for 208/19, I am not confident the Trust Board has a robust plan which will turn this financial position around."

Taking the above into account, you will appreciate how concerned I am, and given the added challenge for the local system concerning its A+E performance of late, I think we would all really benefit for an honest and open discussion when we do meet about what the art of the possible actually is in terms of both the finance and operational standards agendas.

Part of that discussion will centre on what type of improvement offer is required moving forward, if appropriate, as I know we are all keen to see some demonstrable improvements. In the event that we cannot make any discernible way forward in terms of recovery and within an appropriate timeframe, you will appreciate that I will need to consider whether further escalation is required."

- 52 At the time the email was received, KP was not in the Trust and not due to return until 3 April 2018. SM replied on the respondent's behalf, acknowledging the email and noting KPs absence.
- 53 However, KP did pick up the email, remotely on her mobile 'phone. The email from NHSI was sent at 08.58 am. By 09.06am KP had received and read the message and forwarded it to the respondent's executives (including the claimant) with a two-word message "*not good.*"
- 54 This was a quick "knee jerk" type reaction to receiving an unwelcome message when away from work. I accept KP's evidence that she sent the email to say it was not good, simply because it was not good and that the main purpose of her

quick email was to forward NHSIs email to others, ensuring they were informed of its contents.

55 As for what the message from NHSI meant, KP accepted that she understood the reference to “*further escalation*” was to a possibility of placing the respondent trust into special measures. In cross examination, KP accepted that she and the board were under scrutiny during this time, but she did not accept that the position of the board or her position was at risk. I do not completely accept this. I find that KP had a general awareness that, should the respondent trust be placed into special measures this may put her position at risk. This finding is supported by:-

55.1 KP’s response to questions in a later grievance investigation (page 364 at paras 45 and 46). (I do not accept KPs response when questioned by Ms Levene that, at this stage of the grievance questioning, she was describing the position in 2017)

55.2 SM’s evidence about the position generally when an NHS trust was placed in special measures, that it often led to board changes and that was usually a change in the CEO.

56 However, I also accept that KP had not been informed by NHSI or anyone else that her own position was at risk or potentially at risk at this stage.

5 April 2018.

57 A board meeting took place on this date. It was an important meeting given the ongoing concerns about the respondent’s performance and the concerns noted by NHSI’s email of 29 March 2018, that the respondent was not sufficiently addressing matters. NHSI, in its own words, wanted to see “*demonstrable improvements.*”

58 KP met with the claimant before the board meeting. There are no notes of this meeting. I heard evidence from KP and from the claimant.

59 Initially the medical director (“MD”) was also in the meeting. KP informed both the claimant and the MD that deficiencies in the Medicines Division would be raised in the board meeting. KP noted that the non-executive directors (NEDs) were losing confidence and that she wanted to provide them with clear actions to address the concerns with the Medicines Division. KP informed the claimant and the MD that she had decided to ask NHSI for the temporary support of an experienced medical director and operations manager to support the medicine division. In her evidence the claimant stated that KP shared with the MD and her that the NEDs were losing confidence in her personally. I do not find this was said. I base this on :-

59.1 The claimant’s own account of this discussion given as part of the grievance investigation. (page 350);

59.2 SM’s evidence. As chair of the board and the most senior NED I accept that she would have been made aware, had NEDs raised a loss of confidence in KP personally;

59.3 KP’s evidence.

- 60 The meeting between KP and the claimant continued after the MD left. I accept the evidence of KP that she spoke with the claimant in an attempt to assist her in advance of what she (rightly) anticipated would be a difficult meeting. I do not accept the claimant's evidence that she (the claimant) complained to KP that a focus on operational performance was unfair. I do not accept the claimant's evidence that she was told by KP that her personal performance was under scrutiny. There were references to performance, but those references were to the performance of the respondent as a whole. I do accept that there was a focus on the performance of a number of operational areas.
- 61 The claimant became upset in this meeting. She asked KP if she wanted to the claimant to resign. KP's response was "absolutely not" and she offered support to the claimant and told the claimant she needed to accept support from her colleagues.

The Board meeting on 5 April 2018.

- 62 I heard evidence from the following attendees: the claimant, SM, KP, PH. The minutes of the meeting are at pages 178-181. These minutes do not capture in any significant way the questions and concerns raised at that meeting and about which the witnesses have provided evidence. I find as follows:-
- 62.1 In the chair's opening remarks, SM expressed concerns about the performance of the respondent trust and financial deficit position, particularly in the light of the next meeting with NHSI
- 62.2 KP echoed these remarks, noting that financial performance is driven by operational effectiveness.
- 62.3 KP informed the board of her request to NHSI for external support for the Medicine Division
- 62.4 The claimant informed the board that a presentation had been prepared for the board to provide assurance about the performance against the 4-hour target for the emergency Department. This presentation was not provided to the board at the meeting but was deferred to the Safety and Quality sub-committee meeting on 27 April 2018.
- 62.5 Members of the board expressed frustration that they were not seeing improvements in those activities where there had been a focus on improvement.
- 63 The claimant's evidence is that questions and criticism was unfairly focussed on her and, further that her executive colleagues did not step in to support her. Given the claimant's case is focussed to a large extent on the treatment of her by PH and KP, I took particular account of the evidence of SM and the evidence she provided in her response to questions from Ms Levene. I accept and find as follows:-
- 63.1 SM did not notice that the claimant was visibly distressed in the meeting. Had she seen that she was upset then SM, in her role as chair, would have intervened.

63.2 The claimant's demeanour was professional, and she was fully engaged in the meeting.

63.3 The NEDs were frustrated that, whilst they knew what the performance figures of various activities were, they still did not know, in relation to figures falling below targets, why they were what they were and what was going to effectively address them.

63.4 That Dr Campbell did not behave inappropriately in the Board meeting. In an email of 6 April 2018 to SM, Dr Campbell (one of the NEDs present at the meeting said as follows:-

"I came away from yesterday's board meeting very depressed about the state of the Trust and the lack of progress over the last year in tackling the various issues around performance. It really seemed that none of the Executive Team could answer the Why question and fully explain the issues with the Physicians. I realise also the amount of stress this is causing the Director of Ops and the purpose of my questions was really to try and get to the bottom of the problem, (I am sorry if my tirade was unreasonable but as I told you at my appraisal I am deeply frustrated that what could otherwise be a highly rated Trust is being held back by its apparent inability to meet the targets and I suspect others are equally frustrated as well)."

SM's evidence, on being questioned about the reference to "tirade" in this email was that was not an accurate representation of Dr Campbell's questions; that he was well placed to ask the questions he did; that this was an impassioned appeal but that he was "gentlemanly" and "correct." As noted above, I accept that SM would have intervened if she had concerns that the questioning had been unreasonable.

63.5 Whilst other directors were the subject of questioning, the biggest proportion of activity fell within the claimant's portfolio. She was the most senior director of operations of a very large Trust and the view of the Trust board was that areas within the claimant's portfolio were not meeting standards. Members of the Board wanted to know why and what solutions were being put in place that would be effective.

64 On this last point, SMs evidence was that the questioning was appropriate and that she would not apologise *"for seeking assurance in relation to areas of poor performance, a significant proportion of which were in [the claimant's] portfolio."*

Email dated 6 April 2018

65 The day after the Board meeting SM sent an email to all executives and NEDs (page 191). The claimant's evidence (in her witness statement) in relation to this email was *"I suspect that the content of this email had been driven by [PH] and that it was part of his agenda to focus responsibility for the failing performance of the respondent organisation on operational issues rather than financial considerations."* The claimant maintained this position on cross

examination although accepted that, *“on its own, with nothing else going on [the claimant] had no issue with what was written in this email.”*

- 66 I accept that the email was drafted by SM and, whilst a draft had been sent to KP and PH for their comments/review that almost all of the content of the final version was SM’s draft. I accept the evidence of SM that the content of the email accurately reflected discussions that SM had had with other NEDs and following the board meeting on 5 April. It was SM’s email; it was not PH’s and it had not been driven or influenced by PH (or KP).
- 67 The first paragraph of the email, SM states *“Following our meeting yesterday, I wanted to set out my proposal for addressing the lack of assurance the Board received on current levels of operational effectiveness and how we can best proceed.”* The email noted that this could be a *“turning point to mark a more professional, transparent and effective approach”* to the work of the Board. The email set out an intention to carry out a number of actions, running alongside the ongoing improvement plan, particularly focussed on actions and accountabilities to (and of) the Board.
- 68 I have seen emails in response to the email of 6 April 2018. One is from Gail Naylor (GN) the respondent’s director of nursing and therefore someone with responsibilities in areas which were the causing concern (Emergency Department and medicines divisions for example). I note her response to SM’s email (page 203):-

“I fully support this direction and myself, Karen S, Gerry and Suzanne had a 4-hour session on Monday morning compiling our response. I am particularly keen to challenge the evidence on our 'safety story' given that we are so far off delivering some of our constitutional targets. I think it highly likely that the CQC will ask Board members how we know patients are safe in ED and specialties that have long waits. I have specifically asked Dave, our new Director of Governance, to give this issue his 'fresh eyes.’”

- 69 I also note the email response from the claimant dated 10 April 2018:-

“Morning Sue I have spent a lot of time over the weekend considering your email and its content. I am confident that we can address all the points you have raised but I feel It would be really helpful to have a discussion with you if that is possible

Many thanks

Suzanne”

- 70 In accordance with the claimant’s request, SM met with the claimant. The claimant’s evidence is that she raised concerns with SM about the email, specifically about the suggestion that sufficient assurance had not been provided to her and the board and that SM was apologetic.
- 71 I do not accept that SM apologised. I prefer the evidence from SM, that she explained to the claimant the reasons for the email, that she had a clear impression that the claimant wanted to address the concerns and that whilst SM accepted that the claimant would be diligent in addressing them, SM was not

confident the claimant fully understood what was required. This finding is supported by the finding that the content of the email of 6 April 2018 was SM's and also by emails from other NEDs in support of SM's email (email from James Whitaker dated 8 April 2018 at page 194; email from Alistair Campbell dated 6 April 2018 at p192). SM was not apologetic about the content of her email. SM was concerned about the claimant's understanding of what was required to address the issues.

Executive Away Day meeting on 9 April 2018.

72 An executive away day was scheduled for 9 April. The respondent regularly held executive away days on an occasional but regular basis. Neither KP nor PH was able to attend that meeting as they were required to attend a meeting with NHS England. I have seen a print-out from KP's diary confirming this and I accept this as the reason for their non-attendance. I do not accept that their non-attendance was manufactured in order to place additional strain on the claimant.

73 KS was an attendee at the away day. I accept the following evidence from KS:-

"The chief executive had spoken to both myself and the director of Nursing prior to the meeting to explain that she and the director of Finance would not be able to attend and asked us to support the claimant to develop a plan in response to the Chair's email. I recall that I said to the Chief Executive that I did not perceive their non-attendance as a particular issue and that the claimant may find it easier to accept support from us if they were not there."

74 I also note the following from GN, in the course of the grievance investigation, in response to a question about KP and PH not attending the away day:-

"I was not concerned at all. In fact, in my experience it's often better to have the more operationally orientated executive team members when scoping out a response or preparing for a meeting like one with NHSI."

75 The claimant's evidence is that she met with KP later that day and informed KP that she was concerned about a number of things, being (1) the language being used - operational effectiveness being stated as the cause of the Trust's problems; (2) SM's email of 6 April; (3) KP/PH's non-attendance at the earlier meeting (4) PH's unfair behaviour towards the claimant and (5) the lack of support provided to the claimant.

76 KP's evidence is that she has no recollection of such a meeting. I note that had such a meeting taken place, it would have been very significant in this case, effectively raising, prior to the claimant's resignation, most of the claimant's concerns. There are no notes or follow up emails or texts.

77 I find that the meeting as described by the claimant did not take place. This finding is supported by:-

77.1 the lack of any note or follow up correspondence;

77.2 that the claimant did not raise this on or even shortly after her resignation – including in a meeting of 11 May 2018 between the claimant and KP when the claimant explained her reasons for

resigning. Had this meeting taken place as described by the claimant, it is difficult to understand why she would not have referred KP to it, noting that matters were exactly as the claimant had described to KP on 10 April, just 6 days before she gave notice of resignation

77.3 the meeting was not mentioned in the detailed grievance submitted on the claimant's behalf by Taylors, dated 26 July 2018. The first reference to this meeting is in a grievance interview with the claimant on 16 August 2018. The notes of this are at page 264. On their face the notes indicate a significantly expanded version of this meeting was provided by the claimant after that interview when the claimant had an opportunity to review and amend the account taken.

Meeting on 13 April 2018.

- 78 This was a meeting of the executive team in preparation for the next enhanced oversight meeting with NHSI. PH was not in attendance. I accept the explanation provided, that he was required to attend a finance and investment group meeting of the Integrated Care System (ICS) for the area in which the respondent operated (diary extract at page 206). I note that KP was in attendance for much of this meeting as was HC in her senior finance capacity.
- 79 Unusually SM also attended this meeting of executives. The reason for SM's attendance was that the meeting would assist preparations for the next NHSI meeting and SM would be an important attendee at that meeting, representing the respondent.
- 80 In their evidence, both KP and SM are critical of a presentation that the claimant provided at this meeting. SM's evidence is as follows:-

"The meeting included a discussion of draft slides which the claimant had prepared. My recollection is that the slides did not address the points NHSI or the Board (via my email) expected to be covered. I cannot recall the detail, but I think the slides were very descriptive of the here and now through driver diagrams – explaining that the performance was X rather than conveying insight and solutions. I do not believe there were slides explaining the corresponding strategy or plan to address the root causes of poor performance and the predicted impact of these plans. I would have expressed my view that the content did not meet the requirements to take them to the NSI meeting, but I would never articulate this as criticism of any individual."

- 81 KP's evidence is consistent with this.

"The claimant had been working on a presentation and shared a number of slides that did not address the issues raised by NHSI and did not have a plan to remedy the position. I recall there being a discussion about the over optimistic portrayal of the operational position and the claimant became very defensive insisting it wasn't as bad as everyone kept saying as 62 day cancer performance had been achieved in the last 2 months. The improvement in only one of several targets for a 2 month period however could not credibly be described as improvement."

- 82 I note that when questioned by Mr Lewinski, the claimant agreed that a short-term improvement in performance did not amount to a significant achievement.

The claimant's resignation on 16 April 2018.

- 83 The claimant explains her reasons for resigning at paragraph 21 of her witness statement. There she notes that she had worked long hours, had cancelled annual leave at short notice and had had to carry forward 8 days leave from the previous year. The claimant then says this:-

"I formed the view that the behaviour of [KP and PH] had been calculated to attribute responsibility to me and their attempts to focus on operational effectiveness had been a calculated plan to sidestep personal responsibility for the increased deficit. This made me feel like a scapegoat and I felt that I had raised this as an issue on a number of occasions but that this was a developing theme which amounted to a breach of my employment contract. On 16 April I asked to see the Respondent's CEO and handed in a pre-prepared resignation letter."

- 84 The resignation letter is at 284. It simply notes as follows

"Dear Karen

It is with great sadness that after serving 25 years in Lancashire Teaching hospitals NHS FT, I hereby give you my written resignation from my post as operations director.

As per my contract of employment I formally give you six months' notice. Please acknowledge this letter by return.

Assuring you of my personal attention and continued commitment to the Trust during my notice period.

- 85 When meeting with KP and providing her letter of resignation, the claimant did not make any comment about having been scapegoated or otherwise treated unfairly. KP made a file note of the discussion which is at page 217. I accept this file note as an accurate record of the discussion between KP and the claimant.

Suzanne asked to see me first thing Monday 16 April 2018.

She handed me a letter and said she had spent the weekend discussing her intention to resign with her family.

She said they supported her decision.

She noted several times that it was the right decision for her personally.

I asked her several times if she was sure about this decision and she repeated each time it was the right decision for her.

She stated she felt a weight had been lifted off her shoulders now she had reached this decision.

I asked her what she intended to do next and she replied she wasn't sure but felt she would be in a better place to think about it now she had made her decision.

I said I would do everything I could to support her.

I asked her how she wanted to inform people and she said she wanted to tell her colleagues personally.

I advised her that I would need to inform Sue Musson, the Board and NHSI today but would give her the opportunity to speak with executives and her team first.

- 86 The claimant also spoke, separately, with PH and SM to inform them of her resignation. Again, no reference was made to her having been treated unfairly. I note (and accept) the following accounts (PH and then SM):-

“When she resigned the claimant came to see me to let me know. She gave no indication that she thought my behaviour had contributed to her decision. She simply told me that she had decided that it was time to go. I said that I was not ready to go despite the increased pressures we were under. I also said as a light-hearted comment that we “need a ball breaker.” The claimant will have understood the context of this as in the past we had discussed holding her teams to account.”

“The claimant resigned on 16 April 2018. I was in the Trust that day and the Chief Executive informed me of the claimant’s resignation. I proactively went to the claimant’s office and asked how she was. She was tearful and repeated several times that she had made the right decision in resigning. I thanked her for her hard work and long service and expressed my best wishes for her future.”

- 87 In the days following resignation, the claimant and KP continued to exchange texts. The claimant was particularly supportive to KP in advance of the meeting with NHSI on 18 April 2018 (pages 530-532).
- 88 At the meeting on 18 April 2018, NHSI was informed by those attending on behalf of the respondent, that the claimant had given notice of resignation. NHSI recommended the appointment of an interim Chief Operations Officer.
- 89 KP informed the claimant of this. I accept KP’s evidence of this discussion; that the claimant became upset at being told of the intention to appoint an interim COO and was concerned about whether she would continue to receive her salary in full once an interim had been appointed.
- 90 On 22 April 2018 the claimant sent a text to KP asking to meet up “off site” KP confirmed that she was happy to do so. They met on 24 April 2018 at a local hotel. The claimant provided KP with a fit note which stated that she would not be well enough to attend work before 08 May 2021 due to “*stress related symptoms*” (page 232). There are no notes of this meeting. It was an informal meeting between 2 people who had been close colleagues for many years. The discussion focussed on the claimant’s health.

- 91 The claimant did not return to work following 24 April, submitting fit notes which confirmed that she was not well enough to work during the remainder of her notice period (which ended on 16 October 2018).
- 92 The claimant had not obtained a job to go to when she resigned on 16 April 2018. Whilst she had the security of a 6-month notice period, her job prospects and income beyond then were uncertain.

Meeting on 11 May 2018.

- 93 Notes of this meeting are at page 245. I accept these as an accurate summary of what was discussed. I note the following :-
- 93.1 The discussion was open (not without prejudice)
- 93.2 The claimant explained that her reason for resigning was *“because she needed to take control and that everything had become about operations not finance but that correspondence from NHSI had highlighted both operations and finance.”*
- 93.3 That she felt all the burden was being placed on the claimant.
- 93.4 Specifically, PH had *“not been able to look at her for 2/3 weeks and was uncomfortable around her.”* And that he had said it was the right decision *“as the trust needed a ball breaker.”*
- 93.5 That she stated she had received countless messages of support and all the NEDs had emailed her regarding how she had taken the brunt. I note (and have taken account of) the 6 emails dated 16 and 17 April 2018 at pages 285-7.
- 93.6 The claimant said that she felt no choice but to resign. She also said that it was the right decision for her.
- 93.7 The claimant expected a severance package of at least 2 years’ salary plus notice. The claimant’s stated expectations therefore were for a payment of around £300,000 (including a payment for the remainder of her notice period).
- 93.8 The response (from KP and KS) was that they would take on board her views but that there was no mechanism for the respondent to enter into severance terms beyond contractual notice entitlement.
- 94 By correspondence dated 24 May and 5 June 2018, the respondent informed the claimant that it was not possible to enter into severance terms beyond an option of making a payment in lieu of the remaining notice period. Offers of support and careers advice were also made.
- 95 The claimant’s solicitors then wrote to the respondent on 26 July 2021, setting out a formal grievance.

Availability of financial information to the claimant.

- 96 One issue arising from the claimant's evidence – and particularly in relation to PH not attending meetings on 9 and 13 April 2018, was that she did not have financial information available in order to formulate a plan or process of addressing performance concerns.
- 97 I do not accept this. The claimant was an executive and member of the board. I have heard evidence (and accept) that board members (executive and non-executive) were provided with regular financial reports and updates. I also note that HC attended the meeting on 13 April as were SM and KP. Further, in so far as financial information was required the claimant was able to flag this and request it – as she did in an email following the meeting of 13 April 2018 (page 211, reference to item 9 in the attached draft response).

Support available to the Claimant.

- 98 The claimant was a senior, experienced executive and that role will often have required her to provide support to others. However, almost every employee will require support themselves, no matter how senior or how experienced and the claimant was no exception to this.
- 99 The claimant does not claim a lack of support before the end of 2017/beginning of 2018. The evidence is of a supportive executive team. The offices for members of this team were close together and generally an open-door policy operated. It is clear from the evidence (including various text exchanges) that KP and the claimant had had a good working relationship. In response to questions from Mr Lewinski, the claimant accepted that she had a good relationship with KP, who offered the claimant support and spoke to her several times a day.
- 100 As for PH, the claimant accepted that he had been very supportive of her and that he had acted as an unofficial mentor to the claimant following her appointment to the executive role. On a number of occasions during the hearing, PH's management style was described as "blunt." I find this to mean that, when frustrated with or critical of a situation PH would speak in plain, direct terms. There was no criticism of this management style by the claimant.
- 101 It is also relevant here to refer to the table at page 145 (see para 48 above) and the division of responsibilities amongst the executive, for those areas identified as requiring improvement, even though the majority fell within the claimant's portfolio.
- 102 I note the confirmation in post of Faith Button (FB) as a permanent deputy director of operations and the support being provided by FB during the difficult period of the first half of 2018. I note here a number of proposals to achieve improvements made by FB on 16 March 2018 (page 157).
- 103 I also note the decision by KP to take up assistance to achieve improvements in the Medicines Division (para 59 above) and the appointment of the improvement directors (para 47 above).

Criticism of the Claimant's performance.

- 104 There was criticism of the claimant's performance. Examples are below.

- 105 KP made the following criticism in the grievance investigation interview *“I believe that part of the problem with Suzanne is that she attempted to deliver everything herself not through her wider team.”* (page 361) This is supported by evidence from KS (her evidence being that the claimant did not accept enough support from others).
- 106 This criticism is also supported by the following comments from PH” *The claimant also had a tendency to get hands-on whenever there were operational difficulties, and this usually found favour with the people she directly worked with. I felt this approach made it more difficult for the claimant to hold people to account where that was required and this would have particularly been the case in the Medicines Division.*
- 107 I have already noted criticism from members of the board on 5 April 2018 that they did not consider they were getting assurance that the operational issues identified were being addressed. This criticism did, to a large extent, refer to the claimant in her COO role.
- 108 I have also noted the comments and concerns of SM (paras 64 and 71 above).

Allegations of a lack of support for the claimant and inappropriate treatment of her.

- 109 As well as the claimant’s own evidence on these allegations, HC provided a number of examples. These were in the main unspecific. It is relevant that I comment here on HC’s evidence. At paragraph 6 of her statement, HC says this:
- “I recall attending several meetings where I felt that the behaviour of the respondent’s CEO and FD towards the claimant was unacceptable and unprofessional. I felt it was noticeable that their attitude towards her changed towards the end of 2017/beginning of 2018 and on at least 2 occasions I was present in meetings where both the CEO and FD were extremely intimidating, aggressive and unfair in their criticism of the claimant”*
- 110 I note that no specific examples of meetings and what was said at those meetings were provided by HC. Further, the strong description used by HC does not reflect the claimant’s own evidence except in relation to the meeting on 15 December 2017, a meeting at which HC was not present.
- 111 A little further on in her statement, HC states *“I cannot recall the dates of these meetings but I do recall on one occasion the Respondent’s CEO had to leave the meeting because she had become so irate.”* As noted above, this could only be a reference to the meeting on 15 December, a meeting at which HC was not present.
- 112 I also note the following strong comments in HC’s evidence *“I feel that the nature of the relationship degenerated to the point where the behaviour of the respondent’s CEO and FD towards the claimant became unprofessional, unpleasant and personal”.* The extent of alleged misbehaviour reflected in these comments goes even beyond the claimant’s own evidence. The claimant was questioned about her ongoing displays of friendship/collegiality towards KP even following her resignation and her response was that she did not believe that KP

was being vindictive on a personal level, she was not trying to alienate the claimant, that the issue was an organisational one, not a personal one.

- 113 I have decided that HC's evidence on these matters is unreliable and I do not accept it.
- 114 As noted above, I find that the claimant was supported in her role. I have considered specifically whether there was a lack of support provided to the claimant in the weeks leading up to her resignation. I find that the contact between the claimant and PH/KP did reduce between 6 April and the claimant's resignation on 16 April 2018. I do not find that there was a reversal of the open-door policy in the Executive corridor and had the claimant wanted to speak with either PH or KP she could have done so (and did do so during this time). I have already recorded my findings in relation to KP/PH's non-attendance at the meetings on 9 and 13 April 2018.
- 115 I note a "pause" in text messages between the claimant and KP between 27 March 2018 and 17 April 2018. KP was absent from the Trust for the first few days of this period. However, given the extent of text messages between the two it is surprising that there was no message of support from KP, for example following the difficult board meeting on 5 April 2018. I comment on this below under the heading "Was the Claimant being treated as a Scapegoat?"
- 116 As noted above, the claimant was tearful in her discussion with KP immediately before the Board meeting on 5 April 2018, offering to resign. In that discussion, KP told the claimant, in clear terms, that she did not want her to resign. Whilst KP was delivering difficult messages in that discussion she was also providing some support' in the form of advance warning about what would be raised at the Board meeting, the decision to ask NHSI for temporary support to assist the issues within medicines division and discouraging the claimant from resigning.
- 117 KS gave evidence (which I accept) that, shortly after the board meeting on 5 April 2018, she was informed by KP to support the claimant over the following few weeks. KS accepted that she did not do anything specific to provide support to the claimant in the period 6 April – 16 April 2018.

Discussion between PH and HC.

- 118 Conflicting evidence was provided about a discussion between PH and HC which concerned the claimant.
- 119 HC's account is that very shortly before the claimant's resignation (9-13 April 2018 according to the account HC gave in the grievance investigation) she spoke with PH and stated that the claimant seemed to be under significant stress; PH replying that he thought it would be better for the claimant "to go." HC's account is that she challenged that comment, asking PH "what steps we were taking as a management group to support the claimant if we felt that she was suffering significant stress as a consequence of this situation but he did not respond to this comment."
- 120 PH's account is that a discussion did take place with HC but that HC mentioned that the claimant had "an exit strategy."

- 121 On balance I prefer PH's evidence. I have already made clear my views about other aspects of HC's evidence and whilst that does not mean that I do not accept any of HC's evidence, I am concerned about the accuracy of her evidence where there is a conflict in evidence. I also note that it is unlikely that there would have been no response from PH as HC has reported. Having heard PH when giving his evidence, I find it more likely that he would have responded to a pretty challenging comment that HC reports she made.

The use of the term "operational effectiveness"

- 122 The claimant has, rightly, noted that the respondent used this term with some frequency, particularly at and following the Board meeting on 5 April 2018.
- 123 The term is also used in the subject title and content of SM's email of 6 April 2018 (see 67 above). The claimant's evidence is that it was unfair to focus on operational effectiveness to the extent that KP, PH the NEDs and the chair were doing and that it was inaccurate to highlight this as the cause of the Trust's problems.
- 124 The evidence from Respondent witnesses, including KP is that inadequate performance of the operations within the respondent was not the only cause of the deficit. Whilst I have not been provided with an analysis from any witness as to the causes of the respondent's deficit problems were and what cause was responsible for what element of the deficit, I note again the position as set out in KP's letter to NHSI dated 15 January 2018 and particularly the significant contribution to the deficit from a loss of an income stream (iBCF). It is clear that there were factors other than operational issues contributing to the deficit position.
- 125 I also note (1) the improvement plan which the respondent trust had committed to in which there was a significant focus on operational improvements (2) the clear evidence from various sources that operational improvements were necessary (3) the reported failings in relation to Emergency Department and Medicines Division (4) the insistence from the board that operational improvements were necessary.
- 126 I accept the explanation provided by the respondent's witnesses (KP, PH and SM) that operational effectiveness is intrinsically linked to financial performance and in the event that the respondent operates more effectively then its financial performance will improve.
- 127 In her evidence, the claimant noted the terms of NHSI's email of 29 March 2018 (page 173) which included the phrase "*you will appreciate how concerned I am and given the added challenge for the local system concerning it's a and E performance of late, I think we would all really benefit for an honest and open discussion when we do meet about what the art of the possible actually is in terms of both the finance and operational standards agendas.*" The claimant noted particularly NHSI's reference to both operation and finance.
- 128 However, the reference to both does not, in itself, indicate that there are concerns about any aspect of financial poor performance (for example, accounting or budgeting errors) which is not linked to operational performance or the performance of other activities of the respondent Trust (such as excess of

capital expenditure). It does not in itself indicate that improvements are required within areas of the finance team for example.

- 129 It is also relevant to note the reference in the same email from NHSI about the “*art of the possible*” and “*that we are all to see demonstrable improvements.*”
- 130 I find the use of the term “operational effectiveness” for example in the board meeting on 5 April 2018 and SMs email of 6 April 2018 was appropriate. It was a general or umbrella term used to refer to a number of areas where improvements were being sought. Improvement would lead to greater effectiveness.

The Respondent’s Board and its chair

- 131 As expected, the Board comprises executive and non-executive members (NEDs). I heard evidence from SM particularly about some of the NEDs and it is apparent that the NEDs are made up of individuals with relevant skills and experience.
- 132 I note SM’s own skills and experience that she brought to the role of chair. SM has held non-executive roles in the NHS since 2007. At the date she provided her evidence to the Tribunal she was the chair of Liverpool University Hospitals NHS Foundation Trust.
- 133 It is relevant to note that SM’s evidence was of considerable assistance. I find that SM gave her evidence from a position of independence, effectively as an extension of her function as Chair to the Board.
- 134 An important role of the NEDs (including the chair) is to hold the executive team to account. I am satisfied that is what they sought to do in 2018. I am also satisfied that the experience of the NEDs and chair was such that they would not be easily “hoodwinked” by one or more executives looking to divert blame for personal poor performance (or the poor performance of a particular area of the Trust) on to others.
- 135 On the same theme, I also note here the involvement of NHSI. I do not accept that senior individuals within NHSI would be easily misled about areas of (and responsibility for) inadequate performance.

Was the claimant treated as a “scapegoat” by KP and PH?

- 136 Prior to and during this litigation, the claimant has provided various accounts of the reasons why she resigned. Central to these is the allegation that she was treated as a scapegoat. I note the following extract from the Grounds of Claim, attached to the Claim Form:-

“The Claimant believes that she had been singled out as the root cause for the financial problem in an effort for the Chief Executive and Deputy Chief Executive to deflect responsibility and blame. The Claimant believes that the Chief Executive and Deputy Chief Executive felt that their positions were vulnerable in view of the poor overall performance of the Trust and there was a shift of culture to blame the Claimant and those working with her.”

- 137 I also note the view stated by the claimant in her witness statement *“I believe that if I had not been targeted in this way that either [PH or KP] (or possibly both) would have been removed from their position.”*
- 138 I do not find that the claimant was scapegoated as alleged. From the end of January 2018 there was a significant focus on a number of operational areas of the *Trust* and a desire for improvements in these areas. The claimant’s own evidence is that these areas required improvement. The claimant in her senior, executive capacity saw (and could have influenced) the identification of the 11 areas where there would be a focus on improvement; she was aware of the commitment made by the respondent to the NHSI to make improvements in these areas and an internal turnaround plan; she was aware of significant concerns about the Medicines Division.
- 139 The allegation is focussed on KP and PH. I have noted a diminution in contact, including text messaging, in April 2018, before the claimant handed in her notice of resignation. There is also no evidence of any contact between the claimant and PH during this time. However, whilst the claimant’s colleagues might have shown more proactive support in this short period before her resignation, I do not find that this diminution in contact indicates that she was scapegoated.
- 140 A key part of the allegation of scapegoating is that KP and PH dictated the narrative – particularly in relation to the board meeting on 5 April 2018 and the email of 6 April 2018. KP and PH did not dictate the narrative as alleged; nor would they have been able to, given the calibre of the Board, particularly the Board chair at the time (SM).

Submissions

- 141 I am grateful to both Ms Levene and Mr Lewinsky for their hard work in putting their detailed submissions together. The submissions in the main deal with the factual evidence in this case. Given the significant gap between evidence and submissions I know that both counsel were keen to provide detailed documents. I have reviewed and re reviewed both documents and they have helped inform my findings and decision.

The Law

Constructive and unfair dismissal

- 142 The claimant claims (1) that her resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under s98 of the Employment Rights Act 1996.
- 143 Dismissal for the purposes of s98 includes the circumstances stated at s95(1)(c). *“.....an employee is dismissed by his employer if.....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.”*
- 144 In considering the issue of constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a

fundamental breach of the contract (*Western Excavating (ECC) Limited v. Sharp* [1978] QC 761).

- 145 It is an implied term of every employment contract that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see for example *Malik v. BCCI* [1997] IRLR 462_at paras 53 and 54). I refer to this term as “the Implied Term.”
- 146 In considering the Implied Term, Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited* [1981] ICR 666 (Woods”), said that the tribunal must “*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.*”
- 147 A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a “last straw” incident, even though the “last straw” is not, by itself, a breach of contract: *Lewis v Motorworld Garages Limited* 1986 ICR 157 CA.
- 148 In the judgment of the court of appeal in *Omilaju v Waltham Forest London Borough Council* 2005 1 All ER 75. Dyson LJ stated as follows in relation to the last straw.

“A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase “an act in a series” in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant.”

- 149 The recent Court of Appeal decision in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (“Kaur”), commented on the last straw doctrine. The judgment included guidance to Employment Tribunals deciding on constructive dismissal claims. At paragraph 55 of the judgment, Underhill LJ states:-

“In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

- (1) 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?*
- (2) Has he or she affirmed the contract since that act?*
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?*

- (4) *If not, was it nevertheless a part (applying the approach explained in [LB Waltham Forest v. Omilaju [2005] ICR 481] of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the [implied term of trust and confidence]?*
- (5) *Did the employee resign in response (or partly in response) to that breach?*

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

150 Once repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant's decision to resign. The following passage from the judgment of the Court of Appeal in Nottinghamshire County Council v. Meikle [2004] IRLR 703, is helpful:

*“33. It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the *Western Excavating* case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation.”*

151 In the event that an Employment Tribunal decides that the termination of a claimant's employment falls within s95(1) the employer must show the reason for dismissal and that the reason for dismissal was a potentially fair one under s98(1) and (2) ERA. In a constructive dismissal claim, the reason for dismissal is the reason why the employer breached the contract of employment (*Berriman v. Delabole Slate Limited [1985] IRLR 305* at para 12).

152 Ms Levene referred me to 2 reported cases in which the circumstances of constructive dismissal included intolerable working environments.

153 The claimant (“H”) in *Horkulak v. Cantor Fitzgerald [2003] IRLR 756* (“Horkulak”) was subjected to offensive behaviour by his manager, including abusive

language and a refusal to provide the claimant with opportunities to respond to criticism. The decision of the High Court (which the defendant unsuccessfully appealed) included the following conclusions:-

153.1 an employer cannot argue that the offensive effect of foul language is sanitised by its frequent use;

153.2 The cooperation required from employers to employees cannot be “met” with a large salary. Nor does a large salary in some way reduce or limit the duty of cooperation

153.3 Whilst high standard of performance are legitimate expectations, they must be balanced by a fair system of enforcement which reflects the particular conditions affecting employment (at para 81 of the Judgment)

154 *McBride v. Falkirk Football Club* [2012] IRLR 22 (McBride). Ms Levene referred particularly to para 61 of this judgment “*An employer cannot pray in aid that he and others in his industry treat all employees badly and therefore treating an employee badly cannot amount to a breach of the duty to maintain trust and confidence. Employers have a duty not, without reasonable and proper cause, to conduct themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*”

155 Finally I note the judgment in *Tolson v. Governing Body of Mixenden Community School* [2003] IRLR 842 in which the EAT made clear that “*the conduct to be considered when determining an issue as to constructive dismissal is that of the employer.*” This is consistent with the judgment in *Woods* (extract noted at 147 above).

Discussion and Conclusions

156 I have considered the claimant's case on three levels, the first being whether the events as set out in the list of issues, support the case that the claimant was intentionally singled out or scapegoated by KP and PH. That is the case pleaded at paragraphs 14 and 15 of the Grounds of Claim (pages 14-17), in the first version of the claimant’s further particulars (at pages 36 and 37) her principal is I have recorded my findings of fact as far as the allegation of scapegoating is concerned. Neither KP nor PH singled the claimant out as alleged.

157 I have also considered each of the events separately (having made all relevant findings of fact) to consider whether there was a repudiatory breach caused by the respondent’s treatment of the claimant (even though that treatment was not of intentionally scapegoating the claimant). In doing so I have asked the questions set out in *Kaur*:

- (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? Chronologically the most recent act was either the meeting of 13 April 2018 or the conversation between PH and HC. I have made clear my findings of fact in relation to each:

- (a) As far as the discussion between PH and HC is concerned, I do not accept HC's version of events.
 - (b) I have no criticism of SM and KP raising concerns about the claimant's presentation. It is notable that criticism came from both SM and KP. Criticism of a report or presentation is not of itself unsupportive and often indicates that support and input is given. SM and KP had their views about the information that would need to be included and wanted to ensure that a presentation was available that would sufficiently respond to the concerns of NHSI.
- (ii) Has she affirmed the contract since that act? Response: Those events took place very shortly before the claimant's resignation.
 - (iii) If not, was that act (or omission) by itself a repudiatory breach of contract? Response: It was not.
 - (iv) If not, was it nevertheless a part of a course of conduct raising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of contract? Response: Given my findings of fact, it was not.
 - (v) Did the employee resign in response (or partly in response) to that breach? Response: There was no breach.
- 158 Finally I have considered whether an intolerable working atmosphere was caused by the conduct of the respondent even where there was no intention to do so (having regard to the wording of the implied term – conduct on the part of an employer that is calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee).
- 159 I note here my findings of fact about the meeting of 15 December 2018 and also my finding that there was no proactive support to the claimant in the period Friday 6 April -Friday 13 April 2018 (the claimant resigning on Monday 16 April 2018).
- 160 As for as the respondent's conduct on 15 December 2017, whilst the respondent overstepped the mark, it did not in itself amount to a fundamental breach of contract. Had it been one in a number of instances when the respondent overstepped the mark, then it could have been part of a course of conduct that became intolerable for the claimant. However, as made clear in my findings of fact, it was a "one off" at the time and within an employment relationship that was otherwise supportive. In any event, the claimant did not resign because KP had behaved as she had on 15 December 2017. KP apologised and the claimant's employment continued for another 4 months until the claimant gave notice. Further, there is no evidence that the claimant contemplated leaving at the time. That does not stop the claimant seeking to rely on the events of 15 December 2018 some months later but only in so far as it was one of a number of examples (a course of conduct as anticipated by Kaur). It has never been the claimant's case that she resigned because of what happened on 15 December 2017.

- 161 This leaves the finding that there was no proactive support in the final week of the claimant's employment. I note however that, within this week the claimant attended 2 meetings. Whilst she has expressed dissatisfaction about who was not there, it is clear that those who did attend were able to be supportive to the claimant. Perhaps some of the executive could have been more supportive; KS was asked to provide support and she did not take any proactive steps to do so. Perhaps PH could have spoken with the claimant, particularly given that he had not attended the meeting and that he had learned from HC (at some stage during the week 9-13 April 2018) that the claimant had an "exit strategy" (i.e. that she may have been contemplating resignation). However, these matters fall well short of conduct likely to destroy or seriously damage the relationship of trust and confidence.

Employment Judge Leach
Date: 17 June 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 June 2021

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