



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Williams

Respondent (1) Meddygfa Rhydbach Surgery
(2) Dr Gwyn Morris
(3) Dr Zameel Haque
(4) Dr Adriaan Smits

Heard at: Mold **On:** 14 – 16 December 2016 and
4 & 5 April 2017 (in chambers 5
April 2017)

Before: Employment Judge T V Ryan

Members:

Representation:

Claimant: Miss L Quigley (Counsel)

Respondent: Miss Wilson-Theaker (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is:

- (1) The Claimant was constructively unfairly dismissed by the Respondent on 28 April 2016 and her claim of unfair dismissal succeeds.
- (2) The Claimant's claim that the Respondent breached her contract of employment by failing to provide her with contractual notice of termination is not well founded fails and is dismissed.
- (3) Any compensatory award to which the Claimant is entitled shall not be reduced to reflect the risk that she faced of being fairly dismissed for reasons related to her conduct.

- (4) The Claimant's basic and compensatory claims shall not be reduced because of the Claimant's conduct or actions.

REASONS

1. The Issues

The issues were agreed at the outset as follows:

- 1.1 Did the Respondents breach the term of trust and confidence implied in the claimant's contract of employment by
 - 1.1.1 Bullying and harassment
 - 1.1.2 Inappropriate handling of performance management
 - 1.1.3 Failure to deal with the claimant's grievance in a reasonable manner (including unfair criticism)
 - 1.1.4 was the grievance appeal outcome the "last straw"?
- 1.2 Did the Claimant resign in response to the above?
- 1.3 Did the Claimant wait too long before resigning and in so doing affirm the contract?
- 1.4 In the event of this being a dismissal and despite it being an allegation based on the breach of the implied term of trust and confidence was any such dismissal for a potentially fair reason, being a reason related to the Claimant's performance by reference to capability and aptitude?
- 1.5 Subject to any finding that the Claimant was dismissed and was unfairly dismissed ought any compensatory award be reduced to reflect the risk facing her of her being fairly dismissed ("Polkey")?
- 1.6 In the event of a finding that the Claimant was unfairly dismissed ought any basic and compensatory awards be reduced to reflect her conduct and or actions as appropriate?

2. The Facts

- 2.1 The First Respondent is a rural general medical practice. The First Respondent is the professional practice name for the Second, Third and Fourth Respondents practicing in partnership. The Second, Third and Fourth Respondents will be referred to collectively throughout this Judgment as "the partners". The partners had at the material time managerial responsibility for the practice subject only to some delegation to the Claimant as Practice Manager. The partners rely on external legal

and personnel/HR advice and assistance. The respondent issued the following documents: Summary of Employment Terms (p65), Contract of Employment (pp66 – 72), and a handbook including a Disciplinary Policy (p73-74), a Poor Performance Policy and Procedure (pp75 – 78), a Grievance Policy (p 79), a Harassment Policy (pp80-81) and a Dignity at Work Policy (p82ff).

- 2.2 The Claimant commenced her employment with the First Respondent on 23 September 1986 as a receptionist. She was promoted to Practice Manager at the Botwnog Pwllheli Surgery in 1996. In that role she has been described as the most senior non-clinical member of staff. In that role she was responsible for managing administrative staff and administrative liaison with the Local Health Board (LHB). Her job description is at page 98 of the Trial Bundle (to which all further page references relate unless otherwise stated). Her contract of employment dated 1 January 2014 is at pages 65 – 72. It was the Claimant's stated intention to retire from her employment in March 2018.
- 2.3 Two predecessor partners, Dr Paul Langley and Dr Parry-Smith, retired in the period from 2009 to 2014 as consecutive senior partners. Dr Haque the Fourth Respondent joined the partnership in 2010 and from the retirement of Dr Parry-Smith in 2014 the partnership was made up of the Second to Fourth Respondents. The period from 2009 onwards was a period of significant internal change within the partnership let alone ongoing NHS reform and reorganisation.
- 2.4 The practice found itself throughout the above period and from 2014 onwards in what were euphemistically described as "challenging circumstances". There were financial difficulties. There were difficulties with the efficiency of the management of the partnership. In 2014 the partners applied to the LHB to close their branch surgery in Abersoch and the application sets out in some detail the extent and nature of the "challenging circumstances" facing the partners (pages 83 – 84). Whether caused by or contributing to the challenging circumstances described, I find that there was a long running history of difficult interpersonal relationships within the practice as regards administrative and clinical staff on the one hand and the partners on the other but in particular involving Dr Smits (the Fourth Respondent). Complaints were raised at various times by various members of staff in 1997 and 2006 (page 260), 2010 (page 257) 2012 (page 363A) 2011 (referenced at page 260) and 2015 (referenced at page 260). Of some significance, albeit historic in nature, the issues in 2010 (p. 257) were committed to writing and signed by 10 members of the staff who complained that Dr Smits' manner was amongst other things causing distress. Whilst not all members of the Respondents' staff felt harassed and intimidated or that their morale was damaged by

any one or more of the partners nevertheless at times and in the circumstances facing the practice several of the staff were so affected.

- 2.5 Dr Smits was variously described as being direct, brusque and blunt in his manner. Some considered him to be aggressive and that he was irascible. Others may have been less daunted but it would appear that the majority of the staff was at the very least wary of his manner. He could be very assertive on occasions and demanding of direct and accurate responses to his questions with which he would persist until he was satisfied. I find that his management style was at least robust and was often overbearing and, to the Claimant at least, intimidating. In her circumstances and taking into account all the evidence that I heard and read I consider the Claimant's perception of Dr Smits that he bullied, harassed and intimidated her to be a genuine and reasonable one.
- 2.6 The Claimant was not a trained experienced or accomplished Practice Manager at the time that she was promoted to this role in 1996. She was however well thought of by the old regime of partners. She was never very highly regarded by the Respondents. The Respondents considered that the Claimant was perhaps promoted beyond her ability and over time considered that she was in effect working at the level of a glorified receptionist; they wanted, and were paying for, more than that from the Claimant. The Claimant was not a pro-active or enthusiastic manager in that she did not actively engage in meetings with other Practice Managers and her engagement within the practice in respect of IT accounts, insofar as they were relevant to her role, and income generation (such as through the quality outcome framework (QOF)) was not at a managerial level. I find this notwithstanding that some of the responsibility for the QOF's had been delegated elsewhere. The Claimant did not drive efficient management practices and procedures within the practice and there were shortcomings on occasions with regard to arrangements such as in relation to wages, holidays and payments for outside services. In particular there was an issue over the Claimant's management of the caretaker who would make deliveries of blood samples to the local hospital. On one occasion she overpaid him £12,000 which money was recovered but nevertheless undermined the confidence that the partners had in her.
- 2.7 In the spring of 2014 the then partners considered closing their surgery in Abersoch. They applied to LHB on 23.05.14 (PS83 – 84) which letter summarises some of the problems facing the partners at that time. Throughout the duration of the events described in this judgment the practice was struggling. Consequently and in that context in autumn 2014 there was correspondence between Dr. Morris and the Local Health Board (LHB) regarding the Board's provision of managerial support. Significantly in an email of 12th November 2014 Dr. Morris said to the LHB both that he

did not wish it to be involved during the claimant's absence on holiday and also that she should be treated "gently", with the delivery of support being handled sensitively as they felt that the claimant already felt that she was "being pushed out".

- 2.8 Dr. Smits had genuine and evidence-based concerns over the claimant's performance at this wished for level of manager. These concerns were long standing, and various such issues had been raised informally with the claimant repeatedly over the years preceding 2015 in conversation and usual day to day dealings but not in terms of disciplinary action or formal performance management. He would question, challenge and shout at her. Dr. Smits maintained notes of management developments and concerns with the claimant's performance over a period of time between May 2015 and the end of November 2015, and these notes (manuscript and typed versions) are at pages 95 – 95P. The claimant was still not put under warning or any form of formal performance management. One of Dr. Smits' stated concerns at the time was that the claimant, for personal reasons, failed to attend a practice meeting on 25th June 2014, the only one she ever missed. The partners considered all such meetings to be important and the claimant's absence was detrimental to consideration of urgent business; they held this against her thereafter.
- 2.9 On 26th June 2014, the claimant was called into a meeting with the partners who were critical of her performance in several respects. This surprised and upset the claimant. Dr. Smits, in particular, criticised the claimant and the minutes at page 85 list the areas of the partners' stated concerns. The claimant was made aware that she was being both scrutinized and criticised but she was not informed that she was to be the object of formal performance management although a further meeting was to be held in two months' time. This was the first such formal approach to the claimant by the partners in respect of her performance.
- 2.10 The partners had been dissatisfied with the claimant's performance for quite some time; Dr Smits was the most vocally and obviously critical of the claimant. Their collective view was that she was performing as a receptionist and was not taking managerial responsibility to improve the fortunes of the practice. They needed someone to exercise more professional management skills; they considered in effect that the claimant was over-promoted by the previous partners in the practice and that she was not up to the tasks in hand. They did not offer the claimant training or professional management guidance at this stage. They told her their expectations and that she was not living up to them. They did not set targets for her. They did not issue any explicit warnings. They did subject her to prolonged and often unexpected criticism which was reasonably considered by the claimant to have come out of the blue; she had not been so criticised since commencement of her employment and had not

- had an appraisal since 2009. That said, the partners were sincere and had some reasonable grounds for their disappointment at what they considered to be the claimant's shortcomings as practice manager. They also had suspicions about her honesty that had some basis but little evidential support. All in all they had taken against her and lost the will or ability to review her performance and conduct objectively; they became subjectively biased against her; they were wary of the difficulties of replacing her; they were prepared with some reluctance to "put up" with her (my description of the attitude I find existed); they would not have been upset by her retirement or resignation but they were not willing to (and could not actually justify) making her redundant. This approach, which had the appearance of laissez faire management despite the simmering resentment of the partners, failed to address or manage concerns in an efficient manner and allowed the practice to drift, the claimant to consider that in general her practices and performance were being tolerated (in as much as Dr. Smits' approach to most of the staff was confrontational and intolerant) and for the relationship (as seen by the partners) to sour. The partners chose not to manage the claimant through its available and applicable written policies.
- 2.11 Towards the end of 2014 the claimant considered her future in the practice and asked whether she might be made redundant. The partners could not spare her despite their misgivings. They were concerned that they might not be able to recruit a replacement.
- 2.12 In the light of the above situation and in co-operation with the LHB a local, experienced and well-respected practice manager, Deborah Kalaji, was seconded on a part-time basis to review the respondent's practice, its management and staff and to provide support for the claimant. She was to make recommendations to the partners and to assist in implementing such improvements as the partners agreed. Ms Kalaji was introduced to the practice in December 2014 and continued to work in the practice throughout the remainder of the claimant's employment. She carried out a root and branch review of the practice concentrating on managerial improvement. This was in effect a rescue package.
- 2.13 The claimant was grateful for and appreciative of Ms Kalaji's input which she needed. The claimant attempted to address her perceived shortcomings and those of the practice; she was not resistant to Ms. Kalaji's recommendations, advice and assistance. They agreed a Personal Development Plan with revised job description (pages 97 – 105, 109 - 115, and 128 – 139). These documents bear out the partners' perceived difficulties with the claimant however in Ms. Kalaji's opinion by 5th October 2015 "there had "definitely been progress on some items".

- 2.14 Dr Smits' said notes at page 95M record his concern on 24th March 2015 that the claimant might claim constructive dismissal because of actions being taken and her "low morale"; he also noted that he would dismiss her if she changed staff hours without partnership approval. Clearly by that stage he already had little or no confidence in the claimant and their relationship was strained.
- 2.15 The claimant had a formal appraisal with Ms. Kalaji in April 2015 and on advice the partners decided to continue trying to improve management rather than taking any other drastic action or giving grounds for bullying allegations and a risk of a constructive unfair dismissal claim.
- 2.16 Notwithstanding the above there was a difficult meeting between the claimant and the partners on 14th July 2015. Dr. Smits was highly critical of her, raising his voice, gesticulating with papers in his hand waving them around and in the direction of the claimant before eventually banging his hand against the door of the room in anger and frustration. Questions were raised about travelling expenses paid by the claimant and there was an implied suggestion that the claimant had acted dishonestly. This show of petulance and aggression aimed at the claimant caused her upset and distress. The claimant subsequently took sick leave and attended the surgery on 30th July 2015 with a fit note when again she found Dr. Smits to be rude and unfriendly towards her, raising his voice and disdainfully passing over a prescription to her. She informed Dr. Morris who talked her out of raising a formal grievance against Dr. Smits.
- 2.17 Dr. Morris and Dr. Haque were well aware of Dr. Smits manner and how he had conducted himself towards the claimant. They knew that the claimant was upset by him. They valued Dr. Smits as a partner more than the claimant as an employee and they closed ranks to support him. They were concerned, Dr. Morris more so than Dr. Haque, at any adverse consequence that the practice might suffer if the claimant pursued a formal complaint against Dr. Smits. They knew that if any such complaint was upheld it could lead to a professional sanction. Dr. Morris was worried at the possible loss of Dr. Smits to the practice and the effect that would have had on it and on Dr. Morris' own interests.
- 2.18 Whereas I find that the claimant was generally truthful she was prone to some exaggeration such as when on occasions she accused Dr. Smits of pushing her or of forcing papers into or near her face, allegations she moderated under cross examination. Nevertheless Dr. Smits' conduct on occasions was rude, aggressive and beyond being civilly "direct". He could be abrupt, curt, accusatory and demanding with a tendency to impatient displays and shouting. The claimant was frequently subjected to such treatment.

- 2.19 On 13th August 2015 the claimant wrote to the LHB complaining that she was being bullied at work; she did not give any details of bullying or name any perpetrator.
- 2.20 The claimant returned to work on 14th September 2015 on a phased basis and full-time on 2nd October 2015. She had two further difficult meetings with the partners on 8th and 15th October when Dr. Smits was again critical and conducted himself in a way that the claimant found upsetting and consistent with his behavior described above. Neither Dr. Morris nor Dr. Haque at any time sought to intervene, to console or re-assure the claimant or, so far as the claimant was made aware or witnessed, to encourage him to moderate his conduct. The partners instead invited the claimant to a performance review on 21st October 2015 but she was ill again and did not attend it. Having attended work on that day she feared that the meeting would involve not just Ms. Kalaji but all three of the partners and this caused her to feel worried developing a headache and nausea; she left work.
- 2.21 On 5th November 2015, the claimant submitted a formal written grievance to the partners (pp 212 – 213). In her letter the claimant explained in some detail how she felt that she had been bullied and harassed by Dr. Smits. She cited numerous specific examples. The claimant also referred to the complaints made by some of her colleagues about Dr. Smits. None of this was news to the partners. They had lacked trust and confidence in the claimant some time; they had applied pressure on her to improve; they knew that a claim of constructive dismissal was a risk facing them (and one on which they had previously taken legal advice); Dr. Morris had already persuaded the claimant not to present an earlier grievance; both Drs. Morris and Haque had witnessed Dr. Smits' interactions with the claimant and he himself must have been conscious that she was upset by his manner and approach (whether he felt it justified or not).
- 2.22 The partners delegated the handling of the claimant's grievance to a professional consultant, Gillian Williams, who had been recommended by their solicitors. I found Ms. Williams, and similarly the grievance appeals officer Sarah Goodwin, (another recommended consultant) to be sincere, honest and conscientious witnesses notwithstanding oversights, errors and unconscious bias reflected in their handling of matters. They were appointed ostensibly to investigate and decide upon the grievance, and the appeal against its rejection, respectively. They were not expressly pressured to come to particular outcomes and there was no improper collusion or apparent mishandling through any perceived conflict of interest (in that they were each paid by the partners). That said they were unfairly influenced by the manner of the respondents' robust response to the grievance and appeal, being steered towards reaching certain

conclusions without either of them deliberately siding with the partners. They were acting in the role of the respondent's agents.

- 2.23 In terms of chronology the grievance was investigated by Ms. Williams prior to and at the grievance hearing on 18th January 2016 when the claimant was accompanied at her request by Dr Langley (former partner) and they were given every fair and proper opportunity to present the claimant's grievance. Ms. Williams dismissed the grievance by letter dated 5th February 2016(p.229) with which she sent numerous appendices including the partners' respective statements. The claimant appealed by her solicitor's letters dated 12th February 2016 and 29th March 2016(ps 282 – 284, and 291 – 297). Ms. Goodwin investigated the appeal and chaired the appeal hearing on 8th April 2016 at which again Dr. Langley accompanied the claimant (p.313 – 317). Ms. Goodwin rejected the appeal by letter dated 27th April 2016 (ps 336 – 343).
- 2.24 My findings of fact in respect of both hearings and the respective decisions of Ms. Williams and Ms. Goodwin can be dealt with together. I have commented on their good faith and the credibility of their evidence above. They both made a number of sincere and humble concessions under cross-examination as to unwitting shortcomings with their handling of the matter, praying in aid hindsight.
- 2.25 The partners prepared witness statements and submitted details and documents during and for the grievance and appeal procedures. They colluded in their preparation of a defense to the claimant's complaints. Drs Morris and Haque sought to support Dr. Smits out of loyalty and self-interest and they emphasized their negative views of the claimant. Rather than addressing the complaints of bullying and harassment raised by the claimant they concentrated on the partners' criticisms and suspicions of the claimant. Dr. Morris in particular (at pp277 – 281) unburdened himself in his statement of a considerable amount of antipathy towards the claimant for reasons related to her general performance and suspicions about her conduct; his statement (disclosed to the claimant with the grievance outcome) demonstrates that he had no trust and confidence in the claimant, that she could have none in him, and that the relationship was damaged beyond repair, in fact destroyed. For example he expressed the confirmed view of the partners (without any formal investigation process and without allegations even having been put in that way to the claimant) that she was responsible for financial irregularities, that is that she was dishonest and to the loss of the practice. He accused her of theft. He accused her, amongst other things, of deliberately running down the practice and seeking recompense through the grievance process. Dr Haque's views (pp264 – 266) and those of Dr. Smits (pp248 – 250) were in a similar vein and they too were disclosed to the claimant with the grievance outcome letter. Neither Ms. Williams nor Ms. Goodwin

considered that the partners' approach as described above vindicated the claimant's complaints by at least explaining the partners, specifically Dr. Smits', opinion of her and their motives but instead they accepted that there were performance and conduct issues with the claimant. Those matters were not the subject of the grievance. Ms. Williams and Ms Goodwin were wrong-footed by the partners who were attempting to discredit the claimant, and they failed to concentrate on and adequately address the terms of the complaints raised by the claimant.

- 2.26 Ms. Williams and Ms. Goodwin, unduly influenced by the above approach adopted by the partners, failed to conduct a thorough investigation. They accepted the partners' statements at face value and did not consider their obvious self-interest and conflicts of interest or how, if at all, that would affect the credibility of the partners. They limited their enquiries of the staff to statements from Lorraine Abbott and Gillian Jones whose names had been given to them by the claimant who may have expressed a doubt that others would come forward. Swayed off course by the partners' approach to the grievance they failed to give appropriate and due consideration to the statement of Lorraine Abbott who despite saying that she did not find Dr. Smits to be "a problem" nevertheless had heard him raise his voice and bang a file in his hand against the door; she confirmed "a change" when Dr Langley retired and Dr Smits became "senior partner" (p224). Ms. Williams and Ms Goodwin latched on to her saying that as far as she was concerned it was "not a problem" at the expense of considering her statement as potentially corroborative evidence that on proper investigation may have assisted the claimant.
- 2.27 Ms. Williams and Ms. Goodwin expressly limited themselves to the dates of events raised by the claimant without any consideration of earlier, historical and recent, complaints by staff against Dr. Smits that patently provided relevant background and set the "cultural" scene for the conduct of which she complained. Whilst they were not required to make findings upholding or rejecting earlier complaints nevertheless the atmosphere, culture and management style adopted in the practice was highly relevant. It would have provided a context that would have corroborated much of what the claimant said in support of her grievance. To ignore the background and limit consideration to the specific dates mentioned by the claimant in her grievance letter neutralised her complaints that "this bullying and harassment by Dr. Smits has been going on for several years... I feel that I am being forced into a situation where my ability to do my job is being seriously compromised"(p.213).
- 2.28 The failure to consider context at the grievance and appeal stages was not just in respect of historical matters either but there was a failure to consider the claimant's corroborative contemporaneous complaints such as on 30th July 2015 when Dr. Morris dissuaded her from lodging a

grievance. There was ample evidence of consistency both in respect of Dr. Smits' abrasive personnel management style and of the claimant's disquiet at it. The grievance and appeals officers closed their minds to such matters at the cost of conducting an appropriate analysis of evidence that might have supported the claimants' grievance while at the same time placing unwarranted and unquestioning faith in the evidential value of the respondent's statements that supported Dr. Smits and undermined the claimant.

2.29 Ms. Williams and Ms. Goodwin reached conclusions as to the claimant's performance in preference to reaching conclusions as to the matters of which she complained and did not consider available evidence to the effect that the partners may have been trying to oust the claimant because of perceived shortcomings with her performance.

2.30 It follows that Ms. Williams did not consider the grievance issues in a manner that would be recognized as best practice and in accordance with the respondent's grievance procedure (which she accepted to a large extent in her evidence). I make the same finding of fact in respect of Ms. Goodwin's handling of the claimant's grievance appeal. Both well-intentioned consultants devoted time and attention to their tasks and their output, allowing the claimant the opportunity to speak and preparing detailed outcome letters, and gave the appearance of a thorough process. I find that in fact the process at both stages was flawed; it was prejudicial to the claimant and subconsciously biased to the respondents. They were unduly influenced by the partners who set out to turn them against the claimant.

2.31 After the claimant's receipt of the grievance outcome and her solicitor's initial appeal letter but before the appeal hearing the claimant, who was absent from work:

2.31.1 sent an email dated 4th March 2016 to her colleague Lorraine Abbott (p285) asking her to check the partners' emails and to one way or another transmit them to her; she had no authority to access those email account; she was trying to gain access to emails concerning her to discover what, if anything, the partners were doing in relation to her. Only Dr. Smits appeared to take this matter at all seriously as a potential act of gross misconduct and he was far from impartial or objective in his judgment of it; I find he was would like to have used it opportunistically against the claimant if she did not resign when she did.

2.31.2 sent an email dated 8th March 2016 to the LHB asking that it "deactivate" her email account as she "will not be returning to work ...after today". The claimant says that she was about to go on

holiday and did not want incoming emails to build up in her absence. In giving this evidence I found that the claimant was unconvincing and uncertain. Her evidence is inconsistent with the plain meaning of the words used. There is no evidence that she would routinely ask LHB to deactivate her email account when she was to be absent on holiday or sick leave. I find that by this date the claimant had determined that she would not in fact return to work unless the grievance appeal outcome was satisfactory. She did not resign by this letter; it was not her intention to resign at this time but her mind was made up in the light of the grievance outcome that unless matters changed on appeal, of which she had little confidence, she would be resigning or would be dismissed. She expected that her employment would terminate at some imminent date without her ever returning to work. The grievance outcome propelled her to this conclusion.

- 2.32 On 29th April 2016 (having received the grievance outcome letter dated 27th April 2016) the claimant sent a resignation email to Dr. Morris (p345). By this date and in the light of the grievance outcome and failed appeal she concluded that trust and confidence had “completely broken down”. She cited the appeal outcome as the “final straw”. The claimant wrote, and said in evidence, that by this stage she could no longer work for the partners because of their behavior, having been lead to believe that a resolution could be reached (via the grievance procedure) but she had to conclude that this was not the case. She pointed out her honesty regarding her complaints and complained that in response the partners were not honest but smeared her name. I find that these were the reasons for the claimant’s resignation. She did not delay or in any sense affirm the contract from the date that she submitted her initial grievance. She had grieved in the hope that the relationship could be “salvaged “(p345). It was not, and indeed matters were made worse.

3. The Law:

- 3.1 S.94 Employment Rights Act 1996 (ERA) establishes an employee’s right not to be unfairly dismissed. S.95 ERA sets out the circumstances in which an employee is dismissed which includes where an employee terminates the contract of employment (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer’s conduct (a constructive dismissal).
- 3.2 It is well established that for there to be a constructive dismissal the employer must breach the contract in a fundamental particular, the employee must resign because of that breach (or where that breach is influential in effecting the resignation), and the employee must not delay too long after the breach, where “too long” is not just a matter of strict chronology but where the circumstances of the delay are such

that the employee can be said to have waived any right to rely on the respondent's behaviour to base resignation and a claim of dismissal. Any such delay would have to amount to an affirmation of the contract notwithstanding an employer's breach of contract.

- 3.3 The breach relied upon by an employee may be of a fundamental express term or the implied term of trust and confidence and any such breach must be repudiatory; a breach of the implied term will be repudiatory meaning that the behaviour complained of seriously damaged or destroyed the essential relationship of trust and confidence. Objective consideration of the employer's intention in behaving as it did cannot be avoided but motive is not the determinative consideration. Whether or not there has been a repudiatory breach of contract by the employer is a question of fact for the tribunal. The test is contractual and not one importing principles of reasonableness; a breach cannot be cured and it is a matter for the employee whether to accept the breach as one leading to termination of the contract or to waive it and to work on freely (that is not under genuine protest or in a position that merely and genuinely reserves the employee's position pro tempus).
- 3.4 As to whether a claimant has resigned as a result of a breach of contract it is established that where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, rather than attempting to determine which one of the potential reasons is the effective cause of the resignation.
- 3.5 Even if an employee establishes that there has been a dismissal the fairness or otherwise of that dismissal still falls to be determined, subject to the principles of s.98 ERA. That said it will only be in exceptional circumstances that a constructive dismissal based on a repudiatory breach of the implied term will ever be considered fair.
- 3.6 Where it is alleged that there was a "last straw" event or words then the last straw itself need not amount to a repudiatory breach of contract but it must not be innocuous; it must contribute to the claimant's acceptance that the relationship has been seriously damaged or destroyed by the respondent's conduct.
- 3.7 In deciding whether any dismissal is fair or unfair I may not substitute my judgment for that of a respondent to a claim of Unfair Dismissal. It matters not what I would have done and how I would have decided matters had I been the employer. The test is whether the decision to dismiss fell within the range of reasonable responses of a reasonable employer, and if dismissal falls within that range it is fair, otherwise it is not.

- 3.8 As regards remedy considerations a tribunal ought to consider the risk facing an employee of his or her being fairly dismissed and whether this ought to be a factor in reducing any award. Furthermore the claimant's conduct may be a relevant consideration in the tribunal's assessment of any Basic and Compensatory Awards as appropriate. In either such circumstance there must be findings of fact to justify the reasonable speculation as to what may have occurred if the claimant had not resigned and/or to determine the claimant's conduct or actions and why they ought to be taken into account (or not).

4. Application of the law to the facts: Applying that law to the facts found and by reference to the issues above I concluded:-

4.1 *Did the Respondents breach the term of trust and confidence implied in the claimant's contract of employment by*

4.1.1 *Bullying and harassment*

4.1.2 *Inappropriate handling of performance management*

4.1.3 *Failure to deal with grievance in a reasonable manner (including unfair criticism)*

4.1.4 *was the grievance appeal outcome the "last straw"?*

The respondents failed for a considerable length of time to manage the claimant's performance effectively by way of appraisal or under formal capability procedures, and to investigate and manage perceived misconduct within the disciplinary procedures at all. In the circumstances such as they were at the time of the claimant's dismissal the respondents were not well placed to dismiss the claimant fairly notwithstanding their misgivings about her. They would have to have taken more formal performance management steps (including giving a series of warnings and targets) and waited longer and for serious failings by the claimant before dismissing her on grounds of capability; she seemed at the time to be responding to Ms Kalaji's efforts and to be improving. The respondent had suspicions of misconduct but had not investigated them properly or at all, and in the way that they dealt with matters, such as the overpayment of wages, they left open the belief that this was accepted as a mistake which was corrected by the claimant. Against that background the respondents applied undue emotional pressure on the claimant especially through the oppressive words and actions of Dr Smits with the apparent consent or acquiescence of his partners. She reasonably felt that his words and actions created an intimidating working environment and her feelings were shared at various times by many of her colleagues. She felt that she was being got; so she was. The respondents were even aware of the risk of the claimant resigning and claiming constructive dismissal but carried on applying pressure and then influencing the grievance and grievance appeal process. In all of the circumstances the claimant can have had no reasonable belief that the respondents would treat her fairly and as if the contractual relationship between them was subsisting. She had a hope that matters would be resolved through the externally managed grievance

process but as is shown above her faith in that too was suborned by the way in which it was handled. Sadly the grievance process and the appeal against the rejection of her grievance were dealt with in such a way that the claimant knew the relationship with her then employers had been destroyed. The respondents no longer treated her as if they were in a contractual relationship which required, as its foundation, trust and confidence; they had none in her. The respondents were going through the motions as far as the grievance procedure was concerned and so they unfairly influenced the grievance and appeal officers. Those external officers were effectively seduced from their remit and from proper consideration of what the claimant raised quite properly as matters of grievance; instead they fell for the respondents' character and employment assassination of the claimant. The respondents destroyed the relationship of trust and confidence with the claimant and the appeal outcome confirmed this to the claimant; it was an effective last straw in circumstances when she thought it might save the relationship. It was not just the fact that the outcome did not suit her but rather that it confirmed all that she had feared about the respondents' and vindicated her own misgivings. In that context the outcome cannot be considered innocuous and it did contribute to and compound the respondents' breaches of contracts. The answer to 4.1.1 – 4.1.4 above is in each case "yes".

- 4.2 *Did the Claimant resign in response to the above?* Yes. The claimant suspected the worst and so effectively tipped off the LHB that she would not be returning to work, as was more likely than not the case and as it turned out. I find however that the claimant was prepared to return in the unlikely event that the grievance appeal process and its outcome reassured her that the relationship with the respondent's was not destroyed or seriously damaged after all. It did not. This tipped the claimant over to decide that enough was enough and she ought to resign because of the respondent's conduct towards her.
- 4.3 *Did the Claimant wait too long before resigning and in so doing affirm the contract?* No. She exhausted the grievance procedure and resigned timeously upon receiving its outcome.
- 4.4 *In the event of this being a dismissal and despite it being an allegation based on the breach of the implied term of trust and confidence was any such dismissal for a potentially fair reason, being a reason related to the Claimant's performance by reference to capability and aptitude?* There is nothing in this case to make it an exception to the general "rule" that a dismissal by breach of the implied term, and one that is strenuously denied throughout, is not usually going to be a fair dismissal. To be fair the steps taken by the respondent would have to fall within a range of reasonable responses of a reasonable employer. That cannot be said of the steps taken by the respondent's in this case on the basis of my

findings of fact. The claimant's performance could have been better but the respondent's mismanaged and bullied her; despite this there were signs of improvement. She was not given a fair chance to improve free from oppression and uncorroborated suspicion of misconduct. The respondents had taken against her, and may have had some cause for some concern, but they failed to manage either her performance or conduct effectively and fairly instead preferring to apply pressure on her perhaps in the hope that the claimant would resign as she did (but obviously hoping that their delegation of the grievance would head off any tribunal claims). The dismissal was not fair in all of the circumstances and according to the considerations in s.98 (4) ERA.

4.5 *Subject to any finding that the Claimant was dismissed and was unfairly dismissed ought any compensatory award be reduced to reflect the risk facing her of her being fairly dismissed ("Polkey")?* The respondents had ample time and some reason or suspicion to manage the claimant's performance and conduct better. They chose not to do so. They were some way off being in a position to justify dismissal for a reason related to capability by reference to aptitude, or for a reason related to conduct. If they had the evidence to do either and to effect a fair dismissal they ought to have done so but quite clearly they preferred to wait for the claimant to resign and in the meantime they were prepared to her work on. They ought not to benefit by having their cake and eating it, by having a discount for the possibility of doing what they consciously avoided doing properly. That apart I find that the Polkey risk cannot be assessed and is far too speculative. The respondents did not have sufficient evidence of misconduct to pursue the claimant save in relation to her request of a colleague to disclose emails (a matter neither Dr Haque nor Dr Morris attached much importance to in fact although it was a convenient hook). There was evidence that the claimant was improving in her performance and she may have improved further under good management and without the bullying. If one has to speculate as to whether the claimant may have been fairly dismissed one would have to speculate that management leading to that decision was fair and reasonable; in this case that is too speculative to assume. The respondents could not be trusted to act fairly and reasonably in any procedures concerning the claimant by the time of her resignation. It is extremely unlikely that they would have attached any weight to her considerable mitigating factors. It is extremely likely that they would again have suborned any ostensibly fair procedure attempted by an outside agency. This latter speculation is assisted by precedent. There will be no Polkey reduction.

4.6 *In the event of a finding that the Claimant was unfairly dismissed ought any basic and compensatory awards be reduced to reflect her conduct and or actions as appropriate?* No. The claimant's behaviour may have called for better management; absent that and present bullying and harassment the claimant did the right thing in raising a grievance. She was

then let down in respect of that grievance and her appeal against its outcome. In these circumstances it would not be just and equitable to reduce the claimant's awards because of her conduct or actions. To do so would also reward employers who failed to manage an employee properly, who harboured unsubstantiated suspicions about the claimant's conduct but did nothing formal about them, who breached her contract by destroying the relationship and then suborned the grievance procedure.

4.7 As the claimant resigned at a time of her choosing then, albeit her resignation was a constructive dismissal, the respondents cannot be said to have breached the notice provisions of her contract. Loss of notice pay may be a remedy point but the claimant's claim that the respondents breached her contract in this regard must fail.

Employment Judge T V Ryan
Dated: 19 May 2017

JUDGMENT SENT TO THE PARTIES ON

19 May 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
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NOTE:

This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.