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EMPLOYMENT TRIBUNALS

Claimant: Mrs J Geekie

Respondents:

- (1) Dr J Hopcroft
- (2) Dr R Summers
- (3) Dr C Wright
- (4) Dr A Mayet
- (5) Dr P Afsar
- (6) Dr N Skaria
- (7) Dr G Rajarathinam
- (8) Dr S Keegan

Heard at: East London Hearing Centre

On: 14 - 15 June 2018 and (in chambers) 30 July 2018

Before: Employment Judge Ross

Representation

Claimant: In person
Respondent: Ms Patricia Hall, Consultant

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The complaint of unfair dismissal is not upheld.
2. The Claim is dismissed.

REASONS

Complaints and Issues

1. The Claimant was continuously employed by the Respondents from 4 November 2002 until 30 June 2017, latterly as a Nurse Prescriber. Having complied with the Early Conciliation procedure, the Claimant brought a complaint of unfair dismissal,

alleging that she was constructively dismissed. Her case was that certain acts amounted to breach of the duty of trust and confidence.

2. At the outset, I identified the issues with the assistance of the parties. The parties agreed the List of Issues as follows:
 - 2.1. Was the act or omission (or series of acts or omissions) by the doctors at the Fern House Surgery a cause of the Claimant's resignation?
 - 2.2. Did the act(s) or omission(s) by the Respondent amount to a fundamental breach of the contract of employment, or threatened such a breach? The Claimant asserts that the Respondent acted in breach of the implied term of mutual trust and confidence by the series of acts set out in her Claim form. The Claimant's case is that the last straw was an incident alleged to have occurred on 30 March 2017, particularized at paragraph 50 of her witness statement. Therefore, the sub-issues are:
 - 2.2.1. whether the Respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and
 - 2.2.2. if so, whether there was any reasonable or proper cause for such conduct.
 - 2.3. Did the Claimant affirm the contract following the breach?
 - 2.4. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of compensation only.
3. The Claimant contended that the last straw was Dr. Mayet asking another member of staff for a statement against the Claimant, which amounted to harassment of the staff member and upset to her. This is alleged to have occurred on 30 March 2017 after incidents identified in the Claim form on 15 July 2016, 16 November 2016, 21 November 2016, and 23 November 2016.
4. The Respondent denied breach of the implied term relied on. The Respondent confirmed that it advanced no alternative case of fair dismissal if a constructive dismissal was made out.

Evidence

5. There was an agreed bundle of documents (pages 1-238). Pages in this set of Reasons refer to pages in that Bundle (which was added to during the hearing). Ms. Hall helpfully provided a list of essential reading.
6. I read witness statements for and heard oral evidence from the following witnesses:

For the Claimant:

- 6.1. The Claimant

6.2. Lesley Turner

For the Respondent:

6.3. Lorraine Phipps

6.4. Dr. Mayet

7. None of the following findings should in any way be taken as critical of the clinical or administrative ability of those involved. Indeed, from what I heard, the clinical witnesses were all competent; and, in the case of Dr. Mayet, he was well aware of the financial challenges currently faced by GP Surgeries.
8. I found that the Claimant acted as she did believing that she was acting on principle. Her evidence was coloured by the fact that she was someone who tended to have strong emotions, and who did consider herself a person who had to represent other staff, against an axis that she perceived to consist of Dr. Mayet and Ms. Phipps. This is evidenced by her opposition to the imposition of a new contract in November 2015, which she considered flawed because not all terms were set out, and the response from Ms. Phipps, set out in paragraph 7 of the Claimant's statement.
9. When giving his evidence, I found that Dr. Mayet displayed not just self-confidence but also a belief that he was always right. For example, he spent some time instructing me on the legal position when the Claimant did work as a contractor for the Witham Sub-locality, with more conviction than some members of the Bar might have done. I inferred from this that he was unlikely to have received criticism well, constructive or otherwise, particularly about the running of the Surgery from the staff and nurses at the Practice.
10. From the evidence of the witnesses, I inferred a mutual dislike between Dr. Mayet and Ms. Phipps on the one side, and the Claimant on the other. For example, in the course of events at the surgery in 2016, Ms. Phipps referred to an incident in 2011 at North Chelmsford Healthcare Centre, where both herself and the Claimant worked at the time. I found this to be quite unnecessary in the circumstances and lacking in relevance; and, furthermore, it was a stale matter that the partners of the Surgery (if not Dr. Mayet) were aware of this, because the letter at page 71 was on the Claimant's personnel file.
11. The evidence also showed the Respondents to have dealt with the Claimant after she gave her notice in a petty and arbitrary way. For example, she was not given the customary leaving gift. I rejected the Respondents' evidence that this practice had been altered; I found that this occurred because the Claimant had complained about Dr. Mayet.
12. Furthermore, I found the assertions that the Claimant had pressured witnesses to give statements to be misconceived. The Claimant was entitled to try to get witness evidence in support of her case. This is what she did; the fact that the Respondents did not like this result of her grievance and subsequent litigation is irrelevant. I accepted the Claimant's evidence on this point in preference to the hearsay evidence.

The Facts

13. I heard a lot of evidence over the course of the hearing. The following are the relevant findings of fact.
14. The Claimant was employed at the Fern House Surgery, a partnership of doctors with over 16,000 patients.
15. From 2016, the Claimant was also retained as a locum providing out of hours cover in local care homes to help reduce the GP's workload for all the practices in the sub-locality.
16. Contrary to the protestations and legal analysis of Dr. Mayet, I find that the Claimant worked on a self-employed basis in this role for the Witham Sub-locality, not as an employee of the Surgery. She sent invoices for the work done "*for Witham Sub-locality*": see eg. page 196. I found that the Surgery, as the largest practice in the Sub-locality (which consists of four GP surgeries) merely managed the administration and payment of fees. There was no documentary evidence of any contract of employment for this work; there was no evidence of any weight that the Claimant was employed by the Surgery in this locum role. Dr. Mayet's oral evidence about the contractual position was based on assertion and misunderstanding as to the legal position. He was adamant that there could have been no breach of the implied term of trust and confidence if the Claimant could continue working with the same GPs in her locum role; and was keen to argue with me about her status in this role, despite my efforts to merely explain the different legal status of employees and self-employed persons.
17. Although I questioned why this line of questioning was relevant, Dr. Mayet, despite his opinion on the law (or possibly because of it), did not appear able to grasp this.
18. In any event, even if I am wrong about this, I found that this role was not relevant to the issues that I had to determine, which focussed on whether there was a repudiatory breach of her contract of employment as Nurse Prescriber at the Surgery.
19. Dr. Mayet believed that the Claimant considered herself indispensable, and accordingly powerful, in circumstances in which surgeries were struggling financially. He considered that she complained too much, and was more confident to be unhappy because of the reduced resources. Having seen him give evidence, and given his precise knowledge of the financial position in his role as a Commissioner, I can understand that her role as a staff member minded to represent others, or that which she felt to be correct, would alienate him.

Incident 15 July 2016

20. I heard conflicting accounts of this incident from the Claimant and Dr. Mayet. I did not accept either account of events as reliable.
21. The Claim alleges: "*Dr Ahmed Mayet threatened and intimidated me alone in a room with regards to my job if I failed to back him and other GPs over another partner.*"

22. The Claimant's evidence, at paragraph 12 of her witness statement, states that, whilst working in his room, Dr. Mayet told her that if she continued to back her GP mentor, her job could be at risk. In oral evidence, she explained this took place at the end of the day, and they were the only ones left in the Surgery. Dr. Mayet alleged that the Claimant misunderstood an informal conversation; he alleged that he had praised her locum work but advised her to stay out of practice politics if possible.
23. I do not accept the words alleged by the Claimant were spoken. It seemed to me, having seen Dr. Mayet give evidence, that he would not have used such words. Also, given the Claimant's strong personality, I found that she would have put such a complaint in writing immediately.
24. Furthermore, the Claimant relied on a note that she made after 16 November 2016 (page 77). There is no reference in that document to threatened job loss during the conversation in July 2016, and, in any event, this note was written over four months later, when the Claimant had just had the experience with Dr. Mayet explained below.
25. On balance, I find that Dr. Mayet advised the Claimant to stay out of the Practice's politics, but I find he minimised what he did say in his evidence. It seems to me to be incongruous for him to have praised the Claimant and yet warned her to stay out of the politics. There must have been a flow of conversation in-between. This much is supported by his evidence during the grievance investigation: see paragraph 15 at page 101, in which he stated that he had stated to the Claimant that she as "*a tip should try and stay out of the politics*".
26. It is likely that he told the Claimant to consider her approach to her mentor GP with care, because her mentor would probably be leaving. I find the gist of what he said was that there were different parties or camps within the Practice. He said this because he believed that the Claimant did favour her mentor GP and because as he saw it, there was "*stirring and politics*" within the Practice (page 101).
27. The Claimant complained of this incident to Dr. Hopcroft, the senior partner at the Practice. No steps were taken by Dr. Hopcroft, probably because the Claimant did not request that any action be taken (see paragraph 26 of the grievance report, page 102).
28. Although I accept that this conversation with Dr. Mayet was likely to promote an unpleasant working environment, this incident in itself was not calculated or likely to damage the relationship of trust and confidence. He was giving her warning of differences between the partners; in one sense, that was demonstrating confidence in her. It was only later, after the incident of 16 November 2016, that she perceived this July conversation to have been threatening and intimidating.

16 November 2016

29. The Respondents did not challenge the Claimant's evidence that the amount of nursing resource at the Practice had reduced substantially, with a long-term nurse leaving in December 2015, and another reducing their hours. The Claimant had

been working for 6 months with one other qualified nurse who worked 15 hours per week. I accepted administrative jobs had to be fitted in between patients. This situation was complained about by the Claimant.

30. On 16 November 2016, the Claimant raised with Ms. Phipps that there was a clinical risk and a strain on the nurses by the adding of extra appointments by the GPs. She complained that extra patients had been added to the nurse list in the first hour of the day by Dr. Mayet, when she considered that they could have done by himself. The Claimant asked Ms. Phipps to tell the GPs only to send the nurses truly urgent matters. It had previously been directed that the nurses were to raise such matters with the Manager and not to disturb the GPs (evidenced by the reference at page 132).
31. Dr. Mayet had a good reason to ask Reception to book a patient in with the Claimant, and with Natalie Raven, HCA. He based his decision on the clinical need and the apparently available slots in the nurse list.
32. Equally, the Claimant was as busy as she stated in evidence; I accepted her evidence in cross-examination on this. The times given by the software used give only a snapshot; they do not provide the true context, which the Claimant did in her oral evidence. The cross-examination on this issue tended to show the poor relationship and lack of acceptance of facts between the parties.
33. Ms. Phipps contacted Dr. Mayet at around 0930 to inform him that the Claimant had complained that extra patients were booked in. I rejected his evidence that the Claimant should not have raised this with Ms. Phipps rather than him; from the evidence I heard, the Claimant raised her complaint with the correct Manager and that was part of the process.
34. Dr. Mayet was very unhappy with the fact that the Claimant had complained; otherwise, he would not have left his room to go and see her. I find that he entered her room and closed the door, something which Ms. Turner noted that he did in other cases to minimise the risk of witnesses to what he might say. He lost his temper in his meeting with the Claimant; he did raise his voice and point his finger at her, although he did not shout. His witness statement evidence was uncharacteristically vague as to what precisely was said: "*I believe that I said "it works both ways"*", but he did admit to being "*assertive*". Had he not lost his temper, he would have had a clearer recollection.
35. The evidence that Dr. Mayet provided during the grievance process was somewhat different to his evidence before me:

"AM stated that he did not think that he was aggressive but felt that "relationship-wise" it was better for JG to come to him direct. AM said that he explained to JG that it "works both ways" in terms of coming to the Doctors direct with a problem as if it goes via another person it can escalate. AM refuted saying that he would "get" JGAM also stated that he did not shout at JG but acknowledges that he has a loud voice." (page 101).
36. Having seen Dr. Mayet give evidence, I do not accept that he would have stated that he would "*get*", the Claimant. If he had said this, I am sure that such a remark

would have been included in the instant messages for that date, which are at page 61. The relevant message at 10.08, which appears to refer to the visit of Dr. Mayet to the Claimant's room, states:

"no, its ok been told off by ahmed so I cant be bothered anymore they can do what they like"

37. As set out in the Claimant's own note (page 77), I find that he stated that he Claimant should have gone to him direct and not discussed things with the Practice Manager; he admits saying something similar in his evidence in the grievance: he *"felt "relationship wise" it was better for JG to come to him direct"*. This was a forceful, excessive, telling off by Dr. Mayet, as the Claimant noted in her instant message at 10.08.

38. Dr. Mayet also made an implied threat to the Claimant, which explains the *"works both ways"* comment admitted by him. His words contained an implicit threat that if he complained about the Claimant to Ms. Phipps, rather than to the Claimant directly, this could be escalated, with the implication being that some unspecified disciplinary action may escalate from this. Also, I find that he was pointing at the Claimant to emphasise this point. I did not accept his evidence on these points; in response to my question, he stated:

"I may have said in wrong way at time – if said sending too many pts, I would act in CCG lead."

Said if go via another party may not solve problem and not get right outcome. I may have explained it in wrong way in retrospect."

39. For a witness who was usually precise, this amounted to a concession that he had made the admitted comments so that they were taken as a threat.

40. This explains why the Claimant responded *"Are you threatening me?"* Dr. Mayet then left her room and did not reply. It was not suggested by him that he had replied that she was mistaken about her belief. I did not accept that the Claimant was an aggressor on the day in question, nor that she charged into the corridor after Dr. Mayet.

41. I did not accept the oral evidence of Dr. Mayet that this incident lasted 10-15 minutes, discussing clinical issues. This was not mentioned at his interview with the consultant.

42. Some time after this incident, the Claimant made the note at page 77. The fact that it is not entirely accurate is a reflection of her emotional state after this conversation. She was upset by the visit and words of Dr. Mayet. Dr. Wright was informed by the Claimant on the day what had taken place, although she was not shown the note made by the Claimant at page 77. On balance, I concluded that this note was created after 18 November, when the Claimant realised that she may be investigated for the content of instant messages sent by her. It was given to Dr. Hopcroft at some point before 23 November 2016.

Instant messages audit

43. I have no doubt that everyone at the Practice believed that they were working in the best interests of patients. It was for this reason that, on 18 November 2016, the Claimant wanted a patient requiring an urgent ECG to be moved to the GP list. Her concern was patient care - that overloading the nurse's lists could lead to mistakes: see the messages at page 66. On that day, Dr. Mayet had asked reception to give this patient to the nurses to do the ECG because it was urgent and he believed that they had capacity.
44. Ms Phipps' evidence was that Ms. Shawyer, Head of Reception, advised her that on 16 November and 18 November the Claimant and Ms. Raven were refusing to see extra patients and had become aggressive over the instant messaging system and made rude comments about Dr. Mayet. This is an exaggeration; even the statement of Ms. Shawyer at page 133 does not mention the comments as being aggressive, but merely disruptive and inappropriate about GPs.
45. I do find, however, that Ms. Shawyer was finding her job stressful, and complained, being caught between two parties. She was concerned that there would be a "Significant Event" complaint, which is referred to by the Claimant in the instant messages. She was worried about that and its potential impact on her.
46. Ms. Phipps carried out an instant messages audit. The messages included those recorded at page 61 (from 16 November) and those at page 66-67 (from 18 November). I do not consider that it is possible to interpret these as "aggressive". Moreover, it is difficult to see that the Claimant said anything particularly rude about Dr. Mayet. The messages from the Claimant display a concern for patient safety and a concern to protect nursing and HCA staff from being overwhelmed, with the consequent risk of mistakes. From the entries, the most that might be said is that it was inappropriate for the Claimant to state "*he has no idea*" about Dr. Mayet and his decision to send a patient to the nurses.
47. By the time of the Partners' meeting on 21 November, Ms. Phipps had prepared an Audit report, including, at Annex 3, evidence relating to an incident in 2011 at a Healthcare Centre, involving the Claimant and the use of Facebook messages (see page 71).
48. I find that, on the basis of the messages that I have seen, the preparation and submission of this report was an overreaction to something that could, in all reasonableness, have been managed by a brief conversation. It was not alleged, however, that Ms. Phipps did this report at the bidding or direction of Dr. Mayet, nor if this was implicit, how he effected this.
49. Furthermore, Ms. Phipps made assumptions about how busy the Claimant and Ms. Raven (Health Care Assistant) were, without ever having checked with them and going purely from the diary time tool on the software.
50. Moreover, it was an exaggeration to describe the Claimant and Ms. Raven as refusing to see patients. The patients were seen; the entries at 1017 on 18 November (page 66) show that despite complaining, Ms. Raven did see the urgent case. The Claimant, not unusually from the evidence of Ms. Phipps and Dr. Mayet,

was complaining about the number and timing of patients being sent to them. This was nothing new or surprising. Ms. Shaw made the reasonable point that the nurses needed to resolve this issue of extra patients being added with the doctors, not reception.

51. There was no formal or informal disciplinary action taken against the Claimant. The partners decided that the Claimant would be interviewed about the messages by three GPs. There is no evidence that this was to be a disciplinary hearing: see, for example, the minutes of the Partners Meeting of 21 November 2016 (page 232).
52. Ms. Phipps claimed that Dr. Mayet stopped disciplinary action against the Claimant. Such a claim is neither pleaded, nor documented in the contemporaneous documents. I rejected this assertion, but it tends to confirm that the Respondents were not in the process of taking disciplinary action against the Claimant.
53. I attached limited weight to the statement of Ms. Shawyer at page 133. She was Head of Reception and, it seemed to me from all the documents, likely to be under the management and influence as a friend of the Practice Manager, Ms Phipps, when she wrote this, given that she was still in the Respondents' employment. She was not present for cross-examination. She was caught in a difficult position between two strong personalities, with Dr. Mayet on one side, and the Claimant on the other.

The grievance procedure

54. On 23 November 2016, Dr. Hopcroft, the senior partner at the Surgery, held a meeting in his room, attended by Ms. Phipps (maiden name Hendon), Ms. Geekie and Ms Raven. The advice he had received from Peninsular, the Practice's human resources adviser, was that the issues between the parties should be resolved through informal grievance with a mediated solution, and to draw a line under it, ensuring everyone understood what was expected going forwards. Dr. Hopcroft and Ms Phipps believed that the best approach was to arrange a meeting between Dr. Mayet, the Claimant and Ms. Raven to improve the working relationship. An informal meeting was agreed to take place when Ms. Phipps returned from annual leave; and Dr. Mayet was to be advised not to discuss the incidents of 16 November and the instant messaging with the Claimant or Ms. Raven.
55. It is important to note that Dr. Mayet is recorded as being "*upset about the instant messages*", but what is agreed upon at the meeting is an informal resolution.
56. In fact, a formal grievance investigation was commenced in January 2017. This was contrary to the Grievance Procedure of the Practice, which provided for an informal approach to be attempted first. The grievance was dealt with formally because Dr. Hopcroft received advice that it was better to proceed in this way by Peninsular, because another employee Kathy Wilshire had by then accused Dr. Mayet of bullying, and had sent in a written statement. As far as I could see from the evidence, the use of a formal procedure put the Claimant at no disadvantage.

57. The Claimant was interviewed by a consultant from “Face to Face” on 11 January 2017. “Face 2 Face” was a consultancy recommended by Peninsular.
58. Although the Claimant was correct in alleging that the Respondents did not follow the Practice’s grievance procedure in using a third party to hear the grievance, I find that the use of a third-party consultancy was done to avoid the appearance that the investigator was partial to either side in the dispute. The use of “Face 2 Face” was designed to give the Claimant confidence in the process; it was not calculated or likely to undermine the relationship of trust and confidence between employer and employee.
59. However, I found the “Face 2 Face” grievance investigation and report inadequate for the purpose of investigating the Claimant’s grievance, because it contained critical errors or misunderstandings. To begin with, the report stated, at paragraph 10, that the Claimant confirmed that there were no witnesses to the incident on 16 November. To my mind, the investigator had no real basis for this finding. First, as far as I can see, the Claimant did not “confirm” any such thing (because the investigator had not suggested that there were no witnesses); the Claimant had stated that Dr. Mayet had closed the door on entering her room.
60. Secondly, one part of the investigation must be for the investigator to find out whether there were any witnesses, and reach a conclusion on the whole of the evidence, not a partial view of it, where there was the word of one party against another. This was particularly so where, as here, one party was in essence the instructing party of “Face2Face” and where, according to Dr. Mayet, there would have been about ten people in the vicinity of the incident of 16 November, where there were paper-thin walls. I concluded that this defective investigation undermined the grievance findings, to which I gave little weight, preferring to base my judgment on the oral evidence tested in cross-examination.
61. Furthermore, in respect of the complaint that the Claimant had previously reported Dr. Mayet for advising her to pick her friends and support wisely but had had no feedback, the consultant’s report concluded:
- “Given the passage of time, I do not consider it appropriate to uphold this grievance point.”*
62. This is a conclusion which is inconsistent with the stated purpose of the grievance investigation and the experience of anyone who has dealt with harassment cases; often, a victim will not complain about earlier incidents until later, more serious, incidents emerge. The investigator needs to consider the whole pattern of events in such cases; experience shows that the harassment can continue over a period of years, so if events are discounted simply because of the elapse of time, harassment and bullying may sometimes be impossible to prove or may be seen to be less serious than it has been.
63. In addition, I found the conclusion at paragraph 35 of the report simply obtuse. The Claimant’s evidence was that she had been treated differently to her nurse colleagues by Dr. Mayet by not being given a Christmas gift. I find her description of “discrimination by exclusion” understandable. I found it odd that the consultant

did not ask what, if any, inference could be drawn from that conduct. I drew the inference that the Claimant was being treated less favourably because she had complained about Dr. Mayet's conduct. Quite why the receipt of a Christmas card from him altered anything, I could not understand.

64. The report concluded by recommending mediation may assist to improve the working relationship between Dr. Mayet and the Claimant.
65. The partners at the Practice accepted the decision of the consultant.
66. At a short meeting on 13 February 2017, the Claimant was informed of this decision. The Claimant complained that staff would now feel that they could not raise concerns and complained that she was ignored by Dr. Mayet.
67. Ms. Phipps advised that the GPs and management would like to arrange a meeting with the parties to improve working relationships, to ensure all parties have clear understanding of what was expected. I find that this was a genuine proposal, and the management did want to draw a line under what had gone before, in order to move forward. Ms. Phipps and Dr. Hopcroft explained that Dr. Mayet had learned his lesson.
68. The fact that this offer followed an unsatisfactory grievance investigation and report conducted by a third party was not the fault of the Respondent.
69. One difficulty was that, after this meeting, the Claimant was informed by other staff that Dr. Mayet had been telling staff that he had been exonerated by the report and was taking his wife out to celebrate. Although the Claimant was initially wrong as to the date that she gave (a date when he was out of the country), she readily accepted her mistake in evidence and I accept that the Claimant was told this; and having seen Dr. Mayet, and his tendency to believe that he was always right, I find that he did say this. This was not a breach of the implied term of trust and confidence; in some ways, the inadequate grievance investigation and decision did exonerate Dr. Mayet. For him to say this to other staff, however, was insensitive to the feelings of the Claimant. In those circumstances, it is understandable that the Claimant did not have much faith in what would happen going forward.
70. Subsequently, the Claimant requested an appeal on 10 March 2017. The grounds of appeal (page 108) largely criticised the independence and performance of the first consultant.
71. In advance of the appeal hearing, the Claimant gathered witness statements to support her case. The appeal was conducted by "Face 2 Face" again. The hearing took place on 10 May 2017.
72. In the consultant's report, the original decision was upheld. By letter of 14 June 2017 (page 144) Dr. Hopcroft stated that the Respondents confirmed the decision, that Dr. Mayet would undertake management training, that the Practice was sorry the Claimant had not retracted her resignation, and that it had been prepared to arrange mediation.

Incident 30 March 2017

73. The Claimant alleged that on 30 March 2017, Dr. Mayet approached another healthcare worker, Jill Seabrook, asking for a statement against the Claimant in respect of comments that had been made against him.
74. The Claimant stated that she was told by Ms. Seabrook of this approach. Ms. Seabrook had already refused to provide one, and had not wanted to get involved in the dispute between Dr. Mayet and the two complainants (the Claimant and Ms. Wilshire). As a result of this information, the Claimant was convinced that Dr. Mayet would continue to try to find evidence against her.
75. Dr. Mayet denied approaching Ms. Seabrook, alleging that she had spoken to him, and that she had left the Surgery due to bullying by the Claimant. This allegation of bullying had never been raised before, and I rejected it.
76. Furthermore, in the absence of hearing from Ms. Seabrook, it is difficult to conclude what precisely was said by her, when, or to whom. There is the absence of any reference to a conversation with Ms. Seabrook on 30 March 2017 in the resignation letter, which I find to be inconsistent with the Claimant's evidence. In particular, the resignation letter states (with my emphasis added):
- "I have worked for the practice for 14 years and 5 months but due to recent events concluding in a hearing and the defamatory report of the findings"*
77. On balance, it is likely that the Claimant has subsequently assumed from her knowledge of conversations amongst staff that Dr. Mayet was still trying to get a statement from Ms. Seabrook on that date.
78. However, even if she was correct in this assumption, bearing in mind that the Claimant had brought a grievance appeal and was collecting witness statements against Dr. Mayet, he could hardly be blamed for seeking to obtain some evidence in rebuttal about the instant messaging in an attempt to highlight her dislike of him. Given the context in which he approached Ms. Seabrook, I do not find that this was calculated nor likely to destroy the relationship of trust and confidence. To some extent, the Claimant may have jumped the gun in resigning, because had Dr. Mayet continued to seek witnesses after the conclusion of the appeal, the outcome may well have been different.
79. Dr. Mayet alleged that the Claimant had bullied staff into complaining. This was not an allegation in the Grounds of Resistance, nor was it raised as a disciplinary or performance issue. Having seen the Claimant in evidence, I rejected this allegation which I found was based on assumption, not evidence of fact. But I accepted the evidence that the Claimant did consider herself to be a representative for other staff.
80. Following the meeting at which both grievance reports were discussed and the conclusions accepted without further consideration, Ms. Turner resigned on "*moral grounds*". She did not feel that she could continue working at a place where she believed that employer's responsibilities were not being met and bullying and harassment issues not properly dealt with.

81. I accepted Ms. Turner's evidence that on one occasion Dr. Mayet had warned her not to make adverse comments about Ms. Phipps, and raised his voice, causing Dr. Wright to enter the room. With all due respect to Dr. Mayet, the voice level that requires another colleague to enter to check what is happening is more than mere assertiveness. This evidence tended to corroborate the evidence of the Claimant that Dr. Mayet raised his voice in the incident on 16 November 2016.

Resignation and causation

82. The Claimant was absent sick for four weeks due to an operation, after she received the report. She returned to work for one week, then took holiday for one week.
83. The Claimant resigned on 31 March 2017. Her resignation letter is at page 109, and I noted the contents.
84. The Claimant resigned not merely because of the grievance report and its conclusions, which she perceived to be defamatory. Effective reasons for her resignation were as follows:
- 84.1. The incidents complained of by the Claimant in July 2016 and 16 November 2016.
- 84.2. The outcome of the grievance investigation, particularly the fact that the Respondents adopted the conclusions of the consultant
- 84.3. The satisfied response to the grievance report by Dr. Mayet, explained above at paragraph 68.
- 84.4. The Claimant's fear that Dr. Mayet would look to take sanctions against her, whether formally or informally in the future (evidenced by past experience, such as Dr. Mayet ignoring her at the Christmas social and not giving her a Christmas gift) because she had complained about his behaviour in her grievance. Her perception was that the workplace had become hostile.
- 84.5. The final straw, as she saw it, was her mistaken belief about the alleged incident on 30 March 2017 (that Dr. Mayet had been seeking a statement from Ms. Seabrook). She genuinely believed that Dr. Mayet would not stop, and that the partners and management would not intervene to protect staff.
85. I accepted the Claimant's evidence that she did not obtain another job until after she had handed in her notice. It was never put to her in cross-examination that she had resigned because of a new job.
86. I attached no weight to the statement of Ms. Raven at page 135, withdrawing an earlier statement. She was not present for cross-examination and given her previously friendly relationship with the Claimant (on which I accepted the Claimant's evidence) I could not understand why she would withdraw an earlier

statement supporting a friend unless pressured by management at the Practice where she remained employed.

87. The fact that the Claimant worked out her notice was irrelevant to the question of whether there was a breach of the duty of trust and confidence. A constructive dismissal may be with or without notice; and had she not worked it, she was not entitled to be paid for it. But, in any event, the Claimant decided to put her patients' interests ahead of her feelings, which I found to be a responsible approach.

Relevant Law

88. I directed myself as follows.

89. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

90. The burden was on the employee to prove the following:

- (i) That there was a fundamental breach of contract on the part of the employer;
- (ii) That the employer's breach caused the employee to resign;
- (iii) The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

See *Western Excavation v Sharp* [1978] ICR 221.

91. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

- 91.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

- 91.2. It is an implied term of any contract of employment 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 trust and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

- 91.3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, *Browne-Wilkinson J in Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

- 91.4. The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.
- 91.5. A breach occurs when the proscribed conduct takes place: see *Malik*.
- 91.6. Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.
- 91.7. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at paragraph 480 in Harvey on Industrial Relations on Employment Law:
- “(480) Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action but when viewed against a background of such incidents it maybe considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the “last straw” which causes the employee to terminate a deteriorating relationship”.*
- 91.8. The “last straw” need not be unreasonable or blameworthy conduct. All it must do is contribute, however slightly, to the breach of the implied term of trust and confidence: *Waltham Forest LBC v Omilaju* [2005] IRLR 35.
- 91.9. In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.
92. I note that a breach of trust and confidence has two limbs:
- 92.1. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and
- 92.2. that there be no reasonable or proper cause for the conduct.

Submissions

93. Owing to the fact that the hearing had to conclude at lunch-time on 15 June 2018, due to the requirement for me to deal with another case, I offered the parties the option of returning to make oral submissions on a further date, or of making

written submissions. They agreed on the latter course.

94. Oral submissions were filed with the Tribunal by the Claimant on 2 July and by the Respondent on 3 July 2018, with Ms. Hall helpfully summarising some key passages in the law.
95. I have taken into account all of these submissions. The fact that I do not refer to one or other submission is not evidence that it was not considered.

Conclusions

96. Applying the above findings of fact and principles of law to the agreed issues, I have reached the following conclusions.

Issue 1: Causation

97. The acts or omissions of Dr. Mayet and/or the other partners were an effective cause (or more precisely, effective causes) of the Claimant's resignation. This conclusion is explained at paragraph 87 above.

Issue 2: Breach of the relationship of trust and confidence?

98. The acts of Dr. Mayet during the incident of 15 July 2016 did not amount to a fundamental breach of the contract of employment, nor was it capable of forming part of a series of acts amounting to a breach. True, it was inappropriate for Dr. Mayet to make the statements that he made, which would have put any employee into an invidious position; but it was not likely or calculated to destroy the relationship of trust and confidence between employer and employee. I found that these statements demonstrated the existence of opposing parties within the partnership, and a warning not to engage in Practice politics because of this. As I have found, to some extent this represented extending a confidence to the Claimant, albeit one which was inappropriate.
99. The incident of 16 November 2016 demonstrated behaviour by Dr. Mayet that was unreasonable, but I accepted the submission of Ms. Hall that it did not amount to a breach of the relationship of trust and confidence for the following reasons:
 - 99.1. This was a one-off event in which a raised voice, and an implied threat, was directed at the Claimant.
 - 99.2. Moreover, on receipt of her grievance, the Respondents followed advice and instructed consultants to investigate it, following advice to investigate it formally.
 - 99.3. The consultant's investigation into the grievance was unsatisfactory in several respects; but there was no allegation that this was because the consultant had been instructed to behave in this way. The Respondents cannot be blamed for the inadequacies of the third party investigation.
 - 99.4. I have found that there was no link between the receipt of the grievance note (page 77) and the decision to investigate the instant messages. The

Claimant did not allege that Ms. Phipps carried out her investigation because she had been instructed to by Dr. Mayet.

- 99.5. Although the Claimant feared further sanctions from Dr. Mayet, I have found that he did not commit any further act which could amount to a breach of the relationship of trust and confidence. Even though the Claimant genuinely believed that he would do such an act, her emotions got the better of her; and she resigned before any such act had occurred.
100. On balance, the decision of the Respondents to accept the investigation report was not a breach of the relationship of trust and confidence. The partners are all busy professional people; they instructed a consultancy to perform a job. Although it was poor management to simply accept the conclusion without question or further consideration with the Claimant, I do not consider that this was an act calculated or likely to destroy the relationship of trust and confidence.
101. As I have explained above, the Claimant was not made the subject of disciplinary action over the instant messages audit report, whether on 21 November 2016 or any other date. I found that the Respondents favoured an informal resolution of the disputed matters, with a line being drawn under past events.
102. Finally, although the Claimant genuinely believed that Dr. Mayet was trying to get evidence against her from Ms. Seabrook on 30 March 2018, this allegation was not proved for the reasons that I have given above. This allegation could not amount to a “last straw” or a breach of the implied term in any event.
103. The Respondents did not follow the Practice Grievance procedure in some respects, including by skipping the informal stage and using an external consultant, which were parts of the Claimant’s case highlighted in evidence. But this was done upon advice, and the Claimant suffered no prejudice. Indeed, in some ways, this benefitted her, because she had an impartial set of eyes carrying out the investigation and she wanted a response to Dr. Mayet’s actions. Any failures by the Respondents to follow the Grievance procedure were not likely or calculated to destroy the relationship of trust and confidence; and they were done with reasonable cause.
104. The Claimant’s written submissions included 22 bullet points, which the Claimant alleged amounted to acts which destroyed the relationship of trust and confidence. It would not be proportionate for me to address each of these in turn for the following reasons:
- 104.1. Several were not part of the Claim, nor raised during the formation of the list of issues, nor part of the Claimant’s evidence, such as the allegation that the grievance was not kept confidential.
- 104.2. Some of these matters post-dated her resignation.
- 104.3. Some of these matters were not put to the Respondent’s witnesses. For example, it was not put to the Respondent witnesses that mediation was not offered to her nor was any causation for this suggested. The documents led me to infer, in any event, that mediation was to be

proposed, but the Claimant's resignation in March 2017 made this pointless; and that the Partners had hoped that the Claimant might withdraw her resignation in which case they were willing to engage in mediation: see the appeal outcome letter from Dr. Hopcroft at page 144, dated 14 June 2017.

105. Further, insofar as the Claimant complained that the Grievance process was not concluded in a timely way, this did not form part of her cross-examination. Also, these submissions overlooked the facts that the report was conducted by consultants, not the Respondents directly, and that, on her own evidence, she was absent for an operation and holiday for at least five weeks during this period. Given that this was not raised as an issue nor put in cross-examination, it would be unfair for me to make any findings for the reasons for the delay or the effect of the delay.

Summary

106. Having concluded that there was no breach of the relationship of trust and confidence, I have concluded that there was no repudiatory breach of contract.
107. Accordingly, there is no need for me to determine issues 3 or 4.

Employment Judge Ross

1 August 2018