



EMPLOYMENT TRIBUNALS

Claimant: Miss C-E Smith

Respondent: South Western Ambulance Service NHS Foundation Trust

Heard at: Exeter **On: Monday 19, Tuesday 20,
and Wednesday 21
November 2018**

Before: Employment Judge Matthews

Representation:
Claimant: In Person
Respondent: Mr A Allen of Counsel

RESERVED JUDGMENT

1. Miss Smith was unfairly constructively dismissed by the Respondent Trust.
2. The case will be relisted for a remedy hearing with a time allowance of one day.

REASONS

INTRODUCTION

1. Miss Charlie-Emma Smith's claims and the issues involved were clarified and agreed over the course of two Preliminary Hearings by telephone before Employment Judge Roper on 19 March 2018 and before Employment Judge Ford QC on 4 May 2018, respectively. At the start and during the course of this Hearing, the issues were further refined.
2. For reasons set out in the "Position Statement" (the "Position Statement") produced by Mr Allen at the start of the Hearing, the

Respondent Trust asked for a decision on liability only as the first step. Miss Smith agreed to this approach.

3. The Position Statement is a very helpful document. Miss Smith was invited to take time to consider whether or not the “List of allegations of breaches of implied term” was an adequate summary of the issues to be addressed. During the course of the Hearing, Miss Smith confirmed this to be the case although, having given her evidence, Miss Smith dropped her reliance on 7a. This list was then used throughout the Hearing. In particular, it was used as a ready reference for questions put by the Tribunal and summaries by both sides of their arguments at the end of the Hearing. Below, it is used in the conclusions in this Judgment.
4. Miss Smith claims that she was unfairly constructively dismissed. Miss Smith says that conduct of the Trust amounted to a fundamental breach of the implied term of trust and confidence in the employment contract entitling her to resign and treat herself as unfairly constructively dismissed. The conduct relied on is that summarised in the Position Statement with the modification mentioned above. It is also described in much more detail in the “Further Information” supplied by Miss Smith at pages 31-39 of the bundle. At the Preliminary Hearing before Employment Judge Roper, Miss Smith confirmed that she did not rely on any “last straw” argument.
5. The Trust defends the claim. The Trust says that there was no fundamental breach of contract and if there was, Miss Smith delayed too long before resigning and thereby affirmed the contract. Some points are taken on exactly why Miss Smith resigned. The Trust also pleads that, if there was a dismissal, it was fair for a conduct or some other substantial reason. If unfair, the Trust raises arguments of contribution and that a fair dismissal would have resulted in any event as a result of a disciplinary process.
6. Miss Smith gave evidence supported by a written statement. Mr Christopher Nelson (UNISON Branch Secretary) gave evidence in support of Miss Smith and also produced a written statement. On behalf of the Trust the Tribunal heard evidence from Mr Sam Fraser (at all relevant times, Senior HR Business Partner), Ms Kate Searles (at all relevant times, a Mental Health Practitioner in the Staying Well Service (“SWS)), Ms Sarah Thompson (at all relevant times, Head of Safeguarding), Mr Neil Lentern (Head of Education), Mr Derek McCullough (at all relevant times, Acting Head of Operations, East Division), Mr John Dyer (at all relevant times, Head of Operations, East Division) and Ms Amy Beet (Executive Director of People and Culture). Each produced a written statement.

7. There was an agreed bundle of documentation. This was supplemented by a copy of Employment Judge Roper's Case Management Summary of 19 March 2018, a full copy of Employment Judge Ford's Case Management Summary of 4 May 2018 and pages 256A and B. Miss Smith produced a substantial extract from an October 2018 report by Professor Duncan Lewis of Plymouth University Business School entitled "Workplace Culture at Southwestern Ambulance NHS Foundation Trust". Mr Allen, on behalf of the Trust, confirmed that there was no objection to the production of this document save that it was considered irrelevant. The Tribunal explained to Miss Smith that, unless there was something specific to her case within the report, it was likely that it was irrelevant to these proceedings. The report was not mentioned again. The Tribunal looked at the report in part and noted the executive summary and key conclusions but found nothing of assistance to these proceedings.
8. References in this Judgment to pages are to pages in the bundle unless otherwise specified.
9. Mr Allen produced a chronology and the Position Statement already mentioned. Both Miss Smith and Mr Allen produced written summaries of their arguments and spoke to them.
10. Throughout the Hearing Miss Smith was accompanied by her son. Beyond that, apart from Mr Nelson's evidence, Miss Smith had no help or support. Miss Smith appeared composed and focussed throughout the Hearing. Miss Smith mentioned that she was on medication. Miss Smith did not put much of her case to the witnesses in the conventional way that a representative might have done. To ensure a fair hearing, the Tribunal did this through appropriate questioning. Mr Allen acknowledged that and took no point on it.
11. The Hearing was listed for five days. In the event, evidence and summaries took a little under two and a half days. Rather than using the time allowance to consider and give Judgment, the Tribunal reserved judgment to better consider, in particular, the evidence.
12. There is fundamental dispute concerning some of what happened. Some of this is about perceptions of agreed events. However, a significant part is a simple factual dispute about whether or not an event occurred. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. Whilst Mr Allen, on behalf of the Trust, properly put it to the Tribunal that it should not stray outside the series of specific allegations made by Miss Smith, it is

necessary to consider context. An understanding of the context, founded on the evidence, is one part of resolving the factual dispute.

13. The main protagonists in the dispute are Miss Smith and Ms Searles. In many instances, there is no way of reconciling their evidence. In deciding whose evidence to prefer, the Tribunal will explain why.

FACTS

14. The Trust provides emergency and urgent care and non-urgent care patient transport services in Cornwall, the Isles of Scilly, Devon, Dorset, Somerset, Gloucestershire, Wiltshire and the former Avon area. At the time it filed its response in these proceedings the Tribunal believes the Trust employed some 4,000 people.
15. Miss Smith's background has relevance to the events the Tribunal is concerned with. Miss Smith has a Doctorate in Psychoanalysis specialising in adolescent and eating disorders. Miss Smith also has two Master's and two Bachelor's degrees and a diploma in Arts Therapy. Until December 2015 Miss Smith was registered as an Arts Therapist and had 15 years in clinical practice. In 2015 Miss Smith decided to take a break from clinical practice but continue to support the NHS by working for the ambulance service (316).
16. Miss Smith started working for the Trust on or around the beginning of February 2015. This was initially through an agency. On 2 August 2015 Miss Smith became an employee of the Trust. Miss Smith worked in the Resilience and Patient Support functions. On 11 April 2016 Miss Smith was transferred to the Trust's SWS unit. That remained Miss Smith's substantive post until she resigned by a letter dated 25 September 2017 handed to the Trust on 26 September 2017.
17. The SWS unit was formed by the Trust in December 2015. Its function was to support staff with any issue that might be affecting their overall wellbeing. It offered support with a range of personal problems such as relationship issues and debt. It also provided physiotherapy and mental health support and referrals.
18. The setting up of the SWS was overseen by Ms Thompson and Mr Fraser. Ms Thompson was appointed as its head. Ms Searles was appointed by Ms Thompson and Mr Fraser as a Mental Health Practitioner. Ms Searles' job was to act as the clinical lead for the SWS, providing specialist mental health advice to staff and referrals where necessary. The role included proactive health promotion work. Reporting to Ms Searles was the post of Administrator. The unit also included a Trainee HR Business Partner, Ms Alison Watling. The

reporting structure at 205 does not indicate that Ms Watling reported to Ms Searles. Rather, it appears that Ms Watling provided HR input as necessary. There seems, however, to have been a reporting line of some sort between the two.

19. A few months after the formation of the SWS, it became clear that Ms Searles' workload was precluding her from performing the proactive part of her role. The Administrator's role was, therefore, subsumed within the larger role of Office Manager. The Job Summary for this post can be seen at 202. The Summary includes this: *"The post holder will be expected to deal with routine referral matters including referrals for physiotherapy and counselling and also signposting to various external agencies as appropriate, ensuring only urgent work is brought to the attention of the Mental Health Practitioner."* It is readily apparent that this could be read as having a much wider scope than simply handling the administrative aspects of referrals. However, after Miss Smith started with the SWS it was made clear to her that the job did not include primary decision making on referrals. What the Trust was looking for was someone who would be the first point of contact for employees who approached the SWS, organise Ms Searles' and Ms Watling's diaries and plan health promotion events. It was obvious that the role included dealing with sensitive information concerning employees with serious mental health issues. As Mr Fraser puts it (WS5) *"This required a candidate with emotional intelligence, emotional resilience and organisational skills of a high quality"*.
20. The recruitment panel of four for the Office Manager's job included Mr Fraser and Ms Watling. The inclusion of Ms Watling should be noted. It gave Ms Watling a stake in the success of the chosen candidate. The panel did not include Ms Searles, because she was not immediately available and Mr Fraser felt able to assess candidates for an administrative support role (Fraser WS8). Unfortunately, it is quite clear that Ms Searles felt excluded from the process and *"disgruntled"* as a result of it (see, for example, 354 – para 2.02 and 355 – para 2.05). This omission, in Miss Smith's view, was the cause of a significant part of the events that were to follow whilst Miss Smith was in the SWS (see 259 *"CES stated that KS said to CES...."*). The evidence supports Miss Smith's view.
21. After the interviews had finished and it was decided Miss Smith should be appointed, Ms Searles came in for a discussion. As Mr Fraser puts it (WS8): *"Due to Charlie-Emma's previous experience in a clinical role, Kate had some queries regarding the governance of clinical decision making within the SWS. I reiterated that Kate was the clinical lead of the SWS and held accountability for clinical decisions. Kate was assured by this and was happy with the decision"*.

22. Those words are carefully chosen. In plain terms, as later events demonstrated, Ms Searles, looking at Miss Smith's background, was worried that Miss Smith might stray into Ms Searles' role as the decision maker. In that, Ms Searles was to be proved right. In short, Ms Searles did not think Miss Smith was the right choice for the job.
23. Miss Smith says that, presumably when confirming her appointment, Mr Fraser told her that she might find the role difficult because Ms Searles did not like change. Mr Fraser does not believe that he had any such conversation and it would be highly unlikely that he would have done so (WS9). Given that it is clear, at the very least, that Ms Searles was unhappy about Miss Smith being appointed and probably made this clear to Mr Fraser, someone in Mr Fraser's position may well have wished to give Miss Smith a "heads up". On the balance of probability, the Tribunal finds that this conversation did take place.
24. As noted, Miss Smith started work in the SWS on Monday 11 April 2016. Miss Smith makes detailed allegations about Ms Searles' behaviour towards her thereafter. One of the difficulties the Tribunal has encountered is that there are several documents prepared by Miss Smith setting out her case on this subject. Each is different, although they contain a lot of "cutting and pasting" from each other. This includes Miss Smith's statement. In addition, the documents are written in a very discursive way. There is one document that is an exception. This is the document produced by Miss Smith at 314-325. (It is common ground that the dates in it should be "2016" and not "2017".) That document is essential reading. It was produced by Miss Smith on 7 April 2017 to support her bullying and harassment grievance against Ms Searles and Ms Thompson, although it is almost wholly devoted to Ms Searles' behaviours. It is much more contemporaneous than some of Miss Smith's later documentation of the issues. It sets out the detailed allegations Miss Smith maintains against Ms Searles.
25. Ms Searles categorically denies many of these incidents and behaviours and where Ms Searles does not deny them, Ms Searles does not agree with Miss Smith's interpretation of them (for example door banging – see 302 – third bullet).
26. In making findings of fact on these allegations, the Tribunal takes into account two contextual facts, which are not in issue. First, Ms Searles was, by her own admission, an inexperienced manager. Second, in oral evidence to the Tribunal, Ms Searles described her potential concerns about Miss Smith's appointment. At a "gut level" Ms Searles had noted some "red flags". Miss Smith had completed "half a medical training" and "half a legal training". Miss Smith did not appear

to complete things and the SWS needed stability. Miss Smith had “Doctor” in her title and was a qualified psychotherapist. Ms Searles was concerned that someone with this background might not be able to confine her role to that of the Office Manager. That, and the evidence mentioned earlier (see paras 20-23) make it clear that Ms Searles was very unhappy about Miss Smith’s appointment and did not want her in post.

27. These contextual facts, together with one or two other corroborative pieces of evidence, lead the Tribunal to conclude that, on the balance of probability, Miss Smith’s account at 314-325 is an account of what did happen, albeit interspersed with side swipes about Ms Searles and Ms Thompson which reflect Miss Smith’s opinions about how they did or should have done their jobs, rather than their behaviours towards Miss Smith. (An example of the corroborative evidence relates to Miss Smith’s allegation that Ms Searles told Miss Smith that she did not want her in post but preferred the previous Administrator. The Tribunal notes that Ms Searles accepted that she had discussed the previous Administrator with Miss Smith, although denying Miss Smith’s version of it (see 274 – “*You alleged that Kate had told you....*”).)
28. Mr Lentern was later tasked with investigating Miss Smith’s allegations of bullying and harassment. Mr Lentern interviewed Ms Watling. Ms Watling was a key witness on the subject as she was the most likely person to have noticed the behaviours Miss Smith alleges. The Tribunal recognises that Ms Watling’s evidence does not support Miss Smith’s allegations about Ms Searles’ behaviours. What it does do, however, is acknowledge that there were “*a few things that were not quite as they should be*”, “*There might have been a little bit of a problem between them*” and “*these changes may have caused friction.*”. The notes of Ms Watling’s meeting with Mr Lentern and Mr Lentern’s conclusions have been weighed by the Tribunal in reaching its findings and they are dealt with in more detail below.
29. The Tribunal’s findings as far as Miss Smith’s allegations about Ms Searles and Ms Thompson (to the extent that there are any allegations about Ms Thompson) are concerned are subject to the following.
30. First, it is clear from the timeline that Miss Smith produced at 314-315 (as amplified in the pages that follow) that most of these allegations relate to the first six weeks of Miss Smith’s time with the SWS (see also 199 “*Resolution of this matter....*”. The description by Miss Smith of Ms Searles’ behaviour is very similar to that in the allegations but limited to the one occasion). On the balance of probability, the relationship more or less settled down after a while and Ms Searles

and Miss Smith found a way to co-exist in the office. There is support for this in the bundle (see, for example, 179 para 39, 184 para 29 and the text messages between the two at 364-367 in September 2016). Whilst Miss Smith's account of events after 26 May 2016 at 314-315 (as amplified in the pages that follow) makes a number of allegations, they are far less specific and mostly about other issues or simply criticisms of the way Ms Searles and Ms Thompson did their jobs. At 322 Miss Smith writes that, after the incident on 26 May 2016, "*I ended the confrontation by stating from then on I would answer the phone and make appointments for her. This is what I did. Working to a very dilute version of my Job Description did seem to keep Kate happier....*". That seems to have been the position for the following five months until the October 2016 issue concerning the lecture at Plymouth University (315 and 323-324). That, itself, although symptomatic of the underlying issue between Ms Searles and Miss Smith, looks like a one-off in terms of timing.

31. Second, none of the specific behaviours complained of by Miss Smith involved Ms Thompson. Whether or not Ms Thompson adequately recognised and addressed the problem between Ms Searles and Miss Smith may be another issue, but there is no credible evidence to support any suggestion that Ms Thompson initiated or condoned bullying of Miss Smith.
32. Third, there is a perspective other than Miss Smith's. Miss Smith asserts the failings of the Trust but omits the difficulties she imposed on herself by taking a job which required her to suppress her clinical and other experience. This reflects the obvious disconnect between what the Trust was looking for and what Miss Smith thought she had to offer. The following passage demonstrates this and reflects how Ms Searles and Ms Thompson became the focus of the frustration (316):

"I had decided to take respite from Clinical Practice in 2015 and felt working for the Ambulance Service would be a way to ensure I continued to support the NHS whilst taking a break from the Clinical work I had experienced for most of my working life. The role of Office Manager within the Staying Well Service should have been the perfect employment situation where the Trust would gain all of my knowledge and experience without the high income expenditure associated with a clinician. I did not, and do not wish to be in Clinical Practice but have administrative and communication skills that the Trust should have embraced to enable them to deliver a first rate Staying Well Service for their staff. I feel I have been bullied and harassed by an inadequately trained and supported manager. The

insufficiencies of this manager have been ignored by the overall head of the Staying Well Team.”

33. Fourth, Miss Smith, when questioning Ms Searles, volunteered that the breakdown of her marriage had affected her greatly during the early part of her time with the SWS. (Miss Smith never gave this as evidence as such but summarises this in her argument - paragraph 1.b.) This appeared to be the first time that Ms Searles had known about this. Miss Smith here reveals a need that Ms Searles should come to her, rather than Miss Smith sharing her problem with Ms Searles. If this was true of the relationship as a whole, Miss Smith may have seen neutral behaviours by Ms Searles (such as leaving Miss Smith alone to get on with her job) as something that they were not. This does not, however, affect the Tribunal's finding on specific incidents such as Ms Searles making it clear that she did not want Miss Smith in the job.
34. To summarise, on the balance of probabilities, what had happened was this. Miss Smith had been appointed against Ms Searles' wishes. Ms Searles, an inexperienced manager, lacking in confidence, felt threatened by Miss Smith's obvious experience in the field the SWS operated in. (Ms Searles says she felt intimidated WS8 and 341 "*KS admitted that she finds....*" – also see Mr Nelson's view – 213r – "*Kate felt threatened....*" and Miss Smith's view – 34 – "*KS seemed to feel threatened....*"). Ms Searles also had what proved to be a legitimate concern that someone with Miss Smith's experience would find it hard to confine themselves to an administrative role. Ms Searles' initial reaction to Miss Smith's appointment was to make her views clear to Miss Smith and life generally uncomfortable for her in a way that was not detected by others. Over a period, the relationship settled down, with occasional interruptions.
35. As explained above, the events catalogued by Miss Smith at 314-325 are accepted as what happened, on the balance of probabilities, subject to the reservations also set out above. Each allegation will not be gone through here, but is dealt with in the Tribunal's conclusions below. For the sake of clarity, however, it is necessary to mention a few key events.
36. On or around 26 April 2016, some twelve working days into Miss Smith's time with SWS, Ms Searles went off work. Ms Searles returned to work just over a fortnight later on 12 May 2016. In Ms Searles' absence, Ms Thompson had made arrangements in respect of cases coming into the SWS. It is not of great import what those arrangements were.

37. On Ms Searles' return to work she explained to Miss Smith and Ms Watling that any clinical referral had to go through Ms Searles. The nature of this and Ms Thompson's involvement in the process can be seen at 165-6. The point seems to have been made again to Miss Smith by Ms Thompson and Ms Searles on 20 May 2016 at a team meeting (168). Ms Searles was concerned on the subject and Ms Thompson, whether or not concerned herself, was backing up her manager (see 178-179 - paras 35 and 37).
38. Ms Searles' concern on the subject and the temptation that Miss Smith may have felt to go beyond her remit were demonstrated shortly afterwards, on 26 May 2016. The exact sequence of events is subject to some dispute but the material facts are clear. In Ms Searles' absence in the morning, a distressed employee ("Z") had come into the SWS unit. Miss Smith had referred Z for counselling. There is a dispute about how Ms Searles found out about this. Miss Smith says she left Ms Searles a "post-it" note. Ms Searles says she found no such note. It is not, however, in dispute that Miss Smith volunteered the information about what had happened in a team meeting that afternoon.
39. Ms Searles raised this with Ms Thompson after the team meeting. It was agreed that Ms Searles should consult Ms Clare Melbourne in HR, with a view to speaking to Miss Smith and keeping a note.
40. Ms Searles spoke to Miss Smith about this on 27 May 2016. The note is at 168. The note records that Miss Smith argued but said that she understood for the future. Ms Searles notes: *"Silent/bad atmosphere after"*. The note about the atmosphere is expanded on by Ms Searles in her statement (18, 19 - see also Miss Smith's accounts at 175 - para 142, 198-199 - *"When Kate returned to the office...."* and 314, against the date of 26 May 2017 as amplified at 320-321). There is no doubt that both thought there was a bad atmosphere but appear to attribute it to the other. Miss Smith's account includes her conceding to Ms Searles that Miss Smith might have been wrong to facilitate the referral without first referring to Ms Searles, but added that was what the individual had wanted.
41. After that, little of note seems to have happened in the relationship between Ms Searles and Miss Smith for nearly five months (see 213y - Mr Nelson - *"when we looked at the time line...."*).
42. The Tribunal now comes to events largely outside the scope of Miss Smith's account at 314-325.
43. On 20 October 2016 Ms Searles says that she overheard a telephone conversation that Miss Smith was having with an employee ("X").

Miss Smith's involvement with X was as a Peer Supporter, rather than as a result of a referral to SWS. Because Miss Smith was working in SWS, the case file was held there. The Tribunal understands that X had alleged that an Executive Director of the Trust, "Y", had bullied and harassed X. During the conversation, which went on for about an hour, Ms Searles says that Miss Smith referred to Y as a "bastard" and was encouraging X with comments such as "You can win this". Miss Smith denies that she referred to Y in that way. The Tribunal notes that Ms Searles does not seem to have mentioned this specifically at the time. Ms Searles seems to have confined herself to reporting hearing Y described as an "arse" (see 185 - para 47). In any event, the content of the conversation was not relied on by the Trust and it is not necessary for the Tribunal to make a finding of fact on exactly what was overheard.

44. Ms Searles had noticed similar conversations between Miss Smith and X before and decided to discuss the matter with Ms Thompson. Ms Thompson had also had the matter raised with her by Ms Debbie Bilton (Named Professional - Safeguarding) who had been hot desking in the SWS office (see 179 - para 45). Ms Thompson took the initiative and, without reference to Ms Searles or Miss Smith, reviewed the case file. There is no basis for Miss Smith's allegation that, in this, Ms Searles had raised a "formal grievance" against her (see 32).
45. On reviewing X's case file Ms Thompson found an e-mail from Miss Smith to X dated 8 September 2016 (163). This can be referred to for its full content. The points of note are that it clearly shows considerable personal involvement by Miss Smith and it is advisory in nature. It refers to Y as an "arse" and making Y "squirm". Three paragraphs towards the end of the e-mail refer to an "appeal". This is clearly a reference to legal proceedings, probably before the Employment Tribunals. Those paragraphs read:

"If you don't want to come back to work then appeal, make the HR department uncomfortable and work extra hard on top of their already mighty workloads. Hammer in the nails whilst actively searching for another job for yourself. I cannot say how the appeal will turn out but it will be uncomfortable for the Trust.

I suppose I am trying to see what you want to do and how best to go about it. I am guessing, as you can most probably tell. I do not know what answers an appeal will bring but if you have no intention of working for the trust again then go for it as you have nothing to lose and an opportunity for revenge, which can be quite a motivational force used well

and can leave you in a positive place emotionally. Jo will be able to explain the gains, from an appeal, financially for you.

I would like to see you back at work, of course I would. I would like to see you appeal and put them through the wringer of course I would. But the real issue is what is right for you? Only you know this answer really.”

46. Through Mr Fraser and Mr James Bryant (HR Business Partner), Ms Thompson referred the matter to Ms Beet (nee Hanson, which name appears on occasion in the bundle). On 3 November 2016 there was either a meeting or a conference call between Ms Thompson, Ms Lucy Manning (HR Business Manager) and Mr Bryant. Mr Bryant's note is at 142-144. One of the purposes of the discussion was to decide on whether or not Ms Smith should be the subject of a restriction of practice or suspension. It was decided that Miss Smith should be moved outside SWS for a number of reasons, whilst an investigation was carried out. One reason was that the incident evidenced a risk of inappropriate advice being offered as had happened on a previous occasion (a reference to the incident with Z). Mr Bryant was appointed to investigate the incident under the Trust's disciplinary policy.
47. On 4 November 2016 Ms Thompson met Miss Smith and told her of the decision that had been made. Ms Thompson handed Miss Smith the letter at 144A-B. Miss Smith was temporarily assigned to the Quality Directorate. Miss Smith can have been in no doubt what the investigation was about. The first paragraph of Ms Thompson's letter read:
- “Following a number of previous discussions regarding you undertaking of tasks beyond the boundary of your job description without the agreement of management, more recent concerns have led to my reviewing the case file relating to” X “. This has raised further questions regarding the content and professionalism of email communications from you to” X “. I have as a result of this determined that this further formal investigation of the allegations will be required under the Trust's Disciplinary Policy.”*
48. Miss Smith's assignment to the Quality Directorate started on 7 November 2016. On 9 November 2016 Miss Smith went off work, sick.
49. Mr Bryant proceeded to conduct his investigation.

50. On 9 November 2016 Mr Bryant interviewed Ms Searles. The notes are at 183-185. Ms Searles expressed her view that Miss Smith had *“struggled to refrain for giving opinions/advice to users.”* Beyond that Ms Searles’s account reflected the facts.
51. Later, on 9 November 2016, Mr Bryant interviewed Ms Bilton. The notes are at 181-182. Ms Bilton could only comment on the last month, October 2016. Ms Bilton said she had been *“surprised at the nature of Charlie-Emma’s inputs into some client based discussions.”* Ms Bilton continued *“I was surprised that Charlie-Emma was initiating phone calls to clients and entering into detailed discussions with them. She appeared on occasion for example to be almost taking on the role of a counsellor.”* It was for those reasons that Ms Bilton had raised her concerns with both Ms Searles and Ms Thompson.
52. On 11 November 2016 Mr Bryant interviewed Ms Thompson. The notes are at 177-180. Some way into the interview, Mr Bryant handed Ms Thompson a copy of the e-mail of 8 September and it was discussed (179 para 50).
53. Mr Bryant interviewed Miss Smith on 15 November 2016. Mr Nelson accompanied Miss Smith and Miss Smith’s welfare officer, Ms Sarah Jeeves was also present. There is a note at 169-173. Mr Bryant outlined what was being investigated as:
- “The there are concerns the content of communications relating to a specific case” (X) “were unprofessional and reflect personal opinion and bias against the Trust.*
- Related to the first concern there are concerns that you have repeatedly stepped beyond the remit of your role despite being given clear instruction not.”*
54. Mr Nelson made the point that X’s case involved Miss Smith acting as a Peer Supporter rather than the Office Manager of SWS as such. Mr Nelson also wanted to see any evidence that Mr Bryant had before he and Miss Smith responded to the allegations. Mr Bryant replied that they would get it as the meeting progressed. Fairly early on in the meeting Mr Bryant handed over a copy of the 8 September e-mail. Mr Bryant took Miss Smith through some aspects of this. Miss Smith was questioned about referring to Y as an *“arse”*. Miss Smith’s response was that *“It was an opinion, we can all be cantankerous at times”*. As a Peer Supporter Miss Smith felt that what she had written was acceptable. Generally, Miss Smith felt that what she had done was appropriate and aimed at *“deflating”* the position. Mr Nelson said that he was not aware of a role profile for Peer Supporters and Mr Bryant confirmed he was not either. Miss Smith appears to have said nothing

on that subject although, as the investigation later established, there was a role profile and Miss Smith had received it as part of training as a Peer Supporter on 24 March 2016. Mr Nelson, the Tribunal suspects, recognising to himself that the e-mail was a problem for Miss Smith, focussed on more procedural issues. Mr Bryant wanted to move on to the second area of concern but Mr Nelson and Miss Smith effectively terminated the meeting until such time as they could see statements from Ms Watling, Ms Searles and Ms Thompson.

55. On 18 November 2016 Mr Bryant interviewed Ms Watling. The notes are at 186-188. Ms Watling had moved away from the SWS in October 2016. Ms Watling clarified the role of a Peer Supporter. Peer Supporters were volunteers who provided one to one support for staff colleagues. They had been trained particularly in respect of mental health concerns. They were not to be advocates for staff nor should they tell staff what to do. There was a written role profile, which they would have received (see below – para 59). Ms Watling was not sure in what role Miss Smith had been working with X. Overall, Ms Watling had not noticed anything untoward as far as Miss Smith was concerned. Ms Watling was vague about the incident involving Z, despite having an involvement in it. Overall it is hard not to draw the conclusion from this record that Ms Watling simply did not want to get involved. It is certainly the case that, over five months, Ms Watling had not noticed the behaviour by Miss Smith that had caused Ms Bilton concern over a few weeks. It seems implausible that it had occurred only during Ms Bilton's time in proximity to SWS. There is further support for the conclusion that Ms Watling did not want to get involved in the bundle. (See, for example, Miss Smith's observations during the later disciplinary hearing - 213f - (*“it is as if...”*)).
56. On 29 November Mr Bryant reconvened the investigative meeting he had started with Miss Smith and Mr Nelson on 15 November. The note is at 173-176. Ms Jeeves was not present on this occasion. The subject was the second of the concerns going back to the incident with Z. There was no material dispute about what had happened. Miss Smith more or less conceded that what she had done might have been wrong. After that incident Miss Smith had modified her approach to avoid a recurrence. At the end of the meeting Miss Smith referred back to the issue concerning X, emphasising that she had been acting as a Peer Supporter. In neither the note of the original or the note of the reconvened investigative meetings was there a hint that Miss Smith had been bullied by either Ms Searles or Ms Thompson.
57. On 7 December 2016 Miss Smith sent in amendments and additions to the notes of the investigative meetings held with her (195-200). They are nearly as long as Mr Bryant's notes. They are an insight into

Miss Smith's mindset. There was much focus on whether or not acts done as a Peer Supporter could be open to investigation. These notes begin to hint at allegations about Ms Searles' behaviours (197 - "There was a huge case review...." and 198-199 - "When Kate returned....").

58. Finally, as far as Mr Bryant's investigation was concerned, on 15 December 2016 Mr Bryant received some answers to questions he had e-mailed to Mr Fraser (189-190). Mr Fraser confirmed that Miss Smith had been trained as a Peer Supporter and referred to the role profile in the pack supplied on such occasions.

59. There are papers relating to the Peer Supporter role at 191-194. At 193 is a list of what Peer Supporters are not required to do. It includes:

"Instruct staff what to do.

Influence staff for or against their preferred course of action.

Make value judgments regarding the nature of any issue discussed with them.

Provide specific advice relating to matters of employment."

60. Mr Bryant's report is at 152-209. The first eleven pages provide the substance and the rest is appendices. Mr Bryant noted that Miss Smith had completed Peer Supporter training on 24 March 2016. The allegations against Miss Smith were now refined to:

"A. Charlie-Emma Smith acted unprofessionally and beyond the remit of her role in relation to e-mail and oral communication with an employee referred to the Staying Well Service.

B. Failure to acknowledge previous instruction not to offer mental health advice and guidance to patients without guidance from Kate Searles or Sarah Thompson."

61. As far as the first allegation was concerned, Mr Bryant noted the issue of whether or not Miss Smith's actions could be explained by the fact that she was acting as a Peer Supporter rather than discharging an SWS function as Office Manager. Notwithstanding, Miss Smith had acted outside the training and guidance offered to Peer Supporters. Turning to the second allegation, whilst noting the incident, Mr Bryant also noted that Miss Smith had not been involved in anything further until the 8 September e-mail.

62. On 8 January 2017 Miss Smith returned to work on a temporary assignment to the Patient Safety Team of the Trust.
63. On 19 January 2017 Ms Faye Habgood (HR Services Administrator) wrote to Miss Smith (210-211) explaining that it had been decided that a disciplinary hearing should consider Mr Bryant's Investigation Report. This decision had been made by Ms Beet (WS4). The letter warned that the allegations might amount to serious misconduct and result in summary dismissal.
64. On 1 February 2017 Dr Anthony Webb sent Ms Thompson a letter following a telephone assessment with Miss Smith on that date (212-213). The assessment's focus was Miss Smith's "*prolonged absence with stress.*" In her evidence to the Tribunal Miss Smith said that she had told Dr Webb everything. If Miss Smith had said something to Dr Webb about feeling bullied and harassed by Ms Searles it might be expected to be apparent in Dr Webb's letter, especially as Dr Webb touches on the relationship between the two. It is not. Dr Webb's letter included this:

"She had been off with stress related symptoms in November 2016 following a complaint made against her by one of her managers. On reflection and after discussion with her GP she felt that her symptoms had been present for some time and were a mix of psychological and physical symptoms. She attributed her symptoms, at least in part, to her perception of pressures arising with her work, specifically arising around the area of the clarity of her role."....

"She returned to work in early January to a temporary alternative role in the Patient Experience department which she told me she was enjoying immensely. She reported that she was feeling much better both physically and mentally and was continuing to receive treatment and therapy for her psychological symptoms. She was also due further investigations from her specialist into the aches and pains in her limbs but her physical symptoms were generally very much better and she was not restricted by them now."....

"I think her psychological and physical symptoms are potentially resolvable with appropriate treatment and therapy. However she does have ongoing concerns about returning to work in her substantive role and to some extent she seems to have lost faith in her line management which I suspect will act as a barrier to her return unless this relationship can be restored through mediation."....

“It appears that her stress related illness was at least in part in response to her perception of issues arising within her employment. Specifically she had concerns over the clarity of her role and the different expectations between her and her manager regarding her job description.”

65. Mr McCullough chaired the disciplinary hearing on 1 March 2017. Also, on the Trust’s management side were Ms Christine Jacobs (HR Business Partner), Mr Bryant (for part of the hearing), and Ms Emily Finch (Trainee HR Business Partner) who took the note at 213a-213aa. (The copy in the bundle omits page 213u, which the Tribunal has not seen.) Miss Smith was accompanied by Mr Nelson.
66. On the face of it, the hearing was to consider the two factually substantiated matters of an inappropriate e-mail and an old allegation that Miss Smith had exceeded her role. Notwithstanding the apparently simple brief, the hearing headed off in many different directions during the two and a half hours it took up. No doubt Mr Nelson did his job for his member, but the hearing did not reveal anything material that had not already come up in the investigation. As previously noted, bullying and harassment was not mentioned. Miss Smith allowed that the e-mail to X was not a “nice e-mail” taken out of context (213t). Further, her approach was “*absolutely not*” the right approach in hindsight (213v) and she had breached the requirements of the Peer Supporters’ role profile (213z - “*yes but if I hadn’t....*”). Miss Smith was invited to have the last word and this can be seen at 213z “*In all of the statements....*”. Miss Smith was happy to apologise to Y for the content of the e-mail. Miss Smith and Mr Nelson both made clear that, in their view, Miss Smith could not return to work at the SWS.
67. Mr McCullough set out his decision in a letter to Miss Smith dated 10 March 2017 (215-218). Mr McCullough wrote:

“Allegation one

The panel found that you failed to demonstrate that you understood the very serious nature of this email communication and its consequences. The panel finds that this communication was wholly inappropriate and sought to escalate a vulnerable employee with emotive and subjective personal statements. The email you sent was unprofessional and made derogatory statements about your employer. This is inappropriate regardless of whether you were acting in your role of peer supporter or within your substantive role.

The panel upholds this allegation and it is my decision to issue you with a final written warning for one year, commencing 7th March 2017.”....

“In respect of allegation two the panel finds that this should have been dealt with informally.”....“you should consider this an informal warning to ensure you do not exceed your boundaries and seek advice and support in any instance which compromises you in doing so.”

68. Mr McCullough then moved on to Miss Smith’s return to her job as Office Administrator in SWS. Notwithstanding Miss Smith’s desire not to return, this was to be managed through first, a facilitated meeting with Ms Searles to ensure there were no doubts about the job requirement, second, mediation and third, the setting of clear objectives. Recognising Miss Smith’s position, however, two Band 3 and one Band 4 jobs were identified as jobs Miss Smith could apply for, if she wished. A return date of 20 March 2017 was proposed. This was an approach that Ms Beet had agreed (WS5).

69. It appears that Miss Smith saw her GP on 14 March and was signed off sick for two weeks.

70. A note at 219A records that Ms Manning met Ms Searles on 15 March 2017. Ms Manning told Miss Searles that Mr Nelson had told Ms Manning that Miss Smith would rather resign and claim constructive dismissal than return to SWS. Miss Smith was actively seeking other employment and had booked sick. Miss Smith had been given until 27 March to make a decision.

71. That note reflects the exchange of e-mails on 15 March between Mr Nelson, Ms Manning and Ms Beet (220-225). In response to Mr Nelson’s objections to Miss Smith returning to her role, Ms Manning wrote this (224):

“You state CES now has no trust and confidence in her management however whilst it was clear through the case that there was a difference of opinion between CES and Katie on the remit of her work, no complaint has ever been made by CES relating to her management.”

72. It may be that Ms Manning’s observation reflected some puzzlement at the Trust about why Miss Smith was so adamant she did not want to return to the SWS. It may also be that, in pointing out that no complaint had been made by Miss Smith relating to her management, Ms Manning triggered Miss Smith’s grievance.

73. On 17 March 2017 Miss Smith, as she had been invited to do, appealed against the outcome of the disciplinary hearing in an e-mail to Ms Emma Wood (Executive Director of Human Resources and Organisational Development) (230-233). The detailed grounds of appeal were many and varied and can be referred to. Miss Smith ended her letter by agreeing to mediation but could not predict what the outcome would be.
74. There were a lot of developments on 27 March 2017 (245-256). The order in which they took place is not entirely clear but of no significance to the issues before the Tribunal. It is clear that not all of those involved on the Trust's side had the full picture. Presumably Miss Smith did, because she was involved in them all.
75. Prompted by a letter from Ms Beet essentially requiring Miss Smith to make up her mind (245-246), Miss Smith met Mr Bryant and Ms Vanessa Williams (Head of Quality). Mr Bryant confirmed what took place in an e-mail on the same day (249). Miss Smith had confirmed her willingness to return to her role with the SWS the next day, 28 March 2017. This was to be done with a facilitated return to work meeting with Ms Searles and Ms Thompson. At the same time Mr Bryant made an occupational health referral for Miss Smith (247-248). During the course of the day Miss Smith lodged a letter of grievance (254-256). The Tribunal understands that this was a "cut and paste" of a template letter found on a website providing such material. It can be referred to for its full content. Amongst more widespread, general and perhaps wild allegations it contained an allegation that Miss Smith *"had been subjected to a systematic and unrelenting bullying by Kate Searles which was facilitated by Sarah Thompson during the six months of working as the Staying Well Service Office Manager"*. Miss Smith went on to demand that Ms Searles and Ms Thompson be suspended so as to avoid harm to Miss Smith.
76. It was against this background that, on 28 March 2017, Ms Thompson met Miss Smith for the return to work interview. Ms Kate Noone took the note at 256A-B and there is a formal note at 258-261. The latter is signed both by Miss Smith and Ms Thompson. Ms Thompson says that she was apprehensive (WS17). Ms Thompson's apprehension was justified. At this stage Ms Thomson knew nothing of the grievance. Ms Thompson came to the meeting expecting it to be about a return to work. Miss Smith, on the other hand, probably assumed that Ms Thomson knew of the grievance, which reinforced Miss Smith's perception that she could not return to the SWS. The two, therefore, came to the meeting with very differing starting points and expectations.

77. Miss Smith reported physical pain attributable to bursitis aggravated by the stress of the meeting. Miss Smith was receiving two hours of psychotherapy a week by telephone or Skype. Miss Smith said that she felt betrayed by Ms Thompson and Ms Searles. Miss Smith had not reconciled herself to the disciplinary process and felt that the only mistake she had made in respect of the 8 September 2016 e-mail *“was to record my communications as no one else holds such comprehensive notes”*. A no doubt somewhat surprised Ms Thompson redirected the conversation to a return to work. Miss Smith said she felt ready to return but not to the SWS without *“a lot of mediation that has to be open and transparent”*. Miss Smith said that she wanted an *“all cards on the table”* meeting with Ms Thompson and Ms Searles on 30 March. Depending on how that went, the next steps could be decided. Miss Smith then mentioned that she had put in the harassment and bullying grievance against Ms Thompson and Ms Searles. Towards the end of the meeting Ms Thompson went out to seek HR advice and returned with Ms Manning. Specifically, on the subject of what could be done if Miss Smith felt unable to have a handover meeting as part of a return to work, Ms Manning said that Miss Smith would need to take annual leave, sick leave or unpaid leave for the following day, the 29th. (In fact, it appears that Miss Smith was signed off sick on 28 March, in any event).
78. Ms Thompson followed up the meeting with a letter to Miss Smith on 29 March (262-263). Ms Thompson expressed the surprise she had felt when what she had expected to be a meeting about Miss Smith’s return to work had taken a different course.
79. The meeting on 30 March 2017 was attended by Miss Smith accompanied by Mr Nelson. Ms Searles, Ms Thompson and Mr Bryant were there. There is no note of the meeting in the bundle but Mr Bryant wrote to Miss Smith on 4 April 2017 recording what had happened (274-276). Ms Thompson’s evidence is that the meeting did not go well. Miss Smith was *“aggressive and confrontational”* (WS19) and Ms Searles said little. Both sides agree that Ms Thompson told Mr Bryant and Ms Searles that the Office Administrator’s job description needed clarifying. Miss Smith told the meeting that she had been signed off sick indefinitely. Miss Smith expressed concerns about returning to work in her substantive role because she had no trust in Ms Searles and Ms Thompson. Miss Smith felt at risk of further allegations and the threat of dismissal in light of the written warning she had received. Mr Bryant recorded that both Ms Searles and Ms Thompson were willing to engage in mediation. Mr Bryant ended by setting out the next steps. In essence, Miss Smith was to have no further meetings with Ms Searles and Ms Thompson until the appeal process had been completed. Miss Smith was to detail her grievance. A mediation process was to be arranged.

80. Up until Miss Smith lodged her grievance, it is clear from the e-mail exchanges between the Trust and Mr Nelson that the Trust was sure of its position. That was, following due process Miss Smith had been disciplined for misconduct and should now go back to her substantive role or, if she chose, apply for another job or leave. The grievance took the Trust by surprise. Miss Smith had now thrown into the ring substantive reasons why she should not go back to the SWS. The Trust retired to work out what to do next. Both sides fell back on process.
81. Ms Beet charged Mr Lentern with investigating Miss Smith's grievance. Ms Beet had asked Miss Smith to provide details of her general grievance and these came on 7 April 2017 and are at 314-325. This is the subject of findings earlier in this Judgment and they will not be repeated here.
82. As a result of an occupational health visit on 5 April 2017 Miss Smith was passed fit for work and returned to work on 18 April 2017 with the Patient Safety Team. This was to be a temporary role until Miss Smith's grievance was determined (277). In fact, it was extended through until Miss Smith's resignation on 26 September 2017.
83. On 2 May 2017 Mr Lentern met Miss Smith who was accompanied by Mr Nelson. Ms Rebecca Carrington (Interim EA to Executive Director of IM&T) took the note at 326-337. Not much arose that adds to the picture already painted. However, the tribunal notes (332 and 337):

“CN noted that Charlie has only raised this grievance in retaliation to the disciplinary and due to the poor management in one to ones and career conversations.”

“CES added that she has nothing against KS as a person, they had a good time with KS but in a working environment was horrendous...”

“NL added that a permanent role elsewhere is a potential solution.

CES agreed, this would make everyone happy. KS would be able to create a role profile she felt would be useful to her team. Again this is no-ones fault KS that was not part of the job recruitment process. CES did not want to raise this with her and aggravate things, CES just wanted to leave.”

84. If Mr Nelson's comment is taken at face value it would appear that Miss Smith had lodged the grievance as a retaliatory measure in the face of the disciplinary outcome. Miss Smith's commentary on this suggests a different reason. What Miss Smith says is that she had

never intended to surface the bullying but, rather, to keep her head down until she could leave the SWS for some other job with the Trust. This is in essence what Miss Smith was saying in her above gloss on Mr Nelson's comment. It explains why Miss Smith did not raise the bullying and harassment allegations until after the disciplinary outcome when she was faced with a return to the SWS.

85. On 3 May 2016 Mr Lentern met Ms Searles. Mr Nelson is shown as in attendance. He was not and this is presumably the mistake referred to at 397. Ms Carrington's note is at 338-346. Ms Searles' initial reaction to the allegations was that they were untrue but there were things that were perhaps based on truth but twisted. The meeting continued in the same vein.
86. On the same day, 3 May 2016, Mr Lentern met Ms Watling. Ms Carrington's note is at 347-351. The note should be read in full. What follows is a summary. Ms Watling told Mr Lentern that she got on "really well" with Ms Searles and enjoyed working with her. Ms Watling "got along" with Miss Smith who was "very different" from Ms Searles. The note continues:

"NL asked if AW witnessed any behaviours or incidents between KS and CES that gave you cause for concern.

AW did not see anything but was aware of a few things that were not quite as they should be. It seemed to be all to do with the fact that KS was the only one allowed to do clinical work. Before everyone worked together on all items but Sarah Thompson (ST) guided things to make KS the only one to sort Clinical referrals. This change happened some time during the summer."...."There may have been a little bit of a problem between them but AW was not aware how things developed after she left in October."....

"NL asked if there was anything else AW thinks NL should know regarding this allegation.

AW could not think of anything to add other than perhaps that is might boiled down to the work place boundaries and the difference between the job CES was originally employed to do and what it became these changes may have caused friction."....

"AW reiterated her surprise at this process, and hopes the rest of the process goes well. AW added that she really does not remember any occurrences that stood out: AW generally remembers that it was a good place to work."

87. The Tribunal has observed that it is difficult not to conclude from Ms Watling's earlier evidence to Mr Bryant as part of the disciplinary investigation, that Ms Watling simply did not want to get involved in that aspect. On the face of it, no such conclusion can be drawn here. The note seems to reflect that Ms Watling engaged fully. At the Hearing, when asked about Ms Watling's evidence to him, Mr Lentern said that he had been surprised when Miss Smith's expectation that Ms Watling would support her version of events had been met by Ms Watling's "*totally opposite reaction*". Having made the findings of fact that it has about the relationship between Ms Searles and Miss Smith, the Tribunal agrees that it is surprising. Miss Smith suggested that Ms Watling was reluctant to speak out because she was fearful for her job, but there is no evidence to support that. The Tribunal acknowledges that Ms Watling's evidence weighs in against its findings as far as Ms Searles' specific behaviours are concerned. However, as pointed out in paragraph 28 above, Ms Watling's evidence provides support that there were "*a few things that were not quite as they should be*", "*There might have been a little bit of a problem between them*" and "*these changes may have caused friction*". If Mr Lentern picked this up (the Tribunal will return to this below), he does not seem to have probed any further. The other troubling aspect of Ms Watling's evidence is that it makes no mention of the Z incident. In respect of that incident Ms Searles and Miss Smith agree that there was a bad atmosphere in the office and Ms Watling was present throughout. Perhaps Ms Watling had forgotten. If not, this may be another sign that Ms Watling wanted to stay out of the affair.
88. Again, on 3 May 2017, Mr Lentern sent some questions to Mr Fraser, who replied on the same day (359-360).
89. On 9 May 2017 Mr Lentern received a statement he had requested from Mr Bryant about the meeting on 30 March 2017 (361).
90. On 10 May 2017 Mr Lentern established that there was no record on Ms Searles' personnel file of other allegations of bullying or harassment against her (362).
91. Mr Lentern obtained text messages between Ms Searles and Miss Smith in September 2016 that showed nothing untoward. Rather, they reflected normal and warm social exchanges (364-372).
92. Mr Lentern also looked at the 121 records between Ms Searles and Miss Smith that were available (373-374). They revealed no concerns.

93. Chronologically, Mr Lentern's investigation is left at this point. On 10 May 2017 Mr Dyer chaired the appeal hearing. The notes, taken by Ms Cathy Grey (Divisional Secretary), are at 286-293. Accompanying Mr Dyer was Ms Rachel Bingham (HR Business Partner). Mr Nelson accompanied Miss Smith. The hearing mostly focussed on ground that had been gone over before as part of the initial disciplinary process. It was brought up to date with developments to the date of the appeal hearing.
94. Returning to Mr Lentern's investigation, on 12 May 2017 Mr Lentern interviewed Ms Thompson. Ms Rebecca Carrington took the notes at 352-358. In essence, Ms Thompson denied that she had bullied and/or harassed Miss Smith and had never seen Ms Searles do so. Ms Thompson also told Mr Lentern that Ms Searles had been disappointed and "*disgruntled*" that Miss Smith had been appointed to the SWS (again, 354 – para 2.02 and 355 – para 2.05).
95. On 2 June 2017 Mr Dyer wrote to Miss Smith rejecting her appeal (295a-d). The letter can be referred to for its full content. Mr Dyer worked through each of the grounds of appeal and rejected them. These were grouped under the three headings of "*Investigation and substantiation of issues*", "*Procedural Irregularities and Fairness*" and "*Unreasonable Action*".
96. Mr Lentern completed his investigation and his undated report is at 298-309 with appendices running to 376. Mr Lentern noted the ACAS definitions of bullying and harassment as;

"Bullying:

This may be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient.

Harassment:

In general terms this is unwanted conduct related to a protected characteristic (age, race, sex, disability, sexual orientation and religion or belief), which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for that individual in the work place."

97. Mr Lentern explained his evidential findings. Turning to the detail of the report, there is one obvious, and the Tribunal finds critical, area of concern. That is the recording of some of Ms Watling's evidence. Mr Lentern recorded that "*AW confirmed she was unaware of any*

problem between CES and KS.” (302). That is not what Ms Watling had said (see paras 86 and 87 above). Mr Lentern recorded that “AW worked in the same office as CES three days a week for six months and was unaware there was an issue.” (308). That is selective. Mr Lentern also makes no connection between what he knew from Ms Thompson had been Ms Searles’ disgruntlement at Miss Smith’s appointment (see para 94 above) and the three references Ms Watling had made to problems between the two (see paragraphs 86 and 87). Otherwise, Mr Lentern’s findings reflect a logical view of the evidence he had gathered. Mr Lentern’s recommendations were (309):

“Having reviewed the complaints made by CES, I could find no evidence to substantiate any of the allegations made.

Due to the serious nature of the allegations made, and the lack of evidence to support them, I believe there has been a break down in the professional working relationship between CES and KS.

In terms of whether CES should return to her substantive role in the Staying Well Service, I would recommend this is given consideration.”

98. Ms Beet reviewed Mr Lentern’s report (from which, it should be noted, there was no appeal under the Trust’s procedures). Ms Beet wrote to Miss Smith on 5 June 2017 summarising the position (296-297). The grievance was not upheld. Ms Beet considered that the grievance had been potentially vexatious and asked Mr Lentern to conduct a disciplinary investigation into that subject. Mr Lentern wrote to Miss Smith on the subject on 12 and 27 June 2017 setting out the charge (377-378 and 387-388).
99. Mr Lentern held an investigation meeting with Miss Smith on 11 July 2017. Mr Nelson accompanied Miss Smith. Ms Chloe Frear (HR Services Administrator) took the note (431-441). Although, procedurally, there was no appeal against Mr Lentern’s report on Miss Smith’s grievance, the meeting inevitably moved onto that ground. It also crossed into the disciplinary process that had taken place. The second point that Mr Nelson raised was *“There is clearly something going on because Ali is making reference that there is something going on that she cannot pin point it.”* Mr Nelson was, of course, referring to the points made by Ms Watling highlighted in paragraphs 86, 87 and 97 above. Miss Smith mentioned some e-mails that would help to throw light on the atmosphere in the office and the names of five people who were *“more friends than colleagues”* who, at the time, she had spoken to about what had been

happening to her in the SWS. Miss Smith invited Mr Lentern to contact them.

100. Mr Lentern's undated report is at 410-418 and the appendices at 419-478. The business of the report is succinctly referred to at 411. Referring to Miss Smith's grievance it reads: *"....it was considered that the complaint may have been vexatious in nature and raised as an act of retaliation in response to the disciplinary that the complainant had been subjected to, prior to raising her complaint"*.
101. Miss Smith had provided the e-mails she referred to in the investigation meeting, they are at 442 and 449-475. Mr Lentern says that all the e-mails confirmed was that Miss Smith had been looking to change jobs. They threw no light on why that was (WS15 and 413). In fact, there was slightly more than that. One exchange in particular with a Ms Carol King hinted at more (469-470). However, it did not, of itself, support Miss Smith's case.
102. Mr Lentern had elected not to contact any of the employees named by Miss Smith at the investigation meeting. Mr Lentern explains why this was (WS14 and 413). Mr Lentern was concerned that he would not get impartial evidence from people who were *"more friends than colleagues"*. Mr Lentern was also concerned that anything they might have to say would not bear on the allegations made.
103. At 414, Mr Lentern deals with the subject matter of Mr Nelson's comment in the investigation meeting that *"There is clearly something going on because Ali is making reference that there is something going on that she cannot pin point it."* (see paragraph 99). As far as the Tribunal can see, Mr Lentern misses the point entirely and, once more, is selective in the evidence he refers to.
104. Mr Lentern's report concludes (418): *"Therefore, due to the lack of evidence to support the allegations, and the timing of the claims raised, the Investigating Officer has concluded that this complaint should be considered as vexatious in nature."*
105. On 8 September 2017 Miss Smith was informed by letter that there would be a formal hearing on the subject of whether or not she had made a vexatious complaint (403-404). Summary dismissal might result if the charge was substantiated. The letter included a copy of Mr Lentern's report.
106. On 26 September 2017 Miss Smith attended the Trust for the hearing. The person designated to chair the meeting was unwell and the hearing was postponed. Miss Smith handed over a letter dated

the previous day, 25 September, addressed to Ms Beet including the following (407):

“I am resigning from my post as Staying Well Service Office Manager with immediate effect.”...“I feel I am left with no choice but to resign in light of my experience regarding the breach of trust and confidence initiated on November 4th 2016 and in the Trust’s actions regarding the treatment of me since this date.”....

“The final straw being the disciplinary hearing scheduled for Tuesday 26th September 2017 where I believe a decision to dismiss me upon its conclusion has already been decided. This constitutes a further breach of contract by the Trust. I have waived similar breaches over the past 10 months but I am no longer able to do so. This is a fundamental breach of contract on your part.”

107. The hearing finally took place on 26 October 2017. Miss Smith attended to hand in a statement (483-485) but did not stay. The hearing determined that, had Miss Smith not resigned, she would have been summarily dismissed (487-488). There are notes of the meeting at 488A-E.

APPLICABLE LAW

108. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his employer. For this right to arise there must be a dismissal.

109. Section 95(1) of the ERA, so far as it is relevant, provides:

“95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if”....

“(c) the employee terminates the contract under which he is employed (whether with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

110. The general principles relating to unfair constructive dismissal are well understood. An employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The breach may be actual or

anticipatory. The employee in these circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once. The employee must act promptly in response to the employer's actions (and not for some other reason, although the employer's actions need not be the sole cause) or he risks waiving the breach and affirming the contract.

111. It is clearly established that there is implied in contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. Where a claim is founded on a breach of this implied term, the tribunal's function is to look at the employer's conduct as a whole and determine, objectively, if it is such that the employee cannot be expected to put up with it.
112. The burden of proving a breach of contract sufficient to support a finding of unfair constructive dismissal is on the claimant.
113. The Bournemouth case referred to below made it clear that constructive dismissal is established when an employee resigns following a fundamental or repudiatory breach of contract by an employer, judged objectively and not by reference to the reasonable band of responses test familiar in "ordinary" unfair dismissal cases. While reasonableness on the part of the employer is a measure which could be used in determining whether there had been a fundamental breach of contract, it was not a legal requirement. That case also decided that the fairness of dismissal under section 94 ERA will only be an issue where there has been a conscious dismissal by the employer.
114. The Tribunal was referred to Western Excavating (ECC) Ltd v Sharp [1978] 2 WLR 344, Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166, Morrow v Safeway Stores plc [2002] IRLR 9 and Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908.

CONCLUSIONS

115. Why did Miss Smith resign?
116. At the first Preliminary Hearing before Employment Judge Roper it was settled that this is not a "last straw" case. That will not be disturbed, although, now the evidence is before the Tribunal, there is

an obvious issue in that Miss Smith's resignation letter referred to a "final straw". In any event, what Miss Smith made clear in her letter of resignation was that she was resigning because of the treatment she had received at the hands of the Trust beginning with events on 4 November 2016. This encompasses each of the first disciplinary, the grievance and the second disciplinary processes. It does not, therefore, include any treatment that Miss Smith received at the hands of Ms Searles. That makes sense. It is tolerably clear that Miss Smith did not resign as a result of Ms Searles' behaviour towards her (or, indeed, any behaviour of Ms Thompson prior to 4 November 2016).

117. Did the acts and omissions complained of, individually or cumulatively, amount to a breach or breaches of the contract of employment by the Trust going to the root of the contract of employment? In other words, was there a fundamental breach of contract entitling Miss Smith to resign and treat herself as constructively dismissed?

118. As already noted, the alleged breaches on which Miss Smith relies were helpfully agreed as those set out in the Position Statement under the heading "List of allegations of breach of implied term". Miss Smith subsequently agreed that she was not pursuing 7.a. That list will be used to structure consideration of the question in paragraph 117.

119. From 11 April 2016, did Ms Searles bully Miss Smith?

120. *Within the first few days of Miss Smith commencing employment, did Ms Searles tell the Claimant that she did not want her in post? -* On the balance of probabilities, the Tribunal's finding is that this did happen.

121. *In the first few weeks of Miss Smith's role at the SWS, was Ms Searles dismissive of Miss Smith? -* In terms, the Tribunal's finding is that this did happen. This was one means by which Ms Searles expressed her displeasure that Miss Smith had been recruited to the post.

122. *Was Miss Smith forced to work a much reduced version of her job description to keep Ms Searles happy? -* The Tribunal's finding is that this overstates the case. Ms Watling's evidence to Mr Lentern was that the job role was changed (see para 86 above). There was a mismatch between the job description and what Miss Smith was instructed to do. Basically, as Ms Watling said, this was a question of boundaries. Ms Searles did not want Miss Smith to make any clinical decisions. There was nothing wrong with that, but it went further. For

example, Ms Searles, inconsistent approach over Miss Smith's proposal to deliver a lecture to Plymouth University (see 323-324).

123. *Did Ms Searles raise her voice and wave documents or notes in Miss Smith's face when Miss Smith stepped out of line, speak in sarcastic tones regarding Miss Smith's qualifications and experience, hammer her keyboard when writing, slam the office door, heavily stomp in and out of the office and ignore or be dismissive of Miss Smith?* - Again, in terms and subject to the qualifications mentioned in the Tribunal's findings on these issues, the Tribunal's finding is that this is what happened.
124. *Did Ms Searles tell Miss Smith that her qualifications and experience were useless to the Ambulance service and instruct the Claimant to seek employment outside the organisation?* - Whilst the Tribunal doubts that Ms Searles "instructed" Miss Smith in this way, it finds that a conversation of this sort did take place.
125. *Did Kate Searles lose the notes of the management supervision meetings and probationary assessments in order to thwart Miss Smith's movement within the organisation?* - Whilst it is possible that Ms Searles deliberately disposed of these documents, this begins to move Miss Smith's allegations into suspicion rather than demonstrable fact. The Tribunal does not have to make a finding on this issue and does not do so.
126. At this point it is appropriate to pause and consider the nature of what had happened. Those behaviours the Tribunal has found Ms Searles had subjected Miss Smith to were wholly unacceptable. Whilst they did not amount to harassment in a legal sense, they were squarely within the definition of bullying. As such they were a fundamental breach of the implied term of trust and confidence. However, as the Tribunal has explained, Miss Smith did not resign because of them. Indeed, she took no action at all about them until she was faced with the prospect of returning to SWS after the outcome of the first disciplinary process. The reason that Miss Smith did not raise them until then was that it had always been Ms Smith's plan to move on and leave the bullying behind. Miss Smith reasoned that she might more easily do that if she did not, as she saw it, make a fuss.
127. *At the end of October 2016, did Ms Searles raise a formal grievance against Miss Smith without discussing it with her, implementing improvement strategies or formally warning her?* - This is reference to the conversation Ms Searles overheard concerning X and Y. What Ms Searles did was report her concern to Ms Thompson, just as Ms Bilton had done. Given that Ms Searles did not want Ms

Smith in post, one might surmise that she was not unhappy to report the issue to Ms Thompson but, if that was the case, it was incidental to taking what can only be seen as a proper course of action. Ms Searles was not obliged to discuss it with Ms Smith, look at improvement strategies or formally warn her. Given the relationship between the two whenever an issue arose, it would probably have been wrong to do so. Perfectly properly, Ms Searles passed the problem to her line manager, Ms Thompson. There was no fundamental breach of contract in any of this.

128. On 4 November 2016 and in the following days, was an allegation improperly made against Miss Smith of working outside the remit of her role and was she improperly removed from duty pending investigation?
129. Given the content of the e-mail of 8 September 2016, it was entirely proper for the Trust to pursue the allegation and temporarily assign Miss Smith elsewhere.
130. *On 4 November 2016, was Miss Smith not told the details regarding what was alleged nor who had made the allegations?* - Ms Thompson met Miss Smith on 4 November and handed her the letter of that date. Whilst Ms Thompson did not pass Miss Smith a copy of the e-mail of 8 September, the allegation was clear as was the fact that it involved Miss Smith's interactions with X. Miss Smith was not told who had made the allegations but there was nothing wrong with that.
131. *On 4 November 2016, did Ms Searles try to get Miss Smith to break an instruction given to her by Ms Thompson that she should not discuss the case with anyone?* - The Tribunal has not made findings on this although it has considered the evidence before it. The reason for this is that it is unclear how any such event founds an allegation of fundamental breach of contract. So far as the Tribunal can see, nothing exceptional occurred. In the circumstances, it was natural that Miss Smith would have seen Ms Searles as behind it all and react negatively to any contact with her. It was also natural for Ms Searles to try to check that Miss Smith was "alright".
132. *On 7 November 2016, was Miss Smith redeployed to another team as a punitive measure?* - The Tribunal's finding is that the Trust was perfectly entitled to the view that, in the circumstances, Miss Smith should be temporarily reassigned, as its policies allowed. It was not a punitive measure although, obviously, it may have been uncomfortable for Miss Smith in that it would have started people talking.

133. *Did Miss Smith have no access to support services because she had been told both that she was not allowed to contact the SWS and that support services could be accessed through SWS?* - Miss Smith's role in SWS obviously complicated the position. Ms Thompson had addressed this in her letter of 4 November 2016, through the appointment of a welfare officer for Miss Smith (Ms Jeeves). Through that welfare officer, Miss Smith could have accessed other support services.
134. There was no fundamental breach of contract in any of this.
135. *Was the formal investigation conducted by Mr Bryant prior to the disciplinary hearing on 30 January 2017 biased?*
136. *Were the witnesses told what the allegation against Miss Smith was, despite Miss Smith not having been told what the allegation was?* - This is not supported by the facts. As the Tribunal has explained, the allegation against Miss Smith was clear from Ms Thompson's letter of 4 November and Miss Smith was handed a copy of the e-mail of 8 September 2016 almost immediately the investigation meeting with her started.
137. *Did the questions which were asked of the witnesses infer that Miss Smith was guilty?* - The Tribunal is unable to identify how it is that Miss Smith argues this point.
138. *Did Mr Bryant fail to probe further despite the statements given by the witnesses contradicting each other?* - Again, the Tribunal is unable to identify how it is that Miss Smith argues this point.
139. *Did Mr Bryant not interview staff members, Z and X, who Miss Smith considered could have clarified that she did not work beyond her remit?* - The opinions of Z and X had no bearing whatsoever on whether or not Miss Smith had worked outside her remit. What Miss Smith had done was plain to see.
140. *Was the breach of confidentiality of the SWS never addressed?* - This concerns the e-mail of 8 September 2016 and harks back to the alleged impropriety referred to in paragraph 128 above. Miss Smith's stance on this is that, because it was a confidential matter, it was above scrutiny by the Trust. That is plainly wrong. It was a confidential matter but part of the Trust's own processes. As such the Trust was perfectly entitled to oversight of it and that is how the Trust addressed it.
141. On the subject of the first disciplinary investigation, hearing and outcome generally, the Tribunal's finding is that, objectively viewed, it

was fair and reasonable. There was no fundamental breach of contract in any of this.

142. Was the disciplinary appeal hearing on 10 May 2017 deficient in the following respects?
143. *Did the appeal rely on no new evidence?* - By this Miss Smith means that the appeal panel did not interview either Z or X. Again, the opinions of Z and X had no bearing whatsoever on whether or not Miss Smith had worked outside her remit.
144. *Were the witnesses who Miss Smith mentioned not questioned?* - This is the same point as that immediately above.
145. *Was the appeal outcome letter (dated 2 June 2017) fabricated by someone in the HR department?* - The Tribunal accepts Mr Dyer's evidence that this was not the case.
146. There was no fundamental breach of contract in any of this.
147. On 28 March 2017, did the following occur at a return to work meeting between Ms Thompson, Ms Manning and Miss Smith, noted by Ms Noone?
148. *Did Ms Thompson dismiss Miss Smith's damaged mental health when discussing Miss Smith's return to work?* - The complete mismatch of expectation and perception referred to in paragraph 76 above explains all that went wrong with this meeting. Ms Thompson did not dismiss Miss Smith's damaged mental health. Ms Thompson had thought Miss Smith was fit to return to work.
149. *Did Ms Manning say that she could not understand any reason why Miss Smith would not go back to work?* - In terms, probably, but see the context immediately above. Miss Manning did know about the grievance (that is the general grievance, not the detail, which followed later) before she joined the meeting.
150. *Did Ms Manning say that if the Claimant would not go back to work, she should take unpaid leave or resign?* - What Ms Manning actually said is recorded in the Tribunal's findings in paragraph 77 above.
151. *Did Ms Manning make no attempt during the meeting to acknowledge that Miss Smith's mental health was severely damaged by the experiences which Miss Smith had endured?* - It is true that Ms Manning made no such attempt. However, Ms Manning had no knowledge that Miss Smith's health had been so damaged and no knowledge of what experiences Miss Smith had in mind (presumably the bullying).

152. *Did Ms Manning act condescendingly and sarcastic at times, speak to Miss Smith like she was deficient in intelligence and act like a bully?* - Again, see above for the context of the meeting. Miss Smith came to the meeting in challenging mood. Miss Smith made it clear she did not accept the outcome of the disciplinary and showed no remorse. It would hardly be surprising if this had caused the demeanour of the Trust's representatives to harden. However, the Tribunal finds no basis for these characterisations of Ms Manning's behaviour.
153. *Did Ms Thompson act in a similar way to Ms Manning, until she was told about the grievance which the Claimant had raised against Ms Searles and Ms Thompson?* - See the above comments on context. The tribunal finds no basis for these characterisations of Ms Thompson's conduct.
154. *Did Ms Thompson and Ms Manning expect the Miss Smith to go back to work like nothing had happened?* - If this is a reference to the bullying, yes, because neither had any inkling of what had happened. Ms Manning had, not long before, found out about the grievance but had no details.
155. *Did Ms Thompson and Ms Manning make no attempt to action mediation between Miss Smith and Ms Searles?* - The evidence is that they made every effort to do so.
156. There is no fundamental breach of contract in any of this.
157. *On 30 May 2017, at the meeting between Miss Smith, Ms Thompson, Ms Searles, Mr Bryant and Mr Nelson did the following occur?*
158. *Was Miss Smith made to confront her bullies in a confined and pressured environment?* - Miss Smith came voluntarily to a meeting she had requested, attended by people she had asked should attend.
159. *Did Ms Thompson put her hand to her mouth and say to Ms Searles and Mr Bryant that Miss Smith's job description would have to be altered? Was this in order to fit Ms Searles' perceptions rather than an apology to Miss Smith?* - It is agreed that Ms Thompson told Ms Searles and Mr Bryant that the job description would have to be altered. It had been identified as deficient, a point raised by Miss Smith. This was not offered to fit Ms Searles' perceptions or as an apology to Miss Smith. It simply reflected the fact that an aspect of the job description was wrong.

160. *Did no one in management accept that they had got it wrong? - As a statement, that is true. Management did not accept that they had got it wrong because they thought they had got it right.*
161. *Were the notes made by Mr Bryant biased? - Miss Noone also prepared a note. There is no discernible bias. All sides agree that the meeting was emotional and stressful.*
162. *Was Miss Smith punished financially by being forced away from work on sickness absence because she was told that she had to return to her role in the SWS? - This must be seen in context. At the time the Trust's position was that Miss Smith had been properly disciplined short of dismissal and should return to the SWS. The Trust had only just received the harassment and bullying grievance, which contained nothing specific and was mostly irrelevant material taken from a website. The Trust was understandably wrongfooted. As soon as the Trust digested the grievance, arrangements were made for Miss Smith to be assigned outside the SWS pending the outcome of the various processes, where she remained until her resignation. That reflects credit on the Trust.*
163. There was no fundamental breach of contract in any of this.
164. *Was the second disciplinary investigation conducted by Mr Lentern prior to his report of 26 September 2017 including his meeting with Miss Smith in July 2017 deficient in the following ways?*
165. Mr Allen, on behalf of the Trust, properly refers to timing points about this allegation. The points arise because Employment Judge Ford recorded, at the second Preliminary Hearing on 4 May 2018, that Miss Smith did not rely on any allegation after 4 July 2017. The July 2017 meeting took place on 11 July 2017 but is referred to elsewhere by Miss Smith as taking place on the date it was originally set down for, 4 July 2017. That is the narrow point and Mr Allen takes no issue on it. The wider point relates to events between 11 July 2017 and Miss Smith's resignation letter of 25 September 2017. Employment Judge Ford, unlike this Tribunal and, more importantly, the Trust, had not seen Miss Smith's resignation letter. That letter is quite clear. In terms of dates, Miss Smith was relying on the Trust's actions up until 25 September 2017. Contrary to the suggestion in the question asked at paragraph 164, Mr Lentern's second report had been completed sometime before 26 September 2017. It must have been because Miss Smith was sent a copy on 8 September 2017.
166. 7.a is abandoned by Miss Smith.

167. The Tribunal will address 7.b and 7.c together. - *Following a request by Miss Smith to interview six additional witnesses at the meeting on 11 July 2017, did Mr Lentern then not interview any of the people suggested? Did Mr Lentern believe that they would not be able to give impartial evidence because Miss Smith described them as friends as well as colleagues? After months of bullying behaviour at the hands of Ms Searles and having been subject to investigation and humiliation, was Miss Smith informed that the allegations were vexatious and that she would be formally disciplined?*
168. At this point it is worth taking stock of where the various disciplinary and grievance processes had got to. The disciplinary process, including an appeal, was exhausted. The grievance process was technically exhausted because no appeal lay from it. The second disciplinary process, to consider whether or not Miss Smith's grievance had been vexatious, however, inevitably turned into a form of appeal. It probably had to, because intimately bound up in the question it was addressing was the issue of whether there was any flaw in the conclusions in Mr Lentern's grievance investigation report. Putting it another way, if Mr Lentern had drawn the wrong conclusion, the grievance might not be vexatious. From there it was a short step to revisiting some of what had come up in the first disciplinary process. At the meeting on 11 July 2016 Mr Nelson and Miss Smith had done exactly that.
169. The second point Mr Nelson had made at the meeting on 11 July 2016 was that referred to in paragraph 99 above. *"There is clearly something going on because Ali is making reference that there is something going on that she cannot pin point it."* It will be recalled that the note of Ms Watling's evidence had included these comments about the relationship between Ms Searles and Miss Smith: that there were *"a few things that were not quite as they should be"*, *"There might have been a little bit of a problem between them"* and *"these changes may have caused friction"*. On reading the notes of Ms Watling's evidence this was also immediately apparent to the Tribunal. Objectively viewed, if it was apparent to Mr Nelson and he pointed it out to Mr Lentern, why was it not apparent to Mr Lentern? The Tribunal thinks it probably was. The Tribunal has criticised the way Mr Lentern dealt with Ms Watling's evidence in his first investigatory report (see paragraph 97). The Tribunal has also been critical of the way Mr Lentern subsequently dealt with Mr Nelson's drawing his attention to that evidence in Mr Lentern's second report (see paragraph 103). The way in which this was done in both reports leads the Tribunal to conclude that Mr Lentern consciously chose to deal with these uncomfortable parts of Ms Watling's evidence as he did. In doing so he avoided the conclusion that *"there is something going on"*. Of course, if Mr Lentern had concluded that something was

going on between Ms Searles and Miss Smith that would not, of itself, have established the bullying alleged by Miss Smith. Mr Lentern knew, however, that Ms Searles did not want Miss Smith appointed to the SWS and, objectively viewed, if he had put these things together, he would surely have started down the road the Tribunal has gone down in its findings on the subject.

170. This was compounded by Mr Lentern's failure to interview any of the people suggested by Miss Smith. Although the Tribunal recognises Mr Lentern's concern that they might be influenced by friendship with Miss Smith, he could have factored that into his report as necessary. Given how Mr Lentern dealt with the "something going on" issue, it is difficult to avoid the conclusion that Mr Lentern did not conduct any of the suggested interviews because he did not want to risk disturbing his findings to date.
171. There is an implied term in employment contracts that an employer will provide a procedure for dealing with an employee's grievances, as this employer did. There is also a requirement that any individual operation of that procedure will be fair. Any breach of the requirement of fairness will go to the implied term of trust and confidence.
172. In the Tribunal's judgment, looked at objectively, Mr Lentern failed in this respect for the reasons explained above and that was a fundamental breach of contract.
173. The Tribunal recognises, however, that Miss Smith has not directly raised this as an issue, although she does go so far as to complain that the Trust did not get to the truth. What Miss Smith complains about is that the deficiencies in Mr Lentern's investigative approach and second report led to her facing a charge that her grievance was vexatious. In that Miss Smith is right. That, in itself, was a fundamental breach of the implied term of trust and confidence.
174. Did Miss Smith affirm the contract following any breach?
175. The only fundamental breach of the implied term of trust and confidence that Miss Smith relies on is that identified above. On 8 September 2017, relying on that fundamental breach, the Trust informed Miss Smith by letter that she was to face a charge that her grievance had been vexatious,
176. Miss Smith resigned on 25 September 2017. Relying on the Trust's conduct including and since 4 November 2016, Miss Smith specifically mentions the disciplinary hearing scheduled to deal with the allegation against her of lodging a vexatious grievance. Miss Smith did not waive the breach and affirm the contract by delaying too

long before resigning. Assuming Miss Smith received the Trust's letter on 8 September 2017 and read Mr Lentern's second report on that day, the delay was only just over two weeks.

177. Was there a fair dismissal?

178. This is a case in which, as the Bournemouth case puts it, the Trust did not consciously dismiss Miss Smith before her resignation. There is, therefore, nothing to be treated as a sufficient reason for doing so. There is a post resignation issue, but that is a matter that may go to remedy.

179. It follows that Miss Smith's claim of unfair constructive dismissal succeeds.

180. Dates will be offered to decide remedy.

Employment Judge Matthews

Date: 4 December 2018