Case No: 2501539/2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms C Chatfield**

Respondent: **Doctors Stephen Lumb, Matthew Hackett, Hazel Dendle, Ben Rowley, Amy Rowan trading as Weardale Practice**

Heard at: **Teesside Justice Centre** **On:** **10-13 July 2018**

Before: **Employment Judge Johnson**

Members: **Mr. S Wykes**
Mr. K A Smith

Representation
Claimant: In person
Respondent: Mr. W Lane (Consultant)

JUDGMENT

1. The claimant`s complaint of unfair constructive dismissal is not well founded and is dismissed.

2. The claimant`s complaint of breach of contract is not well founded and is dismissed.

3. The claimant`s complaint that the respondent failed to reasonably consider her application for flexible working is not well founded and is dismissed.

REASONS

1. The claimant in this case was not represented and conducted the proceedings herself. The respondent was represented by Mr Lane (employment consultant). The claimant gave evidence herself. Ms Deborah Graham and Ms Victoria Watson gave evidence on behalf of the respondent. There was an agreed bundle of documents marked R1 containing 557 pages of documents. The claimant and the two witnesses for the respondent had all prepared formal, typed witness statements,

which were taken "as read" by the Tribunal, subject to questions in cross-examination and questions from the tribunal.

2. By claim form presented on 18 November 2017, the claimant brought complaints of unfair constructive dismissal, breach of contract and failure to reasonably consider a request for flexible working. The respondent defended all the claims. The claimant's employment with the respondent began on 11 March 2015 and ended when she resigned by letter dated 23 August 2017. The claimant's employment ended on 17 October 2017. The claimant had been employed as a dispensing assistant, working at the respondent's St John's Chapel surgery. The claimant alleged that the respondent was in breach of a number of express terms in her contract of employment, particularly relating to annual appraisals and training opportunities. The claimant further alleged that a colleague, Deborah Madison, had been treated more favourably than her with regard to training and promotion. The claimant also alleged that the respondent had failed to reasonably consider her request for flexible working. The claimant finally alleged that the respondent's behaviour towards her amounted to a course of conduct over a period of time calculated or likely to destroy the mutual relationship of trust and confidence which must exist between employer and employee and that she resigned in response to the "last straw", which was their refusal to agree to her request for flexible working.

3. Having heard the evidence of the claimant and the two witnesses for the respondent, having considered the documents in the bundle and having carefully listened to the closing submissions of the claimant and Mr Lane, the tribunal made the following findings of fact on the balance of probability.

4. The respondents are a partnership of general medical practitioners, with surgeries in Stanhope, Wolsingham and St. John`s Chapel in Weardale. Only the latter has a dispensary, as the other two are in towns where there are commercial dispensing chemists. The claimant is a qualified accountant, with experience working in both large and small accountancy firms. She was employed by the respondent as a dispensing assistant, working part time for 21 hours a week with effect from 11 March 2015, working at the St John's Chapel dispensary. A copy of the claimant`s contract of employment appears at page 38 in the bundle. The claimant was subject to an initial six-month probationary period, which she successfully completed. She undertook an NVQ qualification as a dispensing assistant, with the support of the respondent. The claimant was awarded a pay rise in May 2016 upon completion of that NVQ qualification.

5. In late August 2016 the respondent`s new practice manager was dismissed, after failing to complete his probationary period. As a result, the respondent decided to carry out a restructure of its administrative function by introducing four new roles, namely an assistant practice manager, assistant business manager, medical secretary and business administrator. Deborah Graham was to be appointed as assistant practice

manager, Judith Hutchings as assistant business manager and Jessica Rowland as business administrator. None of those roles were formally advertised or the subject of a specific recruitment exercise. Because of that, the claimant was unable to apply for any of those roles. It is the claimant's case that the respondent was contractually bound to advertise those roles internally before any appointments were made. She further alleges that the respondent's Equal Opportunities Policy requires all promotion and advancement to be made on merit, with all decisions relating to them being made within the overall framework of that policy. The claimant alleges that Debbie Graham`s appointment as assistant practice manager amounted to "preferential treatment". The Tribunal accepted the respondent's explanation that this was an internal restructure, where the new posts were filled by a reorganisation amongst existing staff and therefore there was no need for any kind of formal recruitment process. The claimant never having expressed any interest in administrative duties, there was no obligation whatsoever upon the respondent to consider the claimant for any of these posts. The restructure did not apply to the St John's Chapel dispensary and accordingly did not affect the claimant in any way.

6. In or about February 2016, the respondent introduced a new appraisal system for its staff. In May 2016, Victoria Watson (practice manager) gave a presentation about the new appraisal system. The claimant raised a number of questions about the appraisal system in an email dated 19 May 2016 to Miss Sue Everett. The respondent's reply came from Miss Deborah Graham, the practice manager. That reply was acknowledged by the claimant on 2 June 2016 when the claimant said;

"Thank you for taking the time to answer my questions. Didn't necessarily have concerns. I have been through performance appraisals before so was just wanting to aid my understanding how the process will work here and fully engage with it to get the best out of it. I appreciate it's a new process so will continue to ask if have any questions/concerns. With that in mind and me not having objectives, I have initiated a small sit down with Sue today. I have asked to dispense at least two days a week. Now I am qualified I feel it's important to keep skills current and it is also important to get ahead of the game and not wait until August for objectives as the performance year has already started."

7. Part of the claimant's case is that she was contractually entitled to an annual appraisal, by which she means 1 appraisal in each relevant 12 month period. The respondent acknowledges and accepts that the claimant did not receive an appraisal within the last 12 months of her employment. This was because the respondent identified weaknesses within its appraisal system, which it fully intended to address and correct, but had been unable to do so due to difficulties which arose from one senior member of staff leaving the practice and another being on long term sick leave. The claimant was unable to show that the lack of an appraisal had any detrimental impact upon her whatsoever. The tribunal found that the lack of an appraisal did not affect the claimant's ability to perform her duties or to ask to be considered for any alternative roles within the

respondent`s organisation, nor did it impact upon her training or career advancement.

8. In November 2016 the claimant had a performance appraisal meeting with the respondent`s lead dispenser, Miss Sue Everett. Ms Everett assessed the claimant's performance as "satisfactory", an assessment which the claimant found to be unacceptable. The claimant's evidence to the tribunal was that, as a result of this appraisal, she was put on a "performance plan". This was factually incorrect. The claimant was not put on any kind of "performance plan", nor was she subjected to any kind of capability or performance management. The claimant was given a "personal learning and development plan", with specific objectives for the following 12 months. The tribunal accepted the respondent's evidence that this was standard management practice and part of the performance appraisal process. The plan was designed to assist the claimant and had no negative impact upon the claimant's ability to apply for any alternative roles within the respondent`s practice, or to advance her career within the dispensary. The claimant's evidence to the tribunal was that the assessment of "satisfactory " prevented her from a potential promotion to the post of lead dispenser. The tribunal found that the position of lead dispenser was never available to the claimant in any event. When Sue Everett left the practice, her position as lead dispenser was never filled, as the respondent chose to operate its dispensaries without a lead dispenser. That was a decision which the respondent was entitled to make for its own commercial reasons.

9. Following the departure of Sue Everett as lead dispenser, the claimant formed the view that she was effectively carrying out the role of lead dispenser and therefore should have been appointed to that position, or at least paid a salary commensurate with her increased duties and responsibilities. The claimant considered that the respondent's failure to appoint her to the role of lead dispenser amounted to a breach of her contract of employment and effectively an "unauthorised deduction" from her wages. The tribunal found this allegation to be totally misconceived. The claimant had no contractual entitlement to be appointed to the role of lead dispenser, nor did she have any contractual entitlement to be paid an enhanced salary. The claimant continued in her role as a dispensing assistant, undertaking her normal contractual duties throughout the relevant period of time. The tribunal noted that in her email to Deborah Graham on 4 November 2016, the claimant acknowledged that "I will be expected to contribute some additional hours during the transition between the lead dispenser's departure and the arrival of the new appointee. I am willing and accept to work some additional hours. It would be my preference that these be kept to a minimum allowing for the imperative needs of the St John's Chapel surgery." As things turned out, there was no requirement for the claimant to work additional hours on a long-term basis and the departure of the lead dispenser had little, if any, impact upon the claimant. The claimant also took exception to being described by Sue Everett as "reluctant" to spend less time in the dispensary and that she may not be suitable for any role as lead dispenser because that would require someone who was "more flexible and willing to put more time into the role which is clearly something Claire is not in a position to offer at the moment." The tribunal found that these comments could not reasonably or fairly be described as "derogatory", as the claimant alleged. They were no more than a fair, reasonable and realistic assessment of the claimant's declared position

at that time. In any event, those comments had no impact upon the claimant's role or the duties which were allocated to her.

10. Shortly after the claimant began her employment with the respondent, Miss Debbie Maddison had joined the practice as a part-time administration assistant. Miss Madison expressed an interest in obtaining an NVQ qualification in dispensing, so the respondent offered to provide her with practical experience of working in the St John's Chapel dispensary on one morning each week. To allow Miss Madison to be trained in dispensing, the respondent asked the claimant to cover Miss Madison's administration duties for each of those mornings. The claimant took exception to this arrangement, insisting that the decision had been made without proper consultation, discussion or agreement with her. The claimant said, "This wasn't a direction I wanted my career to take. I felt it was a step backwards and de-skilling me to just receptionist for one year." The respondent's position was that it was in the best interests of the practice to have Miss Madison trained as a dispensing assistant and that the claimant would have to comply with what was a lawful and reasonable instruction. The claimant's concern was that she would be unable to catch up on the dispensing duties which she would miss when she was covering administrative duties for Miss Madison. However, the claimant failed to show any evidence that her absence from the dispensary for one morning a week had any impact whatsoever on the efficiency of the dispensary. The claimant also failed to show that working on administration duties for one morning each week, whilst Miss Madison was trained, had any adverse impact whatsoever upon her skill set or her ability to perform her normal dispensing duties. The tribunal found that it was reasonable for the respondent to require the claimant to undertake these duties and in the circumstances, it was reasonable for the respondent to threaten the claimant with the disciplinary action if she failed to comply. The claimant did comply and no disciplinary action was necessary.

11. Having completed her training by early 2017, Debbie Maddison was formally appointed as medical secretary to the practice. She was based at the Stanhope surgery for the full 21 hours per week that she worked. The claimant again alleged that she was "prevented from any training and applying for this role." The claimant insisted that this was yet another "unadvertised role with no job description." The tribunal accepted the respondent's evidence that it had taken some 12 months to train Debbie Maddison for the position of medical secretary and that her formal appointment to that post was made upon the completion of that training. There was no need for the post to be advertised or offered to anyone else, as the decision to train Debbie Maddison for that post had been taken in late 2016.

12. In December 2016 the claimant asked for a change in her working hours, so that she could spend more time with her recently bereaved father and to attend to her local accommodation business. The claimant's request was that her hours be adjusted so that she did not work at all on a Friday, but worked additional hours earlier in the week so as to maintain her full contractual 21 hours per week. The claimant's request was set out in a letter dated 2 December 2016, which referred to previous discussions on the topic. By letter dated 6 December, Deborah Graham promised to submit the claimant's request to the partners at their next practice business meeting on 16 December. By letter dated 16 January 2017, the respondent agreed to a six-

month period whereby the claimant would not be required to work on a Friday, whilst pointing out their requirement to have two dispensing staff at the St John's Chapel surgery for the full 21 hours when the dispensary was open. By email of 20 January 2017, the claimant accepted the suggestion of a six-month period where she would not have to work on a Friday, asking that the arrangement begin in March 2017. By letter dated 25 January, the respondent confirmed that the claimant`s hours would be reduced from 21 to 17 from 1 March to 1 September and that the claimant would not be required to work on a Friday. In that letter Deborah Graham said that she had "kept your request to change your hours/role on a more permanent basis on file for consideration in the future should the staffing situation or business need change within the practice."

13. On 20 July 2017, the claimant by letter to Deborah Graham asked if the six-month arrangement could continue permanently. The claimant confirmed that she would be willing to work additional hours earlier in the week, if required. By letter dated 22 August Miss Graham replied, stating that the partners and the management team had concluded that it was not in the best interests of the practice to agree to a permanent change. The partners believed that to maintain a viable dispensing branch surgery at St John's Chapel, they would require two dispensing staff to be present throughout the 21 hours when the surgery was open. The respondent had covered the temporary six-month arrangement by using agency staff, which cost 20% more than when the claimant was able to work on a Friday. The claimant was advised of her right to appeal against the decision to refuse to make the arrangement permanent. The claimant did not appeal, deciding instead to tender her immediate resignation by letter dated 23 August, stating;

"Thank you for taking the time out of your busy schedule to come to St John's Chapel to speak to me today. In confirmation of my worst expectations the practice have offered nothing to alleviate the various circumstances I have spoken with you about over the time I have been with you. There is zero commitment to the training of the second dispenser, zero acknowledgement of the time lost to us by the departure of the lead dispenser and zero accommodation or acknowledgement of my personal employment terms and conditions or advancement. I have given 100% professional commitment to sustaining good practice in the face of no manager and continual staff shortages to us here. Consequently, you offer me no hope of any progress or improvement in the future. With regret as much as I have enjoyed the work here, I have to formally tender my resignation with immediate effect."

By a second letter dated 30 August, the claimant stated that "my offer of resignation is with notice. I felt I had to resign as I had no choice as my situation in the workplace had become untenable. I will list my reason separately when raising a formal grievance letter shortly."

14. The claimant raised a formal grievance by letter dated 31st of August 2017. A copy appears at page 108 – 109 in the bundle. The grievance letter contains 11 separate complaints, covering the period from March 2016 to August 2017. In her opening paragraph, the claimant states;

" I have always felt that you have a duty of care to me to ensure that I have confidence and trust that you treat my professional arrangements and conditions

with equality and fairness. My expectations have been that opportunities for development and flexibility would be extended to all employees equally and without prejudice and that the extending of such available opportunities would be based on merit and performance. Sadly, you have not met my reasonable expectations time and time again as evidenced by the grievances outlined below and documents to be shared when reviewing the below."

The 11 separate complaints were as follows;

1. Being asked to cover administrative role.
2. Performance reviews for 2015/16
3. Being considered I wasn't flexible enough when lead dispenser left.
4. Not replacing lead dispenser and her hours.
5. Taking too long for 2015/16 performance review and outcome.
6. Original decision not to accommodate flexible working arrangements.
7. Staffing changes announced in team meeting – Deborah Madison moving from St John's Chapel.
8. Staffing pay rises and flexibility in working arrangements for the staff.
9. Other team member has an issue with me (Deborah Madison)
10. Performance review 2016/17 not done.
11. Final decision not to accommodate flexible working arrangements.

15. The claimant's grievance letter was acknowledged by Deborah Graham on 5 September and the claimant was invited to grievance hearing on 11 September. Ms Graham summarised the claimant's complaints as;

1. Being asked to cover the St John's Chapel administrator role
2. Performance appraisal process
3. Non-replacement of lead dispenser at St John's Chapel
4. Other staffing changes and pay rises
5. Issue with another team member
6. Refusal to accommodate requests to change core hours.

16. Deborah Graham conducted the grievance hearing on 21 September and her outcome letter dated 5 October appears at page 126 – 127A in the bundle. Ms. Graham partially upheld the grievance relating to the performance appraisal process, but did not uphold any of the other complaints. The claimant was advised of her right to appeal against the outcome and she did submit an appeal by letter dated 6 October, on the grounds that the practice manager could not have offered an impartial hearing and that the written response was in many places factually incorrect. The managing partner Ms. Victoria Watson originally arranged to hear the appeal on Friday, 20 October, but subsequently decided to instruct an independent consultant from "Peninsula HR Face2Face" to conduct the appeal. The claimant declined to attend the appeal hearing because she had not received a copy of the handwritten notes of the meetings on 28 September and 20th of October and because she objected to the appeal hearing being recorded. The appeal proceeded in the claimant's absence. The consultant`s report appears at pages 153 – 169 in the bundle. By letter dated 10 November 2017 the respondent dismissed the appeal.

17. The claimant presented her complaint to the employment tribunal on 18 November 2017.

18. THE LAW

In discussions with the claimant at the beginning of the first day of the hearing, it was pointed out to the claimant that her 2 written requests for flexible working did not comply with the statutory requirements set out in Section 80 F of the Employment Rights Act 1996. In particular, they do not state that it is an application under that statutory provision, do not specify the change applied for and the date on which it is proposed the change will become effective, or explain what effect if any the claimant thinks the change would have on her employer and how in her opinion any such effect may be dealt with. Finally, they do not state whether any previous application has been made and if so, when. Because the requests do not satisfy those statutory requirements, the Employment Tribunal cannot consider whether the respondent has reasonably or unreasonably dealt with the application. The claimant accepted that finding and asked the Tribunal to consider whether the respondent's refusal of her request for flexible working amounted to a breach of the implied term of trust and confidence which must exist between employee and employer.

19. The claimant has alleged that the respondent has committed various breaches of several express terms in her contract of employment. The claimant invites the Tribunal to declare that these amounted to breaches of those express terms and that they too amounted to (individually or collectively) a breach of the implied term of trust and confidence.

20. Finally the claimant invites the tribunal to find that the respondent's conduct over a period of time, amounted to the course of conduct culminating in the last straw, which was the unreasonable refusal of her request for flexible working, which amounted to a breach of the implied term of trust and confidence.

21. The relevant statutory provisions engaged by the claims brought by the claimant are contained in the Employment Rights Act 1996.

S.80F statutory right to request contract variation.

(1) a qualifying employee may apply to his employer for a change in his terms and conditions of employment if –

(a) the change relates to –

(i) the hours he is required to work
(ii) the times when he is required to work
(iii) where, as between his home and a place of business of his employer he is required to work or
(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations.

(2) an application under this section must –
(a) state that it is such an application
(b) specify the change applied for and the date on which it is proposed the change should become effective and
(c) explain what effect if any the employee thinks making the change applied for would have on his employer and how in his opinion any such effect might be dealt with.

S.95 Circumstances in which an employee is dismissed

(1) for the purposes of this part an employee is dismissed by his employer if (and subject to subsection 2 only if) –

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

22. As is set out in paragraph 18 above, the claimant's written application for flexible working did not comply with the requirements of Section 80 F set out above. The Employment Tribunal is therefore not required to consider whether or not the respondent reasonably considered the claimant's request. That claim is therefore dismissed.

23. The claimant alleges that was a breach of several of the express terms in her contract of employment. Those were;

(a) The staff appraisal scheme
(b) The equal opportunities policy
(c) The recruitment and selection policy

Mr. Lane for the respondent conceded that the staff handbook formed part of the claimant's contract of employment and therefore any policies contained in that Handbook amounted to a contractual obligation on the part of the respondent. The respondent has a separate document described as its "Staffing Policy", a copy of which appears at page 239 in the bundle. At page 241 is the appraisal system, which states that all employees will have an annual appraisal, which centres upon a meeting between the employee`s supervision manager and the employee. Following the appraisal, the appraiser will complete a performance review, which will identify training plans and objectives for the forthcoming year or period. At page 242 there is a section headed "Study and Training", which states that the practice has a policy of encouraging its employees to undertake training in order to further their career within the organisation. The policy goes on to state that there will be no assumptions made relating to the willingness of individuals to undergo training based on age or length of service or future potential service. Training needs of the practice will be assessed by the business manager, who will also be responsible for coordinating these with the training aspirations of individual staff members.

24. The claimant insisted that the respondent had failed to follow its appraisal policy, in that she did not receive an appraisal in the 12 month period prior to her resignation. The respondent's witnesses conceded that there had been no such appraisal and that this was because of staff shortages caused by one employee leaving and another being on long-term sick leave. Furthermore, the respondent had identified that the appraisal process required improvement. Whilst there may have been a technical breach of the policy, the claimant was unable to satisfy the tribunal that the lack of an appraisal had any material impact upon her duties, her role, her performance, her training, her opportunities for promotion or indeed, anything else. The claimant raised no formal complaint about her lack of appraisal until after she submitted her resignation. When asked by the tribunal what remedy she would require in respect of any alleged breach of contract relating to her appraisals, the claimant could only say that it contributed in some way to her decision to resign. The tribunal found that this was a trivial and insignificant breach which did not show an intention by the respondent not to be

bound by one or more of the essential terms of the contract of employment. It could not reasonably be described as a repudiatory breach of contract.

25. In the claimant's main statement of terms and conditions of employment there are included the following terms;

C) Job Flexibility.
It is an express condition of employment that you are prepared whenever necessary to transfer to alternative departments or duties within our business. During holiday periods etc it may be necessary for you to take over some duties normally performed by colleagues. This flexibility is essential for operational efficiency as the type and volume of work is always subject to change.

In the respondent's Equal Opportunities Policy it states;

1) we recognise that discrimination is unacceptable and although equality of opportunity has been a long-standing feature of our employment practices and procedure we have made the decision to adopt a formal equal opportunities policy. Breaches of the policy will lead to disciplinary proceedings and if appropriate disciplinary action.
2) The aim of the policy is to ensure no job applicant or employee or worker is discriminated against either directly or indirectly on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy or maternity, race, religion or belief, sex or sexual orientation.

In the respondent's Recruitment and Selection Policy it states;

1) The recruitment and selection process is crucially important to any equal opportunities policy. We will endeavour through appropriate training to ensure that employees making selection and recruitment decisions will not discriminate, whether consciously or unconsciously, in making these decisions.
2) Promotion and advancement will be made on merit and all decisions relating to this will be made within the overall framework and principles of this policy.

26. It was never part of the claimant`s pleaded case that she was the victim of discrimination because of any of the protected characteristics set out in the Equality Act 2010. Before the Employment Tribunal, the claimant suggested that the manner in which colleagues had been allocated positions within the organisation was tainted by age discrimination, in that those appointed were older and had more experience than her. However, the claimant accepted that she had never pursued an allegation of unlawful discrimination and that her complaints relating to the manner in which these persons were appointed was based upon an alleged breach of those contractual terms.

27. The claimant's allegations relating to promotion and advancement as set out in her claim form are as follows;

a) biased decision-making on promotions and duties.
c) preferential training opportunities resulting in unadvertised and untimely promotion given to Debbie Maddison

d) claimant deliberately excluded from training opportunities that would have allowed diversity in role in a direction she wanted career to develop in and facilitated more flexible working arrangements
e) claimant deliberately prevented from promotions or any suitable roles.

The Tribunal found that the respondent had not displayed any bias whatsoever in its allocation of new roles to existing members of staff. The restructure at the end of 2015 occurred at a time when the claimant had barely completed her probationary period. It was open to the respondent to undertake a review of its staffing requirements and to restructure its administrative department to suit its own business needs. It was reasonable for the respondent to reallocate duties between its existing staff and there was no obligation upon the respondent to undertake a formal recruitment process. The claimant had no contractual entitlement to be considered for any of those positions. The restructure did not impact at all upon the St John's Chapel dispensary and the claimant was thus not affected by it in any way. It was reasonable for the respondent to identify Debbie Maddison as someone from within the organisation who was capable of being trained to undertake the role of medical secretary, which was an administrative role. The claimant had expressly stated that she did not wish to undertake administrative duties and it was not unreasonable for the respondent to exclude the claimant from consideration for that role. The claimant was trained to NVQ level at the respondent's expense and in accordance with her specific request. The training opportunities given to Debbie Maddison were no different. The tribunal found that there were no preferential training opportunities given to Debbie Maddison, nor was she given any "untimely promotion".

28. The claimant took great exception to being required to undertake administrative duties at St John's Chapel on the one morning each week when Debbie Maddison was being trained as a dispensing assistant. The Tribunal found that the claimant was contractually obliged to undertake those duties in accordance with the "Job Flexibility" section in her terms and conditions of employment. The claimant alleges that she was "coerced" into undertaking these duties and that this prevented her from undertaking training and doing her own role for 20% of her time for a year. The claimant was unable to provide any evidence as to the impact of this arrangement upon her training, workload or opportunities for advancement. The Tribunal found that, in instructing the claimant to do so, the respondent did no more than implement a lawful and reasonable instruction, which was in accordance with the claimant's contract of employment.

29. The claimant has generally alleged that she was excluded from training opportunities and as a result was denied the opportunity for promotion or advancement. The claimant has failed to provide any evidence as to what training she wished to undertake and for which she was denied permission and any vacancies or opportunities within the respondent organisation for which she would have applied, but was prevented from doing so. The lead dispenser left in 2016 and the claimant alleges that thereafter she undertook the duties of the lead dispenser and therefore should have been appointed as the lead dispenser. The Tribunal accepted the respondent's evidence that they had decided not to replace the lead dispenser, but to continue with two dispensing assistants and 2 "checkers". This complied with the respondent's regulatory obligations for running the dispensaries. Again, the Tribunal found that this was a business decision which the respondent was entitled to take for its own commercial reasons. The

lead dispenser role no longer existed and therefore there was no position for which the claimant could have applied. The medical secretary role was an administrative position for which Debbie Maddison had been identified in the restructure, as someone with the potential to fulfil the role. Deborah Graham was identified in a similar way, as someone capable of undertaking the role of assistant practice manager and eventually practice manager. The claimant had never expressed any interest in such an administrative position. It was entirely reasonable for the respondent to allocate those roles to existing members of staff without the need for any formal recruitment process. The manner in which the respondent went about doing so, did not amount to a breach of its Equal Opportunities Policy or its Recruitment and Selection Policy. There was no breach of the claimant's contract of employment.

30. It is trite law that, to succeed in a complaint of unfair constructive dismissal, a claimant must establish;

a) a breach of contract by the employer

b) the breach is fundamental or is as has been put recently a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract

c) the employee has resigned in response to the breach

d) before doing so the employee has not acted so as to affirm the contract notwithstanding the breach.

31. It is now well established that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular, in such a case, the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? This is the "last straw" situation. It's essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of her trust and confidence in the employer. The test of whether the employee`s trust and confidence has been undermined is objective. Proof of a subjective loss of confidence in the employer is not an essential element of the breach.

32. Resignation must be in response to the breach. There are dangers in getting drawn too far into questions about the employee's motives. We are dealing with a contractual relationship and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other. The proper approach, once a repudiation of the contract by the employer has been established is to ask whether the employee has accepted that repudiation by

treating the contract of employment as at an end. It must be in response to the repudiation, although the fact that the employee also objected to other actions or inactions of the employer not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigns in response, at least in part, to fundamental breaches of contract by the employer. The issue is whether the breach played a part in the resignation. I employee claiming constructive dismissal on the basis of a "last straw" is entitled to rely on the totality of the employers acts as a continuing cumulative breach of the implied duty of trust and confidence, notwithstanding a prior affirmation of the contract, provided that the last straw formed part of the series.

33. The tribunal found that the respondent had not committed any breach of its Equal Opportunities Policy or its Recruitment and Selection Policy. The claimant's complaints about Debbie Graham's appointment could not and did not amount to a breach of the claimant's contract of employment. The claimant's complaints about the manner in which the respondent trained Deborah Madison and subsequently appointed her to the role of medical secretary, could not and did not amount to a breach of the claimants contract of employment. The respondent's requirement that the claimant undertook administrative duties one morning each week whilst Deborah Madison was trained, could not and did not amount to a breach of the claimant's contract of employment. The respondent's failure to appoint the claimant to the position of lead dispenser or to pay her an enhanced salary could not and did not amount to a breach of the claimant's contract of employment. The respondents refusal to grant the claimant's request for a permanent change to her working hours could not and did not amount to a breach of the claimant's contract of employment. Miss Sue Everett's comments that the claimant was "reluctant" to spend less time in the dispensary, could not and did not amount to a breach of the claimant's contract of employment. The failure by the respondent to undertake an appraisal of the claimant in the last 12 months of her employment may have been a technical breach of contract, but was certainly not a fundamental breach of contract. None of the above, individually or collectively, amounted to a breach of the implied term of trust and confidence.

34. The tribunal found that the reason why the claimant resigned was because the respondent refused to agree to her request for a permanent change to her working hours. The tribunal found that the respondent`s refusal did not amount to a "last straw" situation, as it did not contribute in any way to any breach of the implied term of trust and confidence.

35. For those reasons the claimant's complaints of unfair constructive dismissal, breach of contract and failure to reasonably consider a request for flexible working are not well founded and are dismissed.

Employment Judge Johnson

Date 16 August 2018