



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4123709/2018

**Held in Inverness on 12, 13, 14, 15 and 16 August, 31 October and
1 November 2019**

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Employment Judge: M Sutherland

Pauline Thomson

**Claimant
In Person**

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Highland Health Board

**Respondent
Represented by:
Mr McGuire of Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the Claimant was unfairly dismissed and the Respondent is ordered to pay the Claimant the sum of £2,186.66 by way of compensation.

REASONS

Introduction

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1. The Claimant made a complaint of constructive unfair dismissal.
2. The Claimant was unrepresented and appeared in person. The Respondent was represented by Mr McGuire of Counsel.
3. The Claimant had submitted further and better particulars which included in paragraph d. details of a dental inspection carried out in June 2018. Following discussion regarding its relevance to the Claim as plead, paragraph d. was deleted.

E.T. Z4 (WR)

4. The Respondent made an application to insert the words “with Dr John Lyon” at the end of paragraph 39 of the paper apart to the Response so that it would state, in the event of a finding of dismissal “the dismissal was for some other substantial reason (a breakdown in working relationship with Dr John Lyon)”.
5 The Tribunal has discretion as to whether to grant or refuse an application to amend having regard to the overriding objective. Guidance as to the exercise of that discretion was given in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661. The tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the
10 injustice and hardship of refusing it. The following are relevant considerations in conducting that balancing exercise: the nature of the amendment; the applicability of time limits; and the timing and manner of the application. The amendment sought to specify a defence already pled and would not require substantial additional areas of enquiry. Having regard to these considerations
15 including the parties’ submissions and comments, it was considered that on balance the injustice and hardship of refusing the amendment exceeded the injustice and hardship of allowing it and the amendment was therefore allowed.
5. The Claimant gave evidence on her own behalf and led evidence from Julie Blair (Administrator). The Respondent led evidence from Alex Fraser (Service
20 Development Manager), Tom McWilliam (Assistant Clinical Dental Director), Dr John Lyon (Clinical Dental Director), Alison Phimister (Area Manager), Chris Arnold (District Manager), Michael Perrera (General Manager, Mental Health etc) and Valarie McCluskie (HR Advisor).
- 25 6. The parties lodged an agreed set of documents. Additional documents were lodged during the hearing.
7. The parties made closing submissions. Following discussion the Respondent gave their submissions first.
8. The following initials are used by way of abbreviation in the findings in fact:

Initials	Name	Title
AF, LM	Alex Fraser	Service Development Manager (Line Manager)
AP	Alison Phimister	Area Manager
CA	Chris Arnold	District Manager
Dr DM	Dr David Monks	Senior Dental Officer/ Tutor
Dr JL	Dr John Lyon	Clinical Dental Director
GH	Georgia Hare	Head of Community Services, South & Mid Division
JM	James Merriman	Community Team Leader
LG	Linda Gunn	Dental Therapy Programme Director for School of Oral Health
LM	Lynne Mackay	Dental Therapist/ Tutor
MP	Michael Perrera	General Manager, Mental Health & Learning Difficulties
SC	Suzy Calder	Head of Service Substance Abuse
VM, HR	Valarie McCluskie	HR Advisor

Findings in fact

9. The Tribunal makes the following findings in fact:
10. The Respondent is a Health Board providing healthcare services in the Highlands. Its dental service is provided through hospitals and satellite clinics. Dr JL is the Clinical Dental Director and head of dentistry for the Respondent. He has held that position since January 2016. Tom McWilliam is the Assistant Clinical Director.
11. The Claimant was employed by the Respondent as a Dental Therapist from 12 September 2012 until 21 August 2018. The Claimant was employed to work 15 hours a week at their Public Dental Services Dental Clinic in Fort William. The Claimant was previously employed by the Respondent as a Dental Nurse and has over 20 years intermittent service with the Respondent. The Claimant reported through the clinical line until 2018 and then latterly through the managerial line.
12. Prior to her employment with the Respondent, the Claimant had previously been a student on the Oral Health Science degree course. The course was

delivered by the University of Highlands in partnership with the Respondent, NHS Education For Scotland, and NHS Dumfries and Galloway. All university teaching and support staff were employees of the Respondent. The Respondent was responsible for clinical governance. UHI were responsible for academic governance. The Claimant was in the first cohort of students. There were difficulties in the relationships between the Claimant and some of the teaching staff. There had been no issues with the Claimant's employment with the Respondent prior to her enrolment as a student.

10 2012

13. In 2012 the Claimant applied for a fixed term post of Dental Tutor. LG was the Chair of the appointment panel.

14. On 12 October 2012 Dr DM sent an email to LG (**'the Covering Email'**) which stated that: a draft letter was attached "that sums up the feelings and concerns of a number of tutors" who were involved in teaching the Claimant when she was a student on the Oral Health Science Degree; that the Claimant is "dangerous and manipulative. Not to be trusted"; that her appointment to a teaching post "would be seriously detrimental to the running the school"; that she "caused so many problems during her time here"; and that "in our opinion she should not be employed as a Therapist Tutor". Dr DM was at that time a Dental Tutor and also a Senior Dentist with the Respondent.

15. Attached to the Covering Email was a letter which raised "serious concerns" and expressed "serious reservations" regarding the potential appointment of the Claimant to the post of Dental Tutor (**'the Tutors' letter'**). The letter stated that she "was the least able student to qualify from her cohort. Not by dint of ability to produce satisfactory restorations, nor the standard of her clinical work, but because she repeatedly displayed unprofessional behaviour on the clinic, and over the three years of her tenancy was a constant challenge to the smooth running of the school". The letter gave ten examples intended to illustrate this behaviour. The letter was drafted by Dr DM. The letter was written in the third

person (“we”/ “our”) and was intended to express the views of a number of tutors. Although the letter referred to “we the undersigned” it was not signed and it was not dated.

5 16. LG sent the Tutors’ Letter and the Covering Email to the Respondent’s HR department. The Claimant was not at that time aware of the Tutors’ letter or the Covering Email.

17. The Claimant was not successful in her application to the post of Dental Tutor in 2012.

2013

10 18. In 2013 the Claimant applied again for a fixed term post of dental tutor. The Claimant was successful in her application and appointed to that post from 24 October 2013 until 13 June 2014. The Claimant performed this role on Thursday and Fridays. On Mondays and Tuesdays she performed her substantive post of Dental Therapist.

15 2014

19. On 4 August 2014 until 27 March 2015 the Claimant was appointed to the post of Therapist Tutor and was seconded from her substantive post.

2015

20 20. In April 2015 LG forwarded to VM, HR a copy of Tutors’ Letter and the Covering Email.

21. On 30 November 2015 the Claimant was relocated on medical grounds to work in Public Dental Services clinics closer to her home in Inverness. The Claimant was based at the PDS Clinic in Grantown until her resignation. The Claimant enjoyed working there and did not experience any work-related issues.

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22. In 2015 the Claimant set up a private dermatology business which trades as The Laser and Skin Clinic.

2016

23. On 2 February 2016 LM, a Tutor at the Dental School, raised a grievance against the Claimant. In April 2016 the Claimant raised a grievance against LM. On 1 September 2016, and following an attempt at conciliation, the Claimant raised a written grievance against LM (**'the April/ Sept 2016 LM Grievance'**). (The Claimant and LM had ceased working together in early 2015 although worked on alternate days in the same surgery in 2016). The Respondent explored whether the grievances by and against LM could be dealt with informally. Giving the overlapping nature of the grievances the Respondent determined that they should both be dealt with under one investigation. In June 2016 SC was appointed to conduct the investigation. On 22 July 2016 SC conducted interviews with LM. On 20 October 2016 SC conducted interviews with the Claimant. Further investigation interviews were conducted in early 2017.
24. On 4 February 2016 LG raised a grievance against the Claimant. On 1 September 2016 the Claimant raised a grievance against LG (**'the September 2016 LG Grievance'**.) The Respondent explored whether the grievances by and against LG could be dealt with informally. LG was an employee of Dumfries and Galloway Health Board and the Respondent initially considered that the matter should be investigated by them.

2017

25. On 17 February 2017 LG's employer, NHS Dumfries & Galloway, confirmed their agreement that the September 2016 LG Grievance should be progressed by the Respondent.
26. An investigation interview with the Claimant regarding the April/ Sept 2016 LM Grievance was arranged for 17 February 2017. The letter inviting her to that meeting was received by but not addressed to the Claimant and she did not attend. Written responses to questions were instead sought and provided on 12 March 2017. In May and June 2017 the Claimant and her rep sought an outcome of the investigation. The Claimant received an apology regarding the delay in responding and recognition that the timescales have slipped.

27. The investigation report regarding the April/ Sept 2016 LM Grievance was produced in July 2017. It concluded that “there is insufficient evidence to uphold a Bullying and Harassment in the work placement [sic] grievance”; “there has been an irretrievable breakdown in the relationship between [LM and the Claimant]”; and “Lynne and Pauline no longer work in the same team and have no direct connection in the past 18 months” The investigation report made reference to “the submission of a letter from the Tutor group to their manager stating that they didn’t want [the Claimant] to be appointed may be considered an example of unreasonable behaviour” (‘the Tutors’ Letter). The investigation report was not shared with the Claimant. It was not the Respondents policy and practice to provide the complainant with a copy of the grievance investigation report. Instead the complainant would be advised the outcome of the investigation.
28. The Claimant was absent from work due to stated stress at work from 5 June 2017 to 1 December 2017. She commenced counselling in June 2017 which is ongoing. Throughout her periods of absence she continued to manage her private business. Through keeping in touch meetings AF, LM understood that the Claimant was stressed because of the time being taken to complete the grievance investigations.
29. On 13 June 2017 Dr JL met with VM, HR. She summarised that meeting in an email stating: “I had a catch up with Dr JL this morning. Our plan is: I will seek an update from the 2 internal investigations as to timeframes for completion and Dr JL will send a holding email asking for clarity on the purpose of the meeting and what [the Claimant] is seeking to achieve. We are both of the view that this is likely to escalate and would wish a meeting with one of you prior to any meeting with PT to look at options available. Dr JL is concerned that [the Claimant] is citing ‘breach of contract’ – would it be appropriate to consider approaching her/ her rep to look at ending her employment by mutual consent?” (**the Mutual Consent email**). Dr JL was concerned that the situation was becoming unmanageable.

30. In June 2017 the Claimant met with Dr JL at her request. This was their first meeting. She was looking for his help with a view to progressing the outstanding grievances. The Claimant found him to be helpful at that meeting.
31. On 14 July 2017 the VM, HR emailed CM regarding the Claimant stating: "In terms of this case with PT [the Claimant] John [Dr JL] has gone through everything with me and feels PT need to be managed out of the organisation, so he is looking for advice on that, possibly with CLO input" (**the Managed Out email**). The Claimant did not see a copy of this email at the time. Dr JL understanding was that they were considering their options. VM had never before been asked for advice on how to manage out an employee. She considered the request to be unique and it raised serious concerns for her.
32. On 11 September 2017 the Respondent held a meeting with the Claimant to advise her that the April/ September 2016 LM Grievance was not upheld. LM was also advised that her grievances against the Claimant were not upheld. An outcome letter was issued to the Claimant on 13 September 2017 which stated that "while you do not work together at this time, the findings are clear that the relationship between the two of you has irretrievably breakdown". The letter also noted "I do appreciate that an investigation is stressful and acknowledge the considerable delay in getting to this point which is unfortunate and regrettable". Given that previous attempts at a facilitated meeting had failed and given that the parties no longer worked together, it was decided that no further direct action was required. The Claimant was advised of her right to request a review of the grievance investigation.
33. During the 11 September 2017 meeting the Claimant became aware of the existence of a letter that which she understood the Tutors including LM had submitted regarding their concerns with her appointment to the Dental School (the Tutors' Letter). On various dates in September 2017 the Claimant and her union rep made several unsuccessful attempts to obtain a copy of the Tutors' letter from the Respondent. The Claimant also sought a copy of the letter from LG. At LG's request the Claimant was asked to contact her through the Respondent as an intermediary.

34. On 21 September 2017 the Claimant was advised that she, along with other Therapists, would be line managed by AF, LM. The Claimant had previously had a clinical line manager, Gordon Laurie, Assistant Clinical Director but he retired.
- 5 35. On 21 September 2017 the Claimant requested a review of the investigation into the April/ Sept 2016 LM Grievance. CA was appointed to undertake that review.
36. On 12 October 2017 the Claimant met with Dr JL. One of the outcomes of that meeting was that the issue of the Tutor's Letter would be raised with CA and that the Claimant would make contact with Dr JL if a further meeting was required.
- 10 37. On 21 December 2017 CA sent the review of the April/ September 2016 LM Grievance to the Claimant and LM. That review disagreed with some of the outcomes of the original investigation into that grievance. It concluded that LM had some involvement in the Tutors' Letter and that the letter was reviewed and handled by the line management structure at the time. It recommended that staff and management be advised of the appropriate channels for raising and dealing with concerns. CA recommended the addition of guidelines for the time frame of an investigation and reporting. He considered that the length of time taken to investigate was considerable but found it difficult to say whether it was unreasonable. VM considered that the length of time taken to investigate was exceptional but not necessarily unreasonable.
- 15 38. On 28 December 2018 the Claimant emailed the Respondent seeking a copy of the Tutor's letter given the findings of the CA review.
- 20 25 2018
39. On 11 January 2018, following receipt of consent by LM, the Claimant was provided with a copy of the investigation report regarding the April/ Sept 2016 LM Grievance.
40. On or about 12 January 2018 LG provided Dr JL with a tranche of emails. Within that tranche was the Tutor's Letter and the Covering Email. Upon
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reading the Tutors' Letter, JL suspected the Dr DM was the author of the letter because of the way it was written.

41. On 12 January 2018 Dr JL and AF, LM discussed the Tutor's Letter and the Covering Email with HR. Following that discussion HR emailed Dr JL and AF, LM stating "We do need to share the letter/ email with [the Claimant] in line with Data Protection...With regards to the sharing of this letter & email I would advise you email it to her today and confirm you received it today and it has posed a number of questions for you, as you are sure it will do for Pauline". Dr JL replied immediately advising that he would forward the letter this afternoon.
42. On 13 January 2018 Dr JL emailed the Claimant a copy of the Tutor's Letter but not the Covering Email. On 14 January 2018 the Claimant replied noting that "there is some information missing; the signatories? It is essential that I am told who they are...and an explanation as to why I have had to chase 'people' from July 2017 to January 2018 and why now, all of a sudden it appears..." On 15 January 2018 Dr JL replied stating "I agree it would be essential to ascertain to signed the letter. Also, I note there is no date on this letter". Dr JL appreciated that the Claimant was keen to know more about the letter including who sent it and when it was sent.
43. On 15 January 2018 a meeting was held with Dr JL, AF (LM), the Claimant, her husband and her union rep. The agreed purpose of the meeting was to discuss: the grievance investigations and outcomes; the Tutors' Letter; and management support. The Claimant had sought for the meeting to be formally minuted but this was declined. The Claimant made notes of the meeting which were sent to the attendees for approval. It was confirmed that the Claimant has no ongoing contact with the people she wished to complain about and that working in Grantown was positive and working well. The Claimant stated that the Tutor's Letter was malicious and potentially career ending. She stated that signatories to the Tutor's Letter have committed gross professional misconduct and should be disciplined. The Claimant stated that the Respondent had clear foreseeability and has breached their duty of care to her. An agreed outcome of the meeting was that "Dr JL to source original

letter with signatories, date and any attachment emails relating to the letter". The Claimant advised that once the signatories are confirmed she will make a formal complaint in respect of each signatory. Although AF, was the Claimant's line manager, Dr JL took the lead on managing the issue with the Tutor's Letter. The Claimant felt Dr JL was obstructive rather than helpful at that meeting.

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44. Dr JL was concerned she was focusing on historical matters and that they were going round in circles. Dr JL understood the Claimant was looking to end the careers of the staff involved and that she had no trust in the management of the service. He thought she was looking for other issues to raise and he believed that they had no prospect of resolving the situation.

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45. In the week following the meeting on 15 January 2018 Dr JL found the Covering Email amongst the emails provided by LG earlier in January. Dr JL did not provide a copy of the Covering Email to the Claimant and he did not provide her with an explanation as to why he was unwilling to provide her with a copy.

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46. On 26 January 2018 the Claimant wrote a lengthy letter to Dr JL stating amongst other matters that "I have to push for over five months before the letter magically appears as if from nowhere, undated, unsigned and its origin undisclosed...The letter is malicious, vindictive and factually incorrect. When I push for an answer regarding the origin of this letter I am accused of behaving in a threatening and accusatory manner." She also stated: "I formally request that you provide: an original copy of the above mentioned letter and all the email attachments and correspondence pertaining to it (the original must include a date, all signatories and proof of its origin)." Dr JL acknowledged receipt of that letter on 31 January 2018. The Claimant's union rep unsuccessfully sought a substantive reply in February 2018.

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47. On 15 March 2018 the Claimant raised a grievance against LM concerning the Tutors' Letter ('**the March 2018 LM Grievance**') and separately against

LG ('the March 2018 LG grievance') in respect of her management of the Tutor's Letter.

48. On 5 April 2018 VM, HR met with Dr JL and AF, LM to discuss the risks associated with investigating the Tutor's Letter. On 5 April 2018 VM, HR
5 emailed Dr JL stating "I met with John [Dr JL] and Alex [AF, LM] this afternoon. There are 2 formal complaints raised by PT. One is in relation to a letter which PT is attributing to LM. As you know this letter was mentioned in the feedback to PT from her other complaint. It transpires that this letter originated with a different tutor, and if this is investigate as a complaint against LM it will open
10 up avenues for complaints against a number of other with a risk of unearthing emails in relation to PT and issues as far back as 2011 when she was a student. Adding to this is complaints and emails which LG has forwarded to John [Dr JL] which highlight issues in managing PT a student which are potentially very damaging" It concluded by stating that "Overall there is a view that trust and confidence has broken down in this employee. PT herself
15 references this in her recent letter to John 'NHS Highland are in breach of their contractual and statute obligation to me'. John [Dr JL] and Alex [AF, LM] are of the view that this must be escalated to CLO for legal perspective and cannot be resolved informally or formally due risks highlighted above" ('the
20 **Trust and Confidence Email**'). JL, LM was of the view that trust and confidence had broken down in the Claimant and that matters were beyond resolution formally or informally. VM, HR was uncomfortable about the management conclusion that there was no way forward.
49. The Claimant was absent from work due to stated stress at work from 23 April
25 2018 until 21 August 2018. During that time she continued to manage her private dermatology business. Through keeping in touch meetings AF, LM understood that the Claimant was very agitated about the content of the Tutors' Letter and obtaining a copy of the Covering Email.
50. On 9 May 2018 AF, LM acknowledged the Claimant's March 2018 LM
30 Grievance and the March 2018 LG Grievance. The Claimant was advised that the March 2018 LM Grievance would be investigated by MP. The Claimant was also advised that the September 2016 LG Grievance and the

March 2018 LG Grievance would be investigated by JM. On 25 May 2018 LG raised a grievance against the Claimant.

51. On 11 June 2018 the Claimant submitted a formal data subject access request ('SAR').

5 52. On 8 June 2018 LG provided a written statement to JM. On 11 June 2018 the Claimant was advised by Dr JL that LG had raised a grievance against her and that would also be considered as part of the JM investigation. The Investigation Report was provided to the Respondent in July 2018. Its conclusions were that: LG failed to manage the issues that the Claimant raised with her but that did not constitute bullying and harassment; that LG's handling of the Tutor's letter and the Covering Email was inappropriate (in 10 2012 she failed to establish whether the letter was true or vexatious but in April 2015 had shared the Tutor's letter with HR in support of LM's complaint) but this does not constitute bullying and harassment; that the Claimant's confident and assertive style is at odds with LG's but this did not constitute bullying and harassment; that the September 2016 LG complaint "was not handled correctly. This caused undue anxiety to both the Claimant and LG".

15 53. On 12 June 2018 JM held an investigation interviews with the Claimant regarding the March 2018 LG Grievance.

20 54. In June 2018 the Claimant sought legal advice regarding her circumstances at work.

55. On 27 July 2018 the Claimant submitted a second data subject access request.

25 56. On 29 July 2018 the Claimant raised a grievance against Dr DM (**'the July 2018 Dr DM Grievance'**) regarding the sending of the Tutor's Letter and a separate grievance against Dr JL (**'the July 2018 Dr JL Grievance'**) regarding his management of the situation.

30 57. On 31 July 2018 the Claimant emailed a senior HR adviser stating: "I appreciate the help you've given me and your honesty throughout the

process. It has been extremely stressful and to that end I have come to the decision to resign my post. I will [sic] writing the letter with Gill [her legal advisor] and it should be with NHHSH [the Respondent] by the end of the week. Would I sent that to my line manager I suspect? I just wanted to say thank you once again for all your help.” The Respondent did not seek to dissuade her from this course of action and simply advised that her letter should be sent to AF, LM.

58. The documents provided in response to the 11 June SAR were ready for collection in July 2018 but the Claimant did not read through the numerous response documents until the second week in August 2018. The response documents contained copies of: the Covering Email and the Tutor’s Letter; the Mutual Consent email; the Managed Out Email; and the Trust and Confidence Email. The Claimant felt that the content of these documents confirmed her suspicions that management were looking for a way to sack her.

59. On 15 August 2018 the Respondent acknowledged receipt of the July 2018 Dr JL Grievance.

60. On 16 August 2018 MP issued to the Respondent the investigation report into the March 2018 LM Grievance. It concluded that the Tutors’ Letter was prepared by Dr DM and not by LM, that there was no evidence that the Claimant’s career had been damaged by the letter, and accordingly the complaint was not founded. The Claimant was not aware of the findings of the investigation report until after her resignation.

61. On 21 August 2018 the Claimant emailed AF, LM intimating her resignation without notice. In that email she praised the “supportive and encouraging” staff at her place of work in Grantown. She stated that “named individuals within the dental management structure, HR and the School of Oral Health Sciences are entirely responsible for the short and long terms effects of institutionalised bullying and harassment, by failing to follow due process, failure to respond to repeated written requests, untruthful and dishonest behaviour resulting in unreasonably long delays in formal and

informal investigations. The final straw came when, as I have always suspected, the dismissive, manipulative and dishonest behaviour of Dr JL and other when, confirmed in email exchanges, his desire to 'manage me out of the organisation perhaps with help from the CLO'. I feel after reading this that I am unable to return to work for NHSH. It is a clear break in trust and confidence and I'm forced to submit my resignation and report to ACAS".

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62. On 23 August 2018 the Respondent advised the Claimant of the outcome of the March 2018 LM Grievance. She was advised that Dr DM rather than LM wrote the Tutor's letter and that there was no evidence that her career had been damaged by the existence of the letter. It recommended that a risk assessment be carried out to ensure a safe and secure working environment for the dental school team. The Claimant was offered a right of review but did not request this.

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63. On 31 August 2018 the Claimant wrote to the Respondent referring to and attaching the Managed Out Email and stating that "My legal team describe it as 5 aces...and yes, it was the deciding factor in resigning my post".

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64. On 27 September 2018 the Respondent advised the Claimant of the outcome of the September 2016 and March 2018 LG Grievances. The Claimant was advised that the grievance was not upheld and that the findings of the investigation were that: "Linda did fail to fully manage the issues that you and other staff raised with her. However, this...does not constitute bullying or harassment"; "that LG's handling of the letter was not designed to harm your career. However...LG's handling of the letter was inappropriate and that the concerns raised in the letter in 2012 should have been looked in at the time... that you were very direct and assertive which was at odds with LG's managerial style...that LG felt intimidated by you but insufficient evidence of bullying and harassment"; "that the original complaint submitted by you against Linda in 2016 was not handled correctly and caused undue anxiety to both of you". The Claimant was offered a right of review but did not request this.

65. On 2 October 2018 the Claimant was advised that Dr Stewart MacPherson, Associate Medical Director had been appointed to conduct the July 2018 Dr JL Grievance. The Claimant advised that she did not intend to cooperate with the investigation which she regarded as a futile cause. The Respondent did not therefore progress the investigation.
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66. AF, LM was appointed to conduct the investigation into the July 2018 Dr DM Grievance. On 8 October 2018 AF, LM met with the Claimant and separately with DM on 29 October 2018 to discuss the grievance. In March 2019 the Claimant was advised of the outcome of the July 2018 Dr DM Grievance. The investigation report stated that “[The Claimant’s] perception that the letter was malicious and written with the intention of preventing her from being successful in interviews for positions with the BS Oral Health Sciences School may be considered reasonable. The Programme Director [LG] did not manage the situation”. It was recommended that Dr DM’s line manager, Tom McWilliams, ensure he is aware how concerns be raised. There were a number of other allegations which were not upheld.
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67. At the time of the Claimant’s resignation: her contractual monthly pay was £1,099.16 gross and £971 net; Respondent’s pension contribution was 20.9%; she was on sick leave and in receipt of half contractual pay; she was 42 years old.
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68. Prior to her resignation the Claimant worked two days a week in her private business. After her resignation she increased that to four days a week. For the year ending 5 April 2017 the net profits of that business were £32,129. For the year ending 5 April 2018 the net profits were £37,761. For the year ending 5 April 2019 the net profits were £53,675.
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69. In order to run her private business the Claimant must maintain her General Council Practice Registration and CPD practice requirements. The Claimant achieves this by working 4 hours a week on a self-employed basis in a private dental clinic. She is paid £104 a week gross for this work. The Claimant has not applied for any work elsewhere.
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Observations on the Evidence

70. All of the witnesses including the Claimant gave their evidence in a credible and reliable manner.

71. The only material exception to this was Dr JL when he stated that he only saw the Tutor's Letter but did not see the Covering Email until the week following the meeting on 15 January 2018. The email from HR makes clear that both the Tutor's Letter and the Email Attachment were discussed in the meeting Dr JL had with HR on 12 January. It is considered more likely than not that Dr JL had in fact seen the Email Attachment and elected not to forward this to the Claimant.

10 Submissions

72. The Respondent's submissions were in summary as follows –

73. The Respondent witnesses gave evidence in a helpful and open manner and their evidence should be accepted as being reliable and credible.

74. The Claimant asserts a last straw namely sight of the Managed Out Email.

15 75. An objective test should be applied to determine whether there has been a breach of the implied duty of trust and confidence (*Malik and Omilaju*). Unreasonable conduct is not sufficient (*Western Excavating*).

76. That the interaction between the last straw doctrine and affirmation is resolved the Court of Appeal in *Kaur v Leeds Teaching Hospital NHS [2019] ICR 1*:

20 *"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need*

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30 *for any separate consideration of a possible previous affirmation*

....)(5) Did the employee resign in response (or partly in response) to that breach?"

- 5 77. The Managed Out Email cannot amount to a last straw because it is not an act or omission of the Respondent because it was written by VM who is an employee and an HR advisor.
78. Further the Managed Out Email was not the cause or trigger of the resignation because it was seen by the Claimant after she had advised HR that she had come to the decision to resign her post.
- 10 79. There was a 2 week delay between the Claimant seeing the Managed Out Email and intimating her resignation and accordingly the Claimant delayed too long in resigning and has affirmed any breach.
80. The Managed Out Email was not a repudiatory breach and was not asserted to be.
- 15 81. The Managed Out Email was not part of a course of conduct which considered cumulatively amounts to a breach of the implied term of trust and confidence – the email was a legitimate consideration of how to resolve the ongoing allegations and counter allegations and should be considered in the context of the earlier Mutual Consent email.
- 20 82. The length of time taken to complete the investigations was not unreasonable having regard to unavailability of parties, the number of allegations, and their historic subject matter.
83. Objectively there is no course of conduct amounting to breach of the implied term of trust and confidence.
- 25 84. The Claimant had decided to resign before she became aware of the last straw (the Managed Out email).
85. If the Claimant was constructively dismissed (which is denied) the Claimant was fairly dismissed for some other substantial reason being the breakdown in her working relationship with Dr JL, Clinical Director.
- 30 86. If the Claimant was unfairly dismissed (which is denied) the Claimant has not suffered any financial loss following termination and in any event should be reduced on Polkey grounds.
87. Any basic and/or compensatory award should be reduced significantly on account of the Claimant's contributory conduct.

The Claimant's submissions

88. The Claimant's submissions were in summary as follows -
89. The Claimant believed that Dr JL did not want her in the organisation and the content of the Managed Out email confirmed this.
- 5 90. The length of time taken to investigate her grievances was wholly unreasonable.
91. The Claimant sought the Email Attachment from Dr JL who had it but did not provide it because he feared the consequences of doing so.
92. VM described the request by Dr JL mentioned in Managed Out Email as
10 unique and serious yet failed to recall the exchange undermining her credibility.
93. The Claimant was happy in Grantown and her dermatology business was dependent upon her dental work. She never intended to resign from the NHS but managerial behaviour made her feel totally unwanted in the department
- 15 94. Management failed to meet with her to discuss the breakdown in managerial relationships.
95. The Claimant has suffered loss of her employer's pension contribution of 20.9%.

Discussion and decision

- 20 96. The Claimant had more than two years' continuous employment and accordingly had the right not to be unfairly dismissed by the Respondent, by virtue of section 94 of the Employment Rights Act 1996 ('ERA 1996').
97. 'Dismissal' is defined in s 95(1) ERA 1996 to include 'constructive dismissal', which occurs where an employee terminates the contract under which they
25 are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).
98. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a
30 way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (*Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*).

99. The issues to be determined in this case are as follows –
- a. Was there a repudiatory breach of the Claimant's contract?
 - b. If so, was the breach a factor in the Claimant's resignation?
 - c. If so, did the Claimant affirm the breach?
 - 5 d. If not, did the Respondent have a potentially fair reason for the breach?
 - e. If so, was the reason fair in the circumstances?

Was there a repudiatory breach of contract?

100. There must be a breach of contract by the employer. The breach must be "a significant breach going to the root of the contract" (*Western Excavating*). This may be a breach of an express or implied term. The essential terms of a contract would ordinarily include express terms regarding pay, duties and hours and the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd [1998] AC 20*).
101. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively there may be a continuing course of conduct extending over a period and culminating in a "last straw" which considered together amount to a repudiatory breach. The "last straw" need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy (*London Borough of Waltham Forest v Omilaju [2005] IRLR 35*).
102. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. As regards the implied term of trust and confidence: "*The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of...*" (*Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*).

103. The Claimant resigned on 21 August 2018 citing management failures: “by failing to follow due process, failure to respond to repeated written requests, untruthful and dishonest behaviour resulting in unreasonably long delays in formal and informal investigations. The final straw came when, as I have
5 always suspected, the dismissive, manipulative and dishonest behaviour of Dr JL and other when, confirmed in email exchanges, his desire to ‘manage me out of the organisation perhaps with help from the CLO’”.
104. Her claim and the further and better particulars referred to: the failure to progress her grievances against LM and LG in a timeous manner; the
10 Respondent’s reluctance to investigate her grievances, confirmed by sight of the Trust and Confidence email; Dr JL’s refusal to identify the author(s) of the Tutor’s Letter or produce a copy of the Covering Email (“the original email which sent the Tutor’s Letter”); and confirmation that Dr JL wanted her managed out of the organisation following receipt of the Managed Out email
15 which amounted to a final straw.
105. In September 2017 the Claimant was advised the outcome of her April/
September 2016 LM Grievance. The April 2016 LM Grievance investigation had taken 18 months to complete (from the making of the complaint to reporting of the outcome to the Claimant). In August 2018 the Respondent
20 advised the Claimant of the outcome of her March 2018 LM Grievance. The March 2018 LM Grievance investigation had taken 6 months to complete. In September 2018 the Claimant was advised of the outcome of her September 2016 and March 2018 LG Grievances. The September 2016 LG Grievance investigation had taken 2 years to complete. The time taken to complete the
25 investigations was considerable but not necessarily unreasonable in the circumstances. Although the CA review of the April/ September 2016 LM Grievance did result in the addition of guidelines for the timeframe of grievance investigation and its reporting.
106. In September 2017 the Claimant became aware of the existence of the Tutors’
30 Letter which was highly critical of the Claimant, which was intended to prevent her appointment to the Dental School, and which the Respondent accepted may be considered “unreasonable behaviour”. From September 2017 the Claimant made various and numerous attempts to gain a copy of the letter.

(The Tutors' Letter was unsigned and undated and sight of the Covering Email was necessary to determine the who sent the letter and when it was sent.)

107. On or about 12 January 2018 Dr JL was provided with copies of the Tutors' Letter and the Covering Email. He discussed the Tutor's Letter and the Covering Email with HR. HR advised him to share both the Tutors' Letter and Covering Email with the Claimant. On 13 January 2018 Dr JL emailed the Claimant a copy of the Tutor's Letter but not the Covering Email. On 14 January 2018 the Claimant replied seeking information regarding who sent it and when it was sent. Dr JL fully understood and appreciated that the Claimant was keen to know this. An agreed outcome of their meeting on 15 January 2018 was that "Dr JL to source original letter with signatories, date and any attachment emails relating to the letter". In the week following the meeting on 15 January 2018 Dr JL found the Covering Email amongst the emails provided by LG earlier in January but did not provide a copy of the Covering Email to the Claimant and did not provide her with an explanation as to why he was unwilling to provide her with a copy.
108. On 26 January 2018 the Claimant wrote to Dr JL noting that "I have to push for over five months before the letter magically appears as if from nowhere, undated, unsigned and its origin undisclosed..." and formally requesting this information and related email and other correspondence which would disclose this. Dr JL did not a copy of the Covering Email or a substantive reply.
109. In July 2018 the Claimant was provided with documents in response to the SAR and read these in the second week in August 2018. The documents contained copies of: the Covering Email and the Tutor's Letter; the Mutual Consent email; the Managed Out Email; and the Trust and Confidence Email. The Claimant felt that these confirmed her suspicions that management had deliberately withheld the Covering Email, they were reluctant to investigate her grievances, and they were looking for a way to sack her.
110. Objectively considered from the perspective of a reasonable person in the position of the Claimant the time take to investigate the LM and LG grievances was considerable, but not necessarily unreasonable and was not calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence.

111. Objectively considered from the perspective of a reasonable person in the position of the Claimant, Dr JL had unreasonably withheld the Covering Email, he was reluctant to investigate her grievances regarding the Tutor's Letter because of associated risks, and he was expressly looking to end her employment with the Respondent, initially by mutual consent but subsequently by managing her out. This conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence.
112. This conduct was without reasonable and proper cause. The Claimant was not expressly advised that Dr JL had the covering Email nor was provided with any explanation as to why he was withholding it. Indeed HR had advised Dr JL to release the Covering Email and the Respondent did ultimately release that email. The reluctance to investigate the Tutor's Letter was understandable given its historic nature but that also stemmed unreasonably from preventing complaints against others regardless of whether or not they might be reasonable. Whilst Dr JL felt their relationship had broken down, and whilst there had been an historic breakdown in working relationships stemming from her time at the dental school, no consideration was given to the ongoing positive working relationships at her current place of work in Grantown.
113. The relevance of the Managed Out Email to the claim pertained to Dr JL's conduct as summarised in the email and not to the conduct of VM in writing the email. Accordingly the Respondent's submission that this was an act of VM which cannot be attributed to the Respondent is not accepted.

Was the breach a factor in claimant's resignation?

114. The breach must be a factor (i.e. have "played a part") in an employee's decision to resign (Wright v North Ayrshire Council 2014 IRLR 4, EAT). The final straw does not require to be the sole or even principal cause of the reason for leaving.
115. Her email of 31 July 2018 to HR did not amount to a resignation but advised of her intention to resign. The Claimant did not in fact intimate her resignation until 21 August 2018. The Respondent considered that she had resigned on 21 August 2018 and not 31 July 2018. Accordingly there was scope to change

her mind about her intention to resign. The Managed Out Email was read by the Claimant before she wrote and intimated her resignation and described in her letter of resignation as the final straw. The Managed Out Email confirmed her suspicions that Dr JL wanted to sack her. The Managed Out Email played a part in the Claimant's final decision to intimate her resignation.

Did the Claimant affirm the breach?

116. An employee must not delay too long in terminating the contract in response to an employer's breach once they become aware of it, otherwise they may be deemed to have affirmed the breach. Section 95(1)(c) ERA varies the common law contractual principle by giving an employee the right to resign on notice without being treated as having affirmed the contract.

117. The Claimant resigned on 21 August 2018. The Claimant resigned in part because Dr JL had unreasonably withheld the Covering Email, he was reluctant to investigate her grievances regarding the Tutor's Letter, and he was looking to end her employment with the Respondent. She had her suspicions regarding these matters following the meeting in January 2018 which were confirmed following sight of the Covering Email; the Managed Out Email; and the Trust and Confidence Email in August 2018.

118. Dr JL's behaviour amounted to a course of conduct pertaining to the management of her grievances latterly regarding the Tutor's letter. Whilst the Claimant had her suspicions following the meeting in January 2018 these were confirmed following sight of the SAR documents in the second week of August 2018. The Claimant did not delay in resigning and did not therefore affirm the breach.

Did the Respondent have a potentially fair reason for the breach?

119. Where an employee has been constructively dismissed the employer must show the reason for their conduct which amounted to a repudiatory breach (***Berriman v Delabole Slate Ltd [1985] ICR 546, [1985] IRLR 305, CA***). The stated reason for the conduct which constituted the breach was a breakdown her working relationship with Dr JL. This reason may amount to some other substantial reason and is therefore potentially fair.

Was the dismissal fair in the circumstances?

120. If the reason for the dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair, Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for their conduct which constituted dismissal. At this stage of enquiry, the onus of proof is neutral.
121. In determining whether the Respondent acted reasonably or unreasonably the tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision (**Iceland Frozen Foods Limited v Jones [1983] ICR 17 (EAT)**).
122. There was no consultation with the Claimant either about any breakdown in her relationship with Dr JL, the effect it had on her ability either to do her role in Grantown or be line managed by AF, and whether there were any options for redeployment. The Respondent sought not to manage with a view to achieving a resolution but took the view, without consultation with the Claimant, that she should be managed out and that the issue was incapable of resolution. The approach taken to any breakdown in the relationship with Dr JL was not within the band of reasonable responses. The dismissal of the Claimant was unfair in the circumstances.

Remedy

123. The remedy sought is compensation only and not re-instatement or re-engagement. In terms of Section 118 of the ERA an award of compensation consists of a basic and compensatory award.

124. The basic award is calculated with reference to Section 119 of the ERA. The Claimant was age 42 and had 5 years continuous service as at the EDT (1 year at age 41 and above). The claimant is therefore entitled to a basic award in sum of £1,686.66 (5 ½ weeks x (£1,099.16 gross monthly pay x 20.9% pension x 12 months)/ 52 weeks).
125. There is no judicial authority for the proposition that the basic award may be reduced on Polkey grounds (the likely chance that the Claimant would have been fairly dismissed in any event). Furthermore statute specifies both the basis of the calculation and the grounds for any reductions neither of which admit Polkey grounds.
126. Statute specifies that where the conduct of the Claimant before termination was such that it would be just and equitable to reduce the amount of the basic award the tribunal shall do so. It is understood that any breakdown in her relationship with Dr JL was caused by the risk of a number of complaints in relation to the Tutor's Letter but it was not suggested that those complaints would necessarily be unreasonable. Prior grievance investigations had concluded that its content may be viewed as unreasonable; that LM had some but not sole involvement in the Tutors' Letter; and that LG's handling of the Tutors' letter had been inappropriate. It is not therefore considered just and equitable to reduce the amount of the basic award.
127. Section 123(1) of the ERA provides that the compensatory award is to be "such amount as the tribunal considers to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".
128. Loss of statutory rights is assessed at £500.
129. As at termination, the Claimant's remuneration from the Respondent (including employer pension contribution) was £15,946.61. Prior to her termination the Claimant worked two days a week in her private business. After her termination she increased that to four days a week. This resulted in an increase of net profits estimated to be £15,914 (business earnings for year ending 5 April 2019 of £53,675 less business earnings for year ending 5 April 2018 of £37,761. Further, business earnings year to April

2017 of £32,129 suggests they were reasonably static prior to the increase in her days.) In addition the Claimant earns £5,408 a week gross for her work in a dental practice. According the Claimant has not suffered any financial loss as a consequence of the dismissal and no compensatory award is made beyond loss of statutory rights.

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130. The total financial award (compensatory plus basic award) is £2,186.66.

131. It is understood that the Claimant did not claim benefits and accordingly there is no prescribed element.

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Employment Judge:
Date of Judgment:
Date sent to parties:

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Michelle Sutherland
21 November 2019
22 November 2019

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