



EMPLOYMENT TRIBUNALS

Claimant: Ms Yvonne Farr

Respondent: Mostyn House Medical Practice

Heard at: Mold and by CVP **On:** 13th December 2019 and 16th
&17th December 2020.

Before: Employment Judge R Powell (sitting alone)

Representation:

Claimant: Mr Browne, one of Her Majesty's Counsel

Respondent: Ms Zakrzewska, litigation consultant

JUDGMENT

The judgment of the Tribunal is that:

The claimant was not unfairly dismissed.

REASONS

Introduction

Before addressing the claim, it is proper that I set out a little of the history of this case. The liability hearing commenced on the 13th December 2019. On that day it was practical for me to undertake some reading and hear the evidence of the claimant and her witness. It was agreed that there was insufficient time to complete the cross examination of a further witness and it was undesirable that her evidence should be heard on two separate dates some months apart. The case was listed for

the first available dates and was expected to have been completed in May 2020. Due to the pandemic, it was not possible for the hearing to proceed in May. The case was again listed for the next available date via the CVP system. Those dates were the 16th and 17th December 2020. I took time to review the bundle and my notes of the claimant's evidence before the reconvened hearing.

Whilst I was able to consider my decision on the afternoon and evening of the 17th December, a subsequent period of sitting delayed the preparation of written reasons until late January 2021.

The Claim

By the claim form presented to the employment tribunal on the 17th April 2019 Mrs Farr alleged that she had been constructively unfairly dismissed. The particulars of claim set out the following conduct which she asserted was repudiatory in nature, whether singularly or cumulatively. The particulars stated as follows:

1. KK¹'s comments and behaviour in respect of the time off YF² had for corrective surgery following breast cancer. In particular KK's comment regarding YF's "wonky boobs". (Summer of 2016).³
2. KK demanding YF come back to work immediately following her breast cancer surgery (later in 2016).
3. KK's comments regarding YF's UTI asking whether she had "botty sex & and washed her hands properly" (later in 2016).
4. KK's friendlier management of SK⁴.
5. KK screaming at YF routinely.
6. Mileage payments for courses SK mileage paid YF not paid. (20 July 2018).
7. Annual leave granted hospital appointments to S K, YF not.
8. Refusal of unpaid day off in phased return to care for her partner when SK granted week of unpaid leave in 2019.
9. Heavy-handed treatment by GP's in meeting re-ANP role 2017.

¹ Ms Kiddell, the Respondent's Practice Manager.

² The Claimant.

³ The dates in brackets are provided by counsel for the claimant in the course of the hearing and are recorded here for convenience and reference.

⁴ Ms Kennedy, a nurse and colleague of the Claimant.

10. April 19, pre-wedding trip rearranged, leave verbally agreed by KK but SK granted the time off, YF refused November 2018.
11. "final straw" event YF struggling to complete all diabetes six-month reviews and told by KK that SK managed to do all NOAC reviews and to ask SK how she managed when there were less than half the number of NOAC patients than diabetes patients.
12. KK shouts at staff, micro-managers YF, does not listen to safety concerns, doesn't apply policies evenly, dismissive towards YF, no admin time given.

Unfortunately, a number of the allegations offer no particulars. The last paragraph contains five separate allegations without offering any particulars at all.

The Evidence

13. To determine this case, I had the benefit considering, and taking into account, the contents of a bundle of 278 pages with the additional disclosure on the 16th December of hand written notes relating to the respondent's investigation of the claimant's grievance which set out, in short summaries, the content of interviews with the majority of the members of the respondent's staff.
14. I heard evidence from the claimant in accordance with her witness statement and she was cross examined. I heard evidence from the claimant's partner Mr Nelson in accordance with his statement and he was also briefly cross-examined. The majority of his evidence described a substantial difference in the claimant's character and demeanour through 2016 to 2018. He was not party to any of the incidents of alleged conduct upon which the claimant relies on her assertion of cumulative repudiated series of acts. Mr. Nelson attended a meeting with the claimant and the respondent on the 30th January 2019. His practice represents the claimant in these proceedings.
15. I also had the benefit of considering a witness statement from Ms C Johnson. She did not attend to give evidence and an application for an order for her attendance was refused by the acting regional employment Judge and not renewed before me.
16. The respondent's evidence came from Miss Kate Kiddell,; the respondent's practice manager; the person accused of the majority of the relevant conduct or omissions. She was cross examined in detail. Dr Vincent McCann who together with Dr McCabe conducted an investigation into the grievance raised by the claimant following her resignation and lastly, Dr Mark Ferris who considered the claimant's appeal against grievance decision. Each doctor was asked about the evidence before them at the two stages of the grievance procedure, the logic behind their rationale and some questions relating to their knowledge, or lack of, the index events asserted by the claimant in this case.

17. I also considered the respondent's handwritten notes, dated the 18th and 24th December 2018, of short summaries of interviews with fourteen members of the respondent's staff and a more detailed note of the interviews with Ms Kiddell and Ms Kennedy. Apart from Ms Kiddell, none of those interviewees gave evidence before me. The notes were not prepared for litigation, all but two accounts were brief and none of them had been approved by the interviewee.
18. Both parties urged me to give weight to different elements of those notes. The respondent relied on the majority which made no complaint about Ms Kiddell's conduct and the claimant placed her emphasis on the notes of "BH", "GS" "KE" and "AH" which made criticisms of Ms Kiddell. Each party asserting that the elements of these notes which suited their respective case were the reliable elements of this source of evidence.
19. Neither the claimant nor Ms Kiddell presented a witness for cross examination who corroborated their respective positions.
20. While I take account of the contents of all the witness statements, and draw on particular passages where material, I am very cautious about relying on factual assertions in the statements where these are not supported by contemporaneous documents or by the credible evidence of other witnesses.
21. The closing submissions of the parties focused their respective views of the reliability of the witness evidence. In particular Mr Browne argued that Ms Kiddell's evidence before the tribunal was manifestly inconsistent with the account, she had given to the grievance investigation. That the evidence of the doctors was inherently unreliable due to their somewhat contrived effort to contradict their own finding that Ms Kiddell has referred to the claimant's post-operative condition as "wonky boobs". That the claimant's evidence was corroborated by contemporary documents and, that there was no motive for the claimant to leave her employment save for the respondent's conduct.
22. I am acutely aware that a number of the key allegations I have to determine occurred between three and four years before this hearing was completed and, that by their nature, a number of the complaints are not likely to have generated any contemporaneous documentary evidence. Others though are likely to have done so and of those, in this case, some documentary evidence has been adduced.

23. I have reminded myself of the familiar guidance on the reliability of witness recollection; Gestmin SGPS SA v Credit Suisse (UK) Ltd 2013, EWHC 3560.
24. I have been particularly concerned that this case is one in which the process of litigation may well have affected coloured the accounts of the key protagonists.
25. Lastly, whilst I have set out my findings of fact in a manner which partitions my conclusions by the relevant pleaded allegation, my decision was made by taking an overall view of the documentary and witness evidence before me.

Findings of fact

26. I make the following findings of fact on the balance of probabilities.
27. The respondent is a medical practice owned and managed by the general practitioners who are partners in the practice. They employ a number of administrative, reception and and nursing staff.
28. The claimant commenced employment with the respondent in January 2012 and she remained an employee, to the expiry of her notice period, in December 2018. She was initially appointed as a Practice Nurse working 30 hours a week across four days. By 2015 she had been appointed to the role of Nurse Practitioner and subsequently whilst undertaking additional qualification, become an Advanced Nurse Practitioner.
29. Throughout this period the claimant worked with Ms Samantha Kennedy who was a nurse and with whom the claimant had a good working relationship. They each had their separate areas of responsibility, in particular the claimant had responsibility for the nursing care of diabetes patients of the practice.
30. The claimant was, and still is, well regarded by the partners of the practice; she is an experienced, well educated and an able advanced nurse practitioner.
31. In October 2013 she was diagnosed with breast cancer and in October and November of that year she underwent surgery, the details of which are before me but are not necessary to repeat in this written judgement.
32. In 2014 she began a course of radiotherapy which lasted for 2 to 3 weeks and throughout that period she remained at work. She describes no difficulties at work arising from her ill health in 2013, 2014 or 2015.

33. Around May 2015 respondent appointed Miss Kate Kiddell as its practice manager. Ms Kiddell was an experienced practice manager and, from the evidence of the respondent's witnesses, she remains a trusted employee to this day.
34. Drs Ferris and McCabe have been members of the respondent's practice throughout the period of the claimant's employment.
35. The records of the claimant's performance evidence a steady progress and cordial relationships with all the partners until April 2017 and thereafter with the three doctors who have given evidence in these proceedings.
36. In February 2016 the respondent assisted the claimant in her advanced studies; allowing her to reduce her working week to accommodate study for a master's degree; which would benefit her own development and the service she provided to the patients of the respondent's practice.
37. However, as noted in the claimant's email of the 8th September 2016, her academic progress had been impeded by surgery, health concerns and childcare (208). I find that, the claimant had to cope with a significant number of health issues; both her own and of those to whom she was very close. Some of the circumstances were very distressing and all gave her cause for worry.
38. I have one record of the claimant's annual appraisal; for the year 2016, dated the 23rd January 2017. This records no concerns about her competence or her progress albeit records (126) a direction from Dr Alison Harvey regarding the limits for claims for time off in lieu ("TOIL"), a request for the claimant to improve her work planning and a reference to an audit which had shown that the claimant's perception (that she received the majority of tasks sent to nurses at the practice) was incorrect.
39. The claimant's first particulars of claim refer to an incident in mid 2016 but her witness evidence (dealing in part with some of the elements of the compendium allegation at paragraph 12 above) address allegations prior to that date. I will approach these findings in the order in which they were pleaded.

Pleaded Allegation: "KK's comments and behaviour in respect of the time off YF had for corrective surgery following breast cancer. In particular KK's comment regarding YF's "wonky boobs"

40. On the 16th February 2017 the claimant had a text exchange with a person who was not an employee of the respondent (177- 178). In that exchange she referred to Ms Kiddell:

“ I had to have more surgery in summer and screamed at me because I couldn't tell her how long I would be Off?!. Apparently the consultant would have told me and given me a sick note... I have kept a note and emailed my concerns with some of her actions so I have a paper trace should I need to involve the RCN.”

41. I note that the claimant has not disclosed the notes of the conduct to which she refers nor any emails concerning Ms Kiddell's demeanour or bullying behaviour in the summer of 2016.

42. The text exchange goes on:

“...but she has absolutely no people skills! Oh god I could tell you stuff. I have been told I should stop having corrective surgery and learn to embrace my wonky boobs...”

“...She asked me if I wiped myself properly or indulged in anal sex!? I kid you not !!!”

43. Both of these statements are consistent with the claimant's witness statement at paragraphs 9 and 10.

44. Ms Kiddell denies making either comment.

45. On 15 January 2019, in response to the claimant's grievance, the respondent sent a copy of its investigation report conclusions. Those conclusions, with respect to Miss Kiddell's alleged 2016 comments found as follows:

“in conclusion, we accept your concerns regarding the use of inappropriate language and have established that Miss Kate Kiddell had used the term “wonky boobs” which seemed insensitive given the circumstances of your illness.

46. In Miss Kiddell's 26th of November 2018 letter, responding to the claimant's grievance, she said:

“I do recall a conversation where we discussed wonky boobs but it was a humorous conversation on both parts and not to cause any offence at all. I would never do that to anyone.”

47. In the outcome of the appeal hearing (192) the respondent said:

“Miss Yvonne Farr also states (appeal paragraph 8) that people who have had breast cancer often say that they are fine, try to be upbeat about it all while struggling both physically and mentally it is an understandable deception, very possibly one that Miss Kate Kiddell believed which could explain why she made the remarks in the first place and why Mrs Yvonne Farr was offended but didn't

mention it at the time. It may also explain the jocularity of the communications between them”.

48. Despite Miss Kiddell’s clear denial of making such a comment in the course of her evidence before me, I consider that, on the balance of probabilities, the text from the claimant of February 2017, the consistent account in her grievance letter and the previous acknowledgement by Miss Kiddell that she was involved in a conversation where the offending phrase was used, persuades me that it is more likely than not that, during a conversation she did use that term.
49. The claimant was challenged as to why she had not raised this matter by way of a grievance or a complaint to one of the doctors within the practice with whom she had a good working relationship.
50. In part her explanation was the conduct of some of the doctors during a meeting on 3rd April 2017, wherein she alleges she was “ganged up on”, which deterred her from a complaint. There is also reference in the documents to the claimant’s assertion that other complaints against Miss Kiddell had not resulted in any action.
51. I have some difficulty with the claimant’s explanation. In the first place the comments with which I am now concerned preceded the April 2017 meeting by at least seven months⁵. Secondly, there is no evidence before me of any prior complaint against Ms Kiddell, whether formal or informal, being made to the partners of the respondent. Thirdly, the claimant was, on the account in her email, retaining evidence for her Trade Union, for use; “if [she] needed to involve the Union”. The claimant did involve her union in her work environment in April 2017; six weeks after this text exchange. However, she did not need to complain or, on the evidence before me, discuss the incidents with her representative.
52. I find the claimant’s explanation for her lack of complaint unconvincing.
53. In my judgment, the lack of complaint and the less than credible explanation for the absence of a complaint informs my conclusions about the character of the relevant conversation between the claimant and Miss Kiddell in which the phrase “wonky boobs” was said.
54. I find it to be more likely than not that Ms Kiddell’s account in the grievance process is true. Her comment was made during a conversation where the claimant herself referred to herself in similar terms. However, regardless of Ms

⁵ This time frame derives from the claimant’s statement paragraph 9 which refers to “summer 2016”. I have noted however that the correspondence disclosed by the claimant includes one reference to an operation; Friday 18th March 2016 (230). The point does not appear to be material.

Kiddell's intention, the comment was gauche, poorly judged and lacking in insight.

55. In reaching this decision I have accepted Miss Kiddell's evidence that the claimant did speak, and write to Ms Kiddell, (138, 18th of August) about the consequences of her surgery in a self-deprecating terms.

56. I also took into account paragraph 9 of the claimant's statement in which she states, that as a Consequence of Ms Kiddell's behaviour;

"I declined further planned surgery, being acutely aware I would possibly be denied time off or face further bullying and harassment-or worse still, jeopardise my job and career by being summarily dismissed which I felt was a real concern at the time."

57. This incident took place, as indicated to me by counsel for the claimant, in the summer of 2016. Again, I look to the description of events in the with Messenger exchanges between the claimant and Ms Kiddell which suggest the claimant had a "cosmetic" operation around 15 August 2017 and her indication, 18th of August 2017 that she had, at that time;

"had enough now so no more unless more probs in future with implant and radiotherapy...."

58. I find the claimant's witness statement insofar that she asserts that she felt her job was in jeopardy, or that she was at risk of being dismissed, if she had further reconstructive surgery after the summer of 2016 to be less than accurate or reliable.

Comments regarding time off post surgery; 2016

59. The claimant's evidence on this issue is set out in paragraph 9 of her statement:

"I was told by Kate that this was "cosmetic surgery" and that she did not need to agree my time off"

60. I find it less than likely to be true that Miss Kiddell suggested that she did not have to consent to the claimant having time off for "cosmetic surgery".

61. The evidence in the Facebook Messenger exchanges suggests that Ms Kiddell did not challenge the claimant's requests for sickness absence following her corrective surgery in 2017 or her absences associated with her son's health in 2017 or her absences related to Mr. Nelson's ill health in 2018.

62. That contemporary record of Ms Kiddell's behaviour in 2017 and 2018, at a time when, on the claimant's evidence, Ms Kiddell's attitude towards the claimant had worsened since April 2017 (latter part of paragraph 15 of the

claimant's statement.) is inconsistent with the claimant's evidence. The messages corroborate Ms Kiddell's evidence about her behaviour in 2017 and leads me to conclude that it is more likely than not that the claimant's evidence is more likely than not an exaggeration on this issue. On the evidence before me I consider that the respondent has established that Ms Kiddell's evidence is the more reliable on this issue.

63. I have reached the same conclusion on the relative reliability of the parties' evidence in respect of paragraph 8 of the claimant's witness statement; Her assertion;

"If I ever had concerns and approached Kate she was totally dismissive, often rude and insulting. To avoid this I began to email my concerns to Kate.... This occasionally helped prevent abuse and bullying but not consistently.

64. The claimant has not referenced or produced an email of "abuse" in an exchange with Ms Kiddell, and the Messenger exchanges demonstrate a supportive and friendly manner in Ms Kiddell's responses.

65. Again, on consideration of the claimant's allegations of a pattern of rudeness, insult, bias and incompetence by Ms Kiddell from May 2015 onwards, I find it very difficult to accept that the claimant, who was an established, respected and senior nurse with good relationships with the partners, would not have raised the new manager's behaviour with those who had appointed her. She did not do so.

66. Further, on the respondent's evidence this would be a matter concerning the claimant's health; a matter for the claimant's doctor, who in this case also happened to be the claimant's employers, to decide whether or not absence following surgery was sickness absence or not. It was not a question for manager to decide.

67. With regard to the comments alleged to have arisen following the claimant's UTI, I note that Mrs Kiddell denied that comment from the outset; unlike the points discussed above where she qualified a reference without expressly denying it.

68. I note that the claimant's account has partially changed and I note in the claimant's witness statement and new assertion has arisen; that Miss Kiddell had accessed the claimant's medical records without consent prior to making the comment as alleged.

69. Here I'm faced with diametrically opposed accounts from two witnesses, neither of whom instilled me with the greatest confidence in the reliability of their recollection or their objectivity. On balance, looking at the overall reliability of these two witnesses I find Miss Kiddell the more reliable, but in this instance she was being asked to recall a comment which occurred at least two years before she was first faced with the allegation whereas Mrs Farr has set down

her account in the text somewhere between six and eight months after the the alleged conversation in question.

70. I am still troubled by the absence of the “paper trace” of notes and emails to which the claimant refers in in her February text and I am concerned by the absence of any complaint to her employers at the relevant time; a time at which, on her own evidence, there had been no difficulty between the partners at herself.
71. I am also troubled by the absence of any contemporary reference to Ms Kiddell’s unauthorised viewing the claimant’s medical records; a serious breach of her privacy (and one which Ms Kiddell denies) nor in the claimant’s resignation letter (149), her grievance or her pleaded claim. That such a serious breach of her privacy could be forgotten, or in the alternative, be first alleged more than two years after the incident is a cause for concern when I assess her reliability as a witness.
72. Nevertheless, It is clear that in February 2017, the claimant had a recollection of Ms Kiddell asking her whether she had “botty” sex and the claimant communicated that to a third party as an example of Ms Kiddell’s poor communication skills. Ms Kiddell denies a comment which was made, on the claimant’s case, in casual conversaton some two years before Ms Kiddell was first aware of the allegation (November 2018). On considering the handwritten notes of the respondent’s investigation (page 10), it is clear Ms Kiddell, could not recall the conversation but was sure she would not say anything which was intended to offend the claimant.
73. Whilst I do not find that Ms Kiddell is dishonest and I have concerns about the claimant’s possible exaggeration of the circumstances, I do find that it is more likely than not that Ms Kiddell did ask the claimant whether she had had “botty sex” in a casual conversation on an unkown date in the late summer or early autum of 2016.

Second leaded allegation: “KK demanding YF come back to work immediately following her breast cancer surgery

74. As Ms Kiddell was not employed until May 2015 logically this allegation can only refer to events after that date.
75. On the claimant’s evidence, I find that she underwent surgery relating to her cancer on two occassions after that date:
- a. In the summer of 2016 she was scheduled for reconstructive surgery, albeit her evidence is not clear whether that went ahead.
 - b. On the 17th August 2017 (see 137).

76. The claimant's witness statement does not refer to a demand to return to work immediately following her breast cancer surgery.
77. The Claimant makes no reference to her surgery in August 2017 and it is evident from the Messenger exchanges that Ms Kiddell was not placing any pressure on the claimant to return to work in 2017.
78. The claimant's evidence concerning her 2016 operation refers to "after my prompt return to work" but does not provide any evidence of a demand from Ms Kiddell.
79. On the evidence before me, it is more likely than not that Ms Kiddell did not make the demand as alleged.

Fouth pleaded allegation: "Friendlier management of Ms S Kennedy"

80. This allegation gave no particulars. Subsequent allegations plead less favourable treatment of the claimant in respect of mileage payments, annual leave granted for hospital appointments, refusal of unpaid days off for phased return and the claimant's 2019 holiday. I address those elements as examples of "friendlier management".
81. At paragraph seven of her witness statement the claimant states that she was reprimanded sharply on her occasional lateness for work; which she accepted. However Ms Kennedy was treated differently when, due to child care considerations, she arrived late for work.
82. Ms Kiddell explained that she had become aware, that temporarily, Ms Kennedy was likely to be unable to arrive at work on time and so her start time was varied to allow her to start ten minutes later than normal. That concession was on condition that Ms Kennedy took a shorter lunch break. In that manner her start time could be predicted, appointments planned accordingly and Ms Kennedy worked her full contracted hours.
83. I find that when the claimant required time off to be with her son (138) Ms Riddell took a similar helpful approach.
84. Ms Kiddell's account, which I accept, does not demonstrate favouritism. It demonstrates the respondent varying its practice in a proportionate manner to prevent a woman with childcare responsibilities from being put at a particular disadvantage. Moreover, the arrangement provided a degree of certainty for Ms Kennedy's attendance which enabled the practice to plan patient appointments.

Fifth pleaded allegation: "KK Screaming at YF routinely"

85. In respect of this allegation, and the claimant's evidence generally about Ms Kiddell's poor attitude, the claimant referred to a text exchange (exhibited to her witness statement YMF 43-45, comments attributed to a former member of staff Georgina Fellows and the statement of Ms Johnson. The three text are described by the claimant as; "texts I have received since having no alternative but to leave the practice". Two of exhibited texts have been hand annotated with dates; 5th October 2016 and the 28th June 2017, one is clearly dated the 27th October 2017. The 27th June 2017 message from "lola" is unfortunately divorced from its context because the person who prepared the document has excluded the communications which evidently preceded and followed after. It states: "f work anyway they don't give a shit do they about any of us xx I am ringing ACAS tom for advice I have had enough ..."
86. The nature of her concerns are not apparent nor whether the conduct of Ms Kiddell was apart of those concerns.
87. The text of th 27th October 2017 is mainly a comment from the claimant saying she is dreading coming back to work after her holiday...and anticipating "...there is some shite email somewhere for me!".
88. The third email, by inference, is a direct reference to Ms Kiddell. It says; "She is awful with us all... she is good at lying when complaints go in about her - she said we could do with getting hold of the other staff at the old surgery and..."
89. Unfortunately, the claimant has not exhibited the start or the end of this text nor any other part of the communication.
90. More directly the claimant has produced her own text message of the 16th February 2017 [YMF1] which refers to Ms Kiddell; "screams at you if you offer a different view and screamed at me because I couldn't tell her how long I would be off". It is this text in which the claimant states she had kept a note of some of her concerns and emailed her concerns with some of Ms Kiddell's actions. Those notes are not relied upon by the claimant in this hearing. There is no tested witness evidence to corroborate the claimant's case.
91. Ms Kiddell denies the allegation. Ms Kiddell's evidence denied that she screamed at the claimant and on this issue her case is corroborated by Dr McCabe. For reasons set out later, I have a good deal of caution about his evidence in general but I do not consider him to be dishonest. On this point, in questions from myself to Dr Ferris, he described the layout and scale of the respondent's offices and reception area; which is consistent with Dr McCabe's evidence.
92. Whilst I place weight upon the claimant's text, written within 6 to 8 months of one unspecified alleged incident, I judge that evidence in the context of the claimant's assertion that the screaming continued throught out the period of

Ms Kiddell's management; a period of three years. There is not reliable corroborative evidence of that assertion. Ms Kiddell's denial has some corroboration from two of the Doctors.

93. Whilst I have concerns about the reliability of all the sources of evidence before me, I consider it to be more likely that Ms Kiddell did not scream at the claimant on any occasion.

Sixth pleaded allegation: "Mileage payments for courses SK mileage paid YF not paid"

94. Ms Kiddell denies this allegation. The pleading does not offer any particulars.

95. The two sentences in paragraph 7 of the claimant's witness statement set out this allegation but do not provide any evidence of the specific courses, mileage claims or dates.

96. In my annotations of the claim, based on the counsel's response to my request for the dates of the alleged incidents, I have noted "20.7.18" which is consistent with the date of an email from the claimant requesting payment for travel expenses. The document does not evidence any rejection. In manuscript the email shows:

"Paid 83 miles august £37.35 ...8/10/15 44 miles....225/12/1532 miles"

97. That evidence, taken at its highest for the claimant's case, shows a request for payment. The annotation suggests payment was made within a month of the request.

98. In paragraph 18 of the claimant's statement she refers to a request for reimbursement of mileage expenses on the 6th November 2018. The claimant states that her request was refused and Ms Kennedy's was granted. She refers to an email she sent subsequently but that email has not been produced.

99. I note that the claimant grievance referred to "proving" a differential in treatment "by copies of emails" which caused Ms Kiddell to "relent" (151).

100. I have searched the agreed bundle for this email but I can find none which match the date and subject matter asserted by the claimant.

101. Ms Kiddell denies the allegation. In the absence of any documentary evidence and my concerns about the reliability of the claimant's account, I prefer the respondent's account and conclude that it is more likely than not that Ms Kiddell did not refuse to authorise the claimant's claims for expenses whilst doing so for Ms Kennedy in like circumstances.

Seventh pleaded allegation: “Annual leave granted for hospital appointments to SK, YF not”

102. The claimant’s case on this issue is set out in the first four lines of paragraph 8 of her witness statement:

“ Annual leave, when requested at the same time as Sam was on leave, even if it was for hospital appointments due to my post cancer treatment and follow ups was denied”.

103. That account does not strictly fit with the pleaded case; it does not evidence Sam’s leave was given in respect of hospital appointments and suggests that the reason the claimant was not granted leave was because Sam was already on leave on such occasions.

104. I was not referred to any specific occasion or a specific request nor to any holiday records from which I might, for myself, glean some evidence of fact as an evidential foundation for this allegation.

105. From my own examination of the documents (in a search for evidence of specific incidents) it is evident that in March 2018 the claimant did send an email and a letter about a medical appointment and Ms Kiddell replied (144):

“Don’t worry about taking it as unpaid. It’s a hospital appt, needs must. Enjoy your day off and see you on Monday”

106. I have been unable to find any evidence of a specific occasion, upon which I could make a finding of fact of the claimant being refused annual leave for a medical appointment.

107. Ms Kiddell’s statement refers to Ms Kennedy confirming that she had not had a medical appointment in work time. That is untested hearsay. The absence of evidence, from either party, of a specific occasion when Ms Kennedy’s absence was for a hospital appointment is more pertinent.

108. I also note that, according to the respondent’s sickness absence procedure, medical appointments taken with prior approval, may be paid. It is not apparent to me why the claimant would seek to take annual leave unless the discretion to take paid leave had been refused. I note the claimant does not allege that she was refused paid leave for medical appointments prior to making the pleaded request for annual leave.

109. In consideration of the above, I find that the respondent did not refuse to allow the claimant annual leave for medical appointments.

Eighth pleaded allegation: “Refusal of unpaid day off in phased return to care for partner when SK granted a week of unpaid leave in 2019”

110. The claimant’s evidence on this allegation is set out in paragraph 15 of her witness statement.
111. She states that she initially took five weeks of sick to be in intensive care with Mr. Nelson. This is confirmed by the sickness certificate, from the respondent which ran until the 9th March 2018 (271).
112. On the 22nd February the claimant discussed her future return to work with Ms Kiddell (271). According to Ms Kiddell’s note and subsequent email (272) the claimant intended to return to work on Monday 12th March 2018; the day Mr. Nelson was discharged from hospital. She also planned to restrict her work to nursing (rather than Advanced Nursing Practitioner work). She intended to take an hour’s lunch and to work 2 hours less a week. Ms Kiddell recorded: “ *I have also offered her the option of starting at 9 in the morning as well to give her time to get Andrew (Mr. Nelson) sorted*”. I note that the claimant’s home address and the respondent’s surgery are both in the town of Llandudno.
113. I have little detail from the claimant of which day of the week she wanted off. On the evidence before me, the claimant’s last revision of her hours (128) show that she did not work on Wednesdays and that she worked a short day on Mondays. I do not know whether that was the effective work pattern in March 2018.
114. Towards the end of paragraph 16 the claimant states that she was forced to use up her annual leave to look after Mr. Nelson. She does not refer to any documentary evidence on this point. The parties did provide the claimant’s record of annual leave for 2018 (242). Although it is common ground that this document was subject to alterations, it has been practical for me to identify whether the claimant, for instance took four separate days of annual leave (one a week) in April, May or June of 2018.
115. The annual leave record shows one day on Wednesday 28th March 2018. One day on the 6th April 2018. A half on the 2nd May 2018, and a half day on the 8th May 2018. One day on Friday 6th and one day on Monday 9th July. Three occasions of two days of leave in August and one day on the 18th October 2018.⁶
116. I am also aware that the claimant booked a total of 12 days annual leave for holidays abroad on the 15th March 2018; half of her annual discretionary leave entitlement.

⁶ There are two additional possible dates which I have taken into account; Wednesday 31st October and Friday 2nd November 2019.

117. The above record does not evidence that the claimant was taking annual leave one day a week from the 12th March 2018 as she asserts.
118. Ms Kiddell denies the allegation and her account reflects the note, and contemporary email to Dr McCann (273).
119. I record one observation; I find it very difficult to accept that, had Ms Kiddell refused the claimant's request, the claimant would not, however informally, have approached the Doctors about such a fundamentally important matter⁷. These were the doctors who had signed her off sick for five weeks so she could take time to be with Mr. Nelson whilst he was in hospital. Similarly, I have noted in the Messenger exchanges between the claimant and Ms Kiddell make mention of a return to work date and the hours (143) but no mention of a request for a phased return or a request to reconsider the refusal of a phased return.
120. Leaving aside the last observation, on the evidence before me I prefer the evidence of Ms Kiddell on this issue. I find that Ms Kiddell did not refuse to allow the claimant one day off a week nor did she require the claimant to take annual leave to care for Mr. Nelson.

Ninth pleaded allegation: "Heavy Handed treatment by the GP's in meeting re ANP role 2017 The Meetings of March and April 2017"

121. I note that the pleaded particulars of these allegations state the following under the title "background":
- "3.4.17 YF attended a meeting with her Union representative and the practice GP's. This was primarily to deal with unrealistic demands from the GP's in relation to her undertaking three separate roles in the practice, not having any breaks and being told that she must undertake work in her time outside working hours. As a result of this meeting YF was given a 15 minutes gap at the end of her ANP sessions"*
122. In paragraph 12 of the claimant's witness statement she refers to a meeting with two of the respondent's doctors in February 2017. On consideration of the documents in the bundle (215 and 216-19) I have concluded that the claimant's evidence referred to a meeting of the 2nd of March 2017. This is not a pleaded allegation.
123. At that meeting Dr Luithe and Dr Harvey discussed how the claimant was recording her work. In essence the claimant had recorded bookings for meeting with patients when she knew patients were not attending the surgery.

⁷ I reach this conclusion based on Mr Nelson's statement of his health.

The claimant had used this time to undertake other tasks (215, second paragraph).

124. The Doctors were concerned that the appointments were set aside for seeing patients, not for work consequent to seeing a patient. The claimant explained that since she had been instructed that TOIL would not be available for the “post appointment” work, she had adopted this approach.
125. On the written summary of the meeting, it does appear that the claimant had been “caught out” and admitted the recorded activity was not a genuine representation of the activity she had undertaken. Moreover, she admitted she had acted in that way to avoid having to undertake work beyond her paid hours.
126. I accept that the claimant felt that she accused of acting fraudulently when she was questioned by the partners as to why she had booked 45 minutes of patient appointments on the respondent’s system knowing that those patients were not due to attend the surgery and, I accept that she would be upset and tearful when she had to explain her rationale for disguising her real activity.
127. The outcome of the meeting was twofold; another meeting would be convened to clarify the respondent’s expectations of an Advanced Nurse Practitioner and that the nurses were allocated an addition 20 minutes a day for administration (215).
128. The claimant then wrote a detailed letter (216 -219) which contained a critique of the partners’ approach to TOIL, her pay scale, the partners’ expectation that she should work beyond her contracted hours without additional pay or TOIL and a complaint against Ms Kiddell (for discussion the claimant’s salary level with Ms Kennedy (whom she did not name).
129. In cross examination Ms Kiddell denied she had discussed the claimant’s salary with Ms Kennedy. She agreed she had discussed pay bands for ANP and NP nurses with Ms Roberts (Primary Care Lead Nurse); a person with whom it was appropriate to do so. I have no direct evidence to contradict Ms Kiddell’s account and the claimant’s allegation is reliant upon the hearsay account of Ms Kennedy.
130. On the balance of probabilities, I prefer Ms Riddell’s direct evidence and find she did not discuss the claimant’s salary with Ms Kennedy.
131. The subsequent meeting of the 3rd of April 2017 is described by the Claimant in paragraph 14 of her statement. She states that Ms Kiddell told the meeting that GP’s had approached her with alleged complaints about the claimant’s management of appointments, that Ms Kiddell was attempting to stop TOIL despite the respondent’s practice being very busy and understaffed

and that the claimant's RCN representative had described the meeting as a "witch hunt".

132. Ms Kiddell's statement contains the following:

"It was at times a somewhat heated meeting but it was not rancorous or uncivil..."

133. The claimant's evidence does not suggest that there was any inappropriate behaviour by the respondent's staff at this meeting. She gives no evidence of "heavy handed" behaviour by the doctors.

134. Ms Kiddell's account is corroborated by the evidence of Dr McCabe.

135. In light of the above, I find that the conduct of the hearing by the respondent's doctors was not heavy handed.

136. I also find that the respondent's approach to TOIL was not a decision or choice of Ms Kiddell; it was one determined by the partners of the practice which Ms Kiddell, as their practice manager, was expected to implement.

137. The Claimant, in her letter to the Partners had expressed her desired outcomes from the 3rd April Meeting. Those of a general character are set out in the first five of her bullet points in page 219.

138. The recorded outcomes of the 3rd April meeting are set out on page 220 and reflect the majority of her desired outcomes in the first seven points.

139. Although not part of the claimant's evidence or pleaded case, Ms Kiddell was cross examined upon five of those points. She gave evidence that the claimant had not taken up the opportunity proposed in items 2, 3 and 7. When challenged why she had not produced documents to which she referred in her answers, she stated that she had been unaware that the claimant was making any allegation about those proposed actions.

140. The claimant's witness statement states that following the 3rd April meeting:

"Kate's treatment of me deteriorated further. Almost daily snipes of a personal and professional nature were made by Kate. Due to the constant drip drip of negativity and experiencing differential treatment to Sam (Kennedy), I found it difficult to sleep and began to dread going to work each day".

141. The claimant's statement does not set out an example of the sniping comments.

142. I have taken into account the Messenger exchanges between the claimant and Ms Kiddell which begin on the 24th May 2017 and conclude in

May 2018. The character of these exchanges are candid, considerate, helpful and friendly on both parts.

143. Ms Kiddell denies the alleged conduct and the available evidence is more consistent with her denial than the claimant's allegation on this point.

144. I find that Ms Kiddell did not make sniping comments.

Tenth pleaded allegation: "April 19 pre wedding trip rearranged, leave verbally agreed by KK but SK granted the time off, YF refused"

145. It is agreed between the parties that, due to Mr. Nelson's rate of recuperation, the pre-wedding Maldives holiday planned for the claimant and he could not take place in December 2018. It is also agreed between the parties that the claimant told Ms Kiddell that she intended to rebook the Maldives Holiday in 2019. When she could so was necessarily dependant on Mr. Nelson's health.

146. Before turning to the disputed elements of the evidence I note the following content of the contemporaneous documents relied upon by the parties:

147. On the 9th November 2018 (274) Ms Kennedy emailed Ms Kiddell to request a four week period of annual leave in Australia. The dates were not fixed; "roughly between 8th April – 7th May".

148. Ms Kiddell replied: " I will have to see what the docs say."

149. On Friday 16th November the claimant emailed Ms Kiddell; " Hi, Sam and I have a problem. My pre honeymoon booked and paid for to Maldives is 6/4/19 to late 18/4/19? Sam has just told me re Australia??"

150. On Monday 19th Ms Kiddell referred the problem to the doctors (145) and briefly set out her perspective; that whilst the claimant had certainly booked her holiday with the travel agent she had not requested the dates as annual leave and then pointed out the degree to which both Ms Kennedy and the claimant were committed to their respective holiday dates. She concludes with a request for; "any suggestions?"

151. On the same day, apparently at Ms Kiddell's suggestion, the claimant emailed the doctors (146). She explains her position and also states; "Although I have had verbal conversations I did not put his on next year's A/L form." She requested a decision from the doctors as soon as possible.

152. Dr McCann replied to say they would think over the matter and asking the claimant to meet with him and Dr Lulthrie at 2pm on Friday the 23rd November 2018.

153. The claimant did not respond to that invitation and she had resigned, with notice, on the 20th November 2018 (149).

154. On the 23rd November (149) Ms Kiddell emailed the claimant to inform her that Dr McCann was “complelty snowed under” and so could not meet with the claimant that day.

155. The claimant did not respond.

156. In her grievance letter of the 26th November 2018, the claimant set out her allegation at the bottom of the second page (151). She states that she had discussed, and verbally agreed, the new dates for the Maldives holiday with Ms Kiddell and:

“Kate now denies any knowledge of this discussion. I completely appreciate the disruption to the practice and the fact that I should have written it on the new holiday forms when they came out. I simply forgot.... Kate has refused any attempt by me to manage this before refusing to allow my annual leave and attempting to bring me before the the GP’s to “discuss” this.”

157. She then goes on to summarise the ways in which she believed that the potential difficulties of having two nurses absent from the sugrery simultaneously could be safely managed.

158. The claimant’s evidence before the tribunal commences at paragraph 19 of her statement.

159. She states that, when she became aware of Ms Kennedy’s holiday booking, she approached Ms Kiddell who denied any knowledge of her holiday and stated that, as Ms Kennedy had been granted her holiday request, the claimant’s request would not be granted. The claimant then goes on to describe how she found herself “emailing, pleading and attempting to apologise for any mistake, even though I knew, this was not my mistake and I had been granted the leave”. She concludes her description with this: “I was informed by Kate that my holiday, which had already already cost hundreds of pounds to change originally, would have to be cancelled.

160. She goes on to note that a copy of the holiday form (a calender) shows both the claimant’s dates and Ms Kennedy’s leave dates which Ms Kennedy had written out. The claimant denies the respondent’s assertion (based on Ms kennedy’s account to the grievance investigation) that this document was prepared after the confclit of dates had been discovered.

161. She refers to the record of Ms Kennedy's grievance interview which contradicts her account. As I have stated elsewhere, I place very little weight on evidence which has not been tested in cross examination, particularly in a case such as this; where the merits of the case are so dependant upon my findings on deeply disputed accounts of events.
162. Ms Kiddell's account is set out at paragraphs 37 to 45 of her statement. Her account aligns itself to the contemporary emails and she denies that the claimant informed her of the dates of the 2019 Maldives holiday before Ms Kennedy had submitted her application to the Doctors for approval.
163. This issue occupied a substantial part of the cross examination of Ms Kiddell. She was questioned on the claimant's Holiday Request from 2018 and the record of "4 to carry over 2019" which Ms Kiddell was invited to accept was a reference to the claimant's intended 2019 Maldives Holiday and thereby some evidence that the 2019 dates had been discussed. Ms Kiddell denied that the "Holiday Form" filled in by the staff was an official record of the approved dates of leave; that document she said was a rota completed by a member of the administrative staff. She stated that Ms Kennedy had completed the "Holiday Form" after the potential conflict had become apparent and the two nurses were "trying to work it out". She denied that the rota had been on display in the corridor of the surgery. She denied that she had approved Ms Kennedy's leave or refused the claimant's request. She stated that she did not have authority to decide applications for periods of leave in excess of two weeks; such matters were passed to the doctors..
164. In the claimant's grievance letter (151) With regard to recording the approved dates on the holiday form; the claimant stated that she "simply forgot" to do so.
165. I am aware that the claimant's case before me is that she apologised for things she had not really failed to do in order to pacify Ms Kiddell. I also note that her grievance was written after she had resigned and at a time when the claimant had no intention or interest in pacifying Ms Kiddell. Accordingly I find the claimant's contemporary statement (that she "simply forgot"), which is consistent with her email to the doctors (146) is truthful. It is also logical; Ms Kennedy would not sensibly propose to book her holiday on dates which she knew were already booked by her colleague when there was no pressure on her to do so.
166. On the evidence before me the claimant did not record the April 2019 dates on her holiday application form (no document was disclosed in this respect and no application was made before me for its disclosure).
167. I find that it was agreed between Ms Kiddell and the claimant that the claimant could take her Maldives holiday in 2019 and that Ms Kiddell was aware of that intention. Three disputes exist which I must resolve:

168. Did the claimant tell Ms Kiddell the precise dates of the 2019 Maldivian holiday before the 16th November 2018?
169. If so, did Ms Kiddell grant that verbal request?
170. If so, did Ms Kiddell forget, or lie, when she later said that Ms Kennedy was the “first past the post” to apply for annual leave in April 2019?
171. I note that the claimant’s first email to Ms Kiddell does not suggest that she had requested or received approval to book specific dates for the Maldivian holiday prior to Ms Kennedy’s holiday request.
172. I note that the claimant’s email to the doctors refers to her discussing her Maldivian holiday with Ms Kiddell but does not refer to Ms Kiddell agreeing to the dates.
173. If the claimant’s account before me was accurate, the most obvious, and powerful, argument the claimant could have put forward to Ms Kiddell, or the doctors, would have been; “Kate authorised my April 2019 leave on the []”. The claimant did not do so until the 26th November in her grievance.
174. I also have some difficulty with the claimant’s statement that the April 2019 entries on the calendar (244) were made when each holiday had been approved by the manager; implicit in that assertion is that her holiday (which she argues was the first to be approved) was written down first.
175. If the Claimant’s holiday had been agreed first and therefore recorded first, logically every date would have been marked “Yvonne” as had been done for the first four days of the claimant’s holiday dates. However, the word “Yvonne” is not recorded for the “cross over” days of the claimant’s and Ms Kennedy’s intended holidays. Those dates show: “S/Y”.
176. For the dates, where Ms Sam Kennedy’s holiday clashed with the claimant’s, Ms Kennedy’s initial “S” has been written down *before* the “Y” (the claimant).
177. I do not accept the claimant’s evidence on this point and prefer Ms Kiddell’s account; I find that the calendar was drawn up after the conflict of the proposed holiday dates was known.
178. I also find it difficult to accept that Ms Kiddell, as alleged, told the claimant she could not have the requested leave in November 2018 when the contemporary emails show that she had passed the matter on to the doctors and, as of the 19th November 2018, the claimant was aware that the doctors were the persons who would make a decision on how to address the issue.
179. Lastly, I find that Ms Kiddell’s account is consistent with the contemporary emails.

180. For these reasons, I have concluded that it is more likely that the discussion about the 2019 Maldives holiday between the claimant and Ms Kiddell did not go beyond the claimant expressing that intention, Ms Kiddell acknowledging that intention and agreeing that the claimant could carry four days annual leave over to the next holiday year.

181. I find that Ms Kiddell did not know of the claimant's intended dates of holiday until the 16th November 2018. I also find that Ms Kiddell did not refuse the claimant her requested holiday. Nor for that matter had the respondent done so by the date of the claimant's resignation.

Eleventh pleaded allegation: "Final Straw event YF struggled to complete all diabetes 6 month reviews and by KK that SK managed to do all the NOAC reviews and to ask SK how she managed when there are less than half the number of NOAC patients than diabetes patients."

182. This issue is factually less fraught than most others in this case; the communication between the parties is set out in four short emails of the 20th November 2018 (147-8).

183. The claimant's statement in this respect goes beyond both the pleaded case and the account set out in the claimant's grievance letter of the 26th November 2018 (152) and consequently Ms Kiddell's witness statement did not address much that which was not foreshadowed by the pleading. Mr. Browne's cross examination focused on the pleaded case.

184. Ms Kiddell confirmed that Ms Kennedy, who worked full time, had an allocated 30 minute period once a week, for administration which she understood Ms Kennedy booked for patient appointments, depending on the need for patients to be seen on that day. Ms Kiddell also gave evidence that the claimant had administration time as well. She accepted she did not know how many patients were typically seen during a NOAC clinic or how long the NOAC clinic lasted.

185. It is not disputed that the claimant had many more diabetic blood samples to review than Ms Kennedy had NOAC cases to review. It is also not in dispute that the claimant was the more senior, experienced and qualified of the two.

186. The claimant wrote to Ms Kiddell:

"Sorry, I am finding it difficult to keep up with these now alongside other tasks and bloods in the admin time I'm having to leave lots and try to work through when have DNAs, I thought we need to carry out at least telephone review for DES?"

Ms Kiddell replied: "No, The 6 months review is only for bloods (hba1c) and then depending on the result (you ask lola) lola sends the pt a letter asking pt TCI if needed or telling pt all is okay but pt can come in if they have any concerns.

Sam is doing all the NOAC month reviews. They require telephone consultations. Maybe ask her how she squeezes them in"

The claimant replied:

"I have asked Sam and we both think that there are a lot more diabetic pts than NOAC? If I do not have to carry out a review then I will just carry on working through when I can."

Ms Kiddell's final comment was:

"I spoke to Sam before (not spoken to you yet) to see if she can help with the diabetic 6 month reviews in any way. Maybe there is a simple protocol that can be drawn up so that lola knows automatically what letter to send to the patient by looking at the result but you or Sam would still need to view the result and put a comment either 6 month review or something similar. Hope that helps."

187. The claimant's case states at paragraph 22:

"... When I approached Kate regarding struggling to fit in the management of 700 plus diabetic reviews on top of numerous other roles Kate continued in the same condescending tone which she regularly used which was absolutely soul destroying. She again told me to ask Sam how she (SAM) managed 100 NOAC patients. Kate failed to listen or consider what I had said she failed to differentiate between levels of work expected, she was dismissive and totally unapproachable."

188. Although the claimant's witness statement did not identify the form of that approach it is evident from her written grievance [152, second paragraph] that her complaint refers to an email exchange.

189. As there is no dispute about the accuracy of the copy of the email exchange before me, I find the following:

190. With respect to the "failure to listen", I find that Ms Kiddell informed the claimant that she did not need to carry out telephone interviews for DES cases.

191. I find that she informed the claimant that she had previously asked Ms Kennedy to assist the claimant with the diabetic reviews in any way she could.

192. I find that Ms Kiddell had suggested a protocol which might reduce the amount of work of the claimant when directing lola to send out the appropriate letter to patients.

193. I find that Ms Kiddell was neither dismissive nor unapproachable. She responds directly to the claimant's question:

C: "if I don't have to carry out a review then I will just carry on working through when I can"

KK: "No, the 6 month review is only for bloods"

194. Ms Kiddell states a potential mitigation of the work load and indicates she had asked Ms Kennedy to assist the claimant in any way Ms Kennedy could. That response indicates that Ms Kiddell had read and considered the claimant's comments.

195. The suggestion that the claimant should speak to her colleague Ms Kennedy was a step which the claimant herself had taken; "*I have spoken to Sam..*". Viewed objectively, that part of Ms Kiddell's response is not reasonable viewed as condescending; it was an action which the claimant, by her own conduct, had thought appropriate. I find that the comment was an appropriate suggestion.

196. In reaching this conclusion I have taken into account the claimant's case; that, in the context of the preceding years of continuous shouting, bias and bullying behaviour, the comment was not innocuous. I have concluded that most of the prior conduct of which the claimant complains is less than likely to have occurred.

197. In my judgment the suggestion that the claimant should talk to her colleague was reasonable and proper. Ms Kiddell is not clinically trained and, in the context of her other positive statements at that time, it was proper to suggest a discussion with a clinical colleague.

Twelveth pleaded allegation

198. I have sought to cross reference specific incidents in the claimant's witness statement for myself; in the absence of any particulars. These I have addressed above.

The Doctors' evidence

199. It will be evident to the parties that the above findings of fact make little reference to the evidence of the three doctors. I have placed little reliance on the evidence of Dr's McCabe and McCann for the reasons argued by Mr. Browne; their concerted effort to distance themselves from their own conclusion in the grievance process regarding Ms Kiddell's use of the words "wonky boobs" left me with little confidence in their ability to assist me. In any event, the majority of their evidence related to the grievance procedure which commenced after the claimant had decided to resign and was therefore of

modest relevance to the primary factual disputes. Dr Ferris' oral evidence confirmed that the Claimant was well respected and well thought of by the practice and that view continued after she had resigned and raised her grievance. Dr Ferris did confirm that he had not witnessed any inappropriate conduct by the claimant and denied he had described the claimant as a "wicked witch". I accepted his evidence.

Discussion and Conclusions

The legal Matrix

200. Section 95 of the Employment Rights Act 1996 provides so far as is relevant:

(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.

201. The approach to constructive dismissal is set out by Lord Denning in Western Excavating (ECC) Ltd v Sharp 119781 1 All ER 713, 119781 QB 761, 119781 2 WLR 344, CA in which he defined constructive dismissal as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

202. The implied obligation of mutual trust and confidence in employment contracts requires that the employer shall not, "without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee": see Malik v BCCI [1998] AC 20 per Lord Steyn at 45, adopting the formulation in Woods v WM Car Services (Peterborough) Ltd [ICR 666 (EAT)] and Lewis v Motorworld Garages Ltd [1986] ICR 157; and Imperial Group Pension Trust v Imperial Tobacco Ltd [1991] ICR 524.

203. The implied obligation as formulated is apt to cover a great diversity of situations in which a balance has to be struck between an employer's interests in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited. It is a mutual obligation, though it

seems that the implied term adds little to the employee's implied obligations to serve his employer loyally and not to act contrary to his employer's interests.

Repudiatory conduct

204. In assessing whether there has been a breach, it seems clear that what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended. Moreover the impact will be assessed objectively: BG Plc v O'Brien[2001} IRLR 496 EAT.
205. The burden lies on the employee to prove the breach on a balance of probabilities. This means, where the employer claims that he had reasonable and proper cause for his conduct, that the employee must prove the absence of reasonable and proper cause.
206. The test whether there is a breach or not is said to be a 'severe' one: Gogay v Hertfordshire CC [2000] IRLR 703 at para 56 per Hale LJ. In this regard it should be remembered that for an employee to become entitled to claim that he has been constructively dismissed on this ground, it is not enough to prove that the employer has done something which was in breach of contract or 'out of order' or that it has caused some damage to the relationship; there is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can fairly be regarded as repudiatory of the contract of employment⁸, that is to say, so serious that the employee is entitled to regard himself as entitled to leave immediately without notice; Croft v Consignia Plc [2002] IRLR 851 EAT, The Post Office v Roberts [1980] IRLR 347 EAT.

A repudiatory breach

207. I must first make an analysis of my findings of fact in respect of the respondent's conduct and whether such of the alleged conduct as is proven, was without reasonable and proper cause. This necessitates findings on each of the allegations and thereafter deciding whether individually or cumulatively any proven breach is repudiatory. I first review my findings of fact;
208. I have found that Ms Kiddell did not make inappropriate comments in respect of the claimant's time off for corrective surgery.
209. I have not found that the Ms Kiddell was friendlier towards Ms Kennedy than she was towards the claimant.
210. I have found that the respondent referred to the claimant as having "wonky boobs" and, on another occasion, asked if she had had "botty" sex.

⁸ Also see: *RDF Media Group Plc v Alan Clements*, paragraph 105.

211. The respondent did not assert any reasonable and proper cause for such comments and, I find that the said that conduct was without reasonable and proper cause.
212. The dates of those two incidents are uncertain but, I accept the time frame put forward in the claimant's submission; "summer to late summer" 2016.
213. I have found that the conduct of the GP's was not heavy handed in the March and April 2017 meetings.
214. I have found that Ms Kiddell did not scream at the claimant.
215. I have found that when the claimant raised a safety concern regarding the provision of repeat prescriptions for asthmatic patients, Ms Kiddell listened and took appropriate action.
216. I have found that administrative time was agreed for the claimant.
217. I have found that the respondent did not refuse mileage payments on occasions where Ms Kennedy was granted such payments.
218. I have found that the respondent did not refuse annual leave for the claimant's hospital appointments.
219. I have found that the respondent did not refuse unpaid time off as part of a phased return in March 2018.
220. I have found the alleged November 2018 conduct of Ms Kiddell, regarding the Maldives holiday booking, did not occur.
221. I have found that one part of the alleged conduct of the 20th November 2018 occurred; the suggestion that the claimant should "ask Sam" I have found that that conduct was with reasonable and proper cause and, viewed objectively, it was not demeaning or offensive in any degree. On the contrary it was an appropriate response.
222. I then applied those findings to the legal matrix
223. Any breach of the implied term of trust and confidence is likely to be repudiatory in nature; that follows from the dicta in the cases cited at paragraphs 200 - 205 above.
224. I have no doubt that nature of the two proven comments could, depending upon the circumstances, be likely to seriously damage or destroy

the relationship of trust and confidence between the respondent and the claimant.

225. I remind myself that the analysis I must apply is an objective test and that the intentions of the respondent are not a material consideration; it is the effect.

226. I find that claimant did not remonstrate with Ms Kiddell and she had undoubtedly made humorous, and self deprecating, comment, to Ms Kiddell about her post operative appearance ("chicken fillets"). In light of the claimant's text, in which she refers to Ms Riddell as having "no people skills" and Ms Riddell's account to the grievance investigation that, objectively it was apparent at the time that the comment was made without ill will. I also find that it nevertheless offended the claimant.

227. I find that about two months later Ms Kiddell asked the claimant if she had "botty sex".

228. I have been guided comment in *Tullet Prebon plc v BGC Brokers LP* [2010] IRLR 648 wherein, Jack J, sitting in the High Court, said:

"It is in a sense circular to say that the employer's conduct must be serious enough to entitle the employee to leave. However, in considering what gravity of conduct by the employer is required, it is helpful to say that it must be such as so to damage the employee's trust in the employer, that he should not be expected to continue to work for the employer. Conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough."

229. I have not accepted the context of Ms Kiddell's comments put forward by the claimant with respect to the first comment. The second comment was an unwelcome comment made in passing.

230. The degree of that damage is, in my judgment evident in the claimant's text to which I have referred above [YMF 26]: "She has absolutely no people skills!! Oh god I could tell you stuff...⁹"

231. I find that the respondent's conduct caused a degree of damage to the employment relationship.

232. The fact that the claimant did not complain, however informally, in circumstances where there was no impediment to her doing so, the evidence of a friendly manner between the claimant and Ms Kiddell in the contemporaneous documents and my lack of confidence in many aspects of the claimant's evidence leads me to the conclusion that, on the facts of this case, viewed objectively, the degree of damage was not of such gravity that it would

warrant an employee to conclude that she should not be expected to continue to work for the employer.

The Last Action

233. Mr. Browne referred me to the authority of Patel v Leeds Teaching Hospital NHS Trust, which I have read. I have taken particular note of the additional comments of HHJ Auerbach in the case of Williams v The Governing Body of Alerderman Davies Chuch in Wales Primary School UKEAT/0108/19/LA:

“ 30.... If there has been conduct which crosses the Malik threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of contributing to a breach of the Malik term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment?

31. That question appeared to have received different answers from the EAT, but was tackled head on by the Court of Appeal in Kaur v Leeds Teaching Hospital NHS Trust. Their decision confirms that the answer is “yes”. In Kaur, Underhill LJ, which whose speech Singh LJ concurred, gave the following guidance:

“I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. 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 for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

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

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy”.

32. This helpful guidance assists Tribunals to navigate through one particular possible permutation of the branchings of the decision tree. Some other possible permutations are relatively straightforward. If the answer to Underhill’s LJ question two is “yes”, then the claim of constructive dismissal must fail. If the answer to question three is “yes” then the Tribunal should proceed to question five.

33. As I understand it the parenthetical “if it was” following question four, conveys that it is an affirmative answer to that question that will also take the Tribunal to question five.

However, what if the answer to question four is “no”? That is the scenario with which this ground of appeal in the present case is concerned. The answer is, that if the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign.

34. In my judgment this is the correct analysis as a matter of principle, and indeed is in line with what has been said by the Court of Appeal in previous authorities. It is the correct answer in principle because, so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it has not been lost, and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent, conduct has also contributed to the decision to resign. It would be true in such a case that in point of time, it will be the later conduct that has “tipped” the employee into resigning; but as a matter of causation, it is the combination of both the earlier and the later conduct that has together caused the employee to resign. “

234. I address the five questions set out in Patel:

235. The claimant’s pleaded claim asserts that the act of the employer which “tipped the scale” was the content of the email exchange of the 20th November 2018. It was clear from the claimant’s evidence that her perception of one sentence in the respondent’s emails was influenced by the prior, as she alleged, unfair, biased and bullying conduct of the respondent.

236. The claimant did not affirm that conduct; she resigned within three days.

237. The act of itself was not of itself alleged to be repudiatory in nature and I did not find it to amount to a breach at all.

238. I have found that the “final straw” was reasonable and proper conduct. I will not repeat my findings of fact here but, in my judgment, those findings of fact lead me to conclude that the conduct was innocuous; it was without fault.

239. In those circumstances, the character of the respondent’s 2016 conduct, as I have found it, has not been altered by any subsequent event and did not amount to a repudiatory breach.

240. In light of my conclusion that the respondent did not commit a repudiatory breach of the implied term of trust and confidence the claimant’s resignation did not amount to a dismissal for the purposes of section 95(1)(c) of the Employment Rights Act 1996.

241. I therefore conclude that the claimant was not unfairly dismissed.

242. In light of the above, I do not need to determine whether the claimant’s continued employment between the autumn of 2016 and November 2018 amounted to an affirmation of her contract of employment.

Employment Judge R F Powell
Dated:16th February 2021

JUDGMENT SENT TO THE PARTIES ON 22 February 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS