EMPLOYMENT TRIBUNALS

Claimant: Mrs C Jefferson

Respondent: Dr J Brown, Dr J Franklin, Dr C Zengeri, Dr M Chavali and Dr S Azam t/a Ash Tree House Surgery

FINAL HEARING

Heard at: Manchester (remote hearing in public by video CVP)

On: 25-26 January 2021

Before: Judge Brian Doyle (sitting alone)

Representatives
For the claimant: Ms L Gould, Counsel
For the respondent: Mr M Howson, Peninsula Business Services Ltd

JUDGMENT

1. The claimant was unfairly and wrongfully dismissed by the respondent such that her claim (as amended) is well-founded.

2. The respondent is ordered to pay to the claimant the total sum in compensation of £20,836.86 comprising (1) a basic award for unfair dismissal of £6,446.70; (2) a compensatory award for unfair dismissal of £11,762.40; and (3) an award for wrongful dismissal of £2,627.76.

3. The recoupment regulations do not apply to these awards.

4. The respondent's application for written reasons is granted and written reasons will be provided as soon as possible.

REASONS

Introduction

1. These are the written reasons referred to at paragraph 4 of the Tribunal's judgment above.

2. This is a claim of unfair and wrongful dismissal arising from the claimant's resignation from her employment with the respondent medical practice in circumstances in which she had been asked to take on varied job duties and in circumstances of the respondent's handling of her resulting grievance.

3. The Tribunal dealt with an application for specific disclosure of three documents at the outset of the hearing.

4. It became apparent late in the hearing that the claimant intended her claim to contain both a complaint of unfair dismissal and one of wrongful dismissal. That was readily apparent from her schedule of loss. However, this was not identified as at issue at the outset of the hearing and only became a matter to be considered once the Tribunal had given its decision on liability and before it had considered its decision on remedy.

5. The claimant had not ticked the relevant box on the ET1 claim form. However, there was sufficient material in paragraphs 59-62 of the particulars of claim, and at pages [19-20, 188] of the bundle and at paragraphs 73-75 regarding remedy to indicate that the respondent was aware that a claim in respect of notice pay was intended.

6. A claim for notice pay is not implicit or inherent in a constructive dismissal complaint. Nevertheless, applying the *Selkent* principles, the Tribunal permitted a late amendment to the claim. This is not strictly a new cause of action, but is one that amounts to a re-labelling of existing material. There is no time limitation issue. No further evidence is required. The balance of hardship, prejudice and justice requires that the amendment be made, even at the remedy stage.

The evidence

7. The Tribunal had before it an indexed electronic bundle of documents comprising 261 pages including the index. It heard witness evidence from the claimant, Mrs Carole Jefferson, who also called Mrs Fiona Gibson (formerly Practice Co-Ordinator with the respondent) and Mrs Sheryl Ormand (formerly Referral Administrator with the respondent), and from Dr Jon Brown (the respondent's Senior Partner). All four witnesses had prepared written witness statements, which were taken as read.

Assessment of the evidence

8. The claimant, Mrs Jefferson, was an impressive witness, with a detailed recollection of the events that led to her resignation from the respondent's employment in 2019. Although it was clear that those events had had a marked

effect upon her and were at times upsetting to recall, she did not exaggerate her evidence and took particular care to answer questions only to the extent that she could do so accurately and honestly. Her evidence inevitably had passages in which she described her feelings and impressions at the time or since (having seen evidence during disclosure that she had not previously seen). Given that she is relying upon her resignation as amounting to a constructive dismissal, there are also places in her evidence where she provides a quasi-legal analysis for her actions or reactions. The Tribunal has taken care in differentiating her evidence from matters of mere opinion and/or submission. Nevertheless, her account was a wholly plausible, credible and reliable one, such that the Tribunal has had no difficulty in basing the large part of its findings of fact upon her evidence.

9. Mrs Gibson and Mrs Ormand gave short and focussed evidence on what they saw and heard of the claimant at the relevant time. Mrs Gibson was particularly helpful in aiding the Tribunal's understanding of the extent of the payroll duties that were at the heart of the dispute between the employee and her employer. Both witnesses provided corroborative evidence that supported and underpinned the claimant's evidence as to her treatment by her employer. The Tribunal accepted their evidence.

10. Dr Brown was also an impressive witness. He gave his evidence with considerable care and with some natural hesitation, which the Tribunal interpreted as arising from an understandable concern to give an honest account that derived solely from matters that were wholly within his personal knowledge or understanding. He was an honest witness, but one whose evidence was necessarily shaped by the respondent's decisions and actions to which he was party. That is not in any way a criticism of this witness. His evidence, honestly and credibly given, did not undermine the claimant's case, but rather demonstrated that it had merit, as will be apparent below.

Findings of fact

11. The respondent is a GP surgery. It is a partnership of five GPs. It employs a number of non-partner GPs, five or so non-GP clinical staff and around 20 other staff members.

12. The claimant, Mrs Carole Jefferson, commenced employment with the Ash Tree House Surgery on 7 August 1991. Her job title had varied over time, but had included "Financial Controller", as well as "Secretary/Financial Controller". She was a part-time employee. She worked 19.5 hours per week over three days.

13. Her original contract of employment (at least, an updated one that she signed in 2008) appears at [32-41]. It does not contain a flexibility clause. Among other duties, she had responsibility for the maintenance of the surgery's premises and equipment. She had never undertaken payroll duties for either the surgery or for any other organisation. Some of the duties that she had undertaken appear at [65-67]. Some of these duties are evidenced by emails appearing at [68-73].

14. In 2015, she took on additional duties that had previously been handled by the then Practice Manager. These included reconciling the surgery's OneCard, invoicing for

medical students, updating the Empowering Budget and acting as the primary contact for any Open Exeter queries [65-66]. This evidenced the claimant's flexibility. She was not averse to taking on extra work in her role, provided she had the capacity to do so and provided the additional duties did not give rise to other concerns. Her part-time role was a busy one.

15. In March or April 2018, the Practice Manager at the time explained to the respondent's employees that an external consultancy had been retained by the surgery as HR and Employment Law advisers. It was the claimant's understanding that that the consultants advised the respondent to update each of the employees' statutory statement of employment particulars and its employee handbook as a matter of priority and urgency.

16. On 2 May 2018, the then Practice Manager asked the claimant to enter into a new contract of employment [42-44] (3 pages and 15 clauses). As is apparent from this document, it takes a different form (that of a statutory statement) and content from that signed in 2008 (10 pages and 32 clauses). It purports to do more than simply update the claimant's salary details. Contrary to the respondent's response to the claim, this was not provided to her on 27 April 2018.

17. On 2 May 2018 the claimant went to the then Practice Manager's office. The Practice Manager was extremely busy printing out the new "contracts". She said that the consultants had said that the "contracts" needed to be signed quickly and that she needed them signed and returned to her before she left for a holiday on 4 May 2018. The Practice Manager asked the claimant to sign the new "contract" immediately in front of her. She did so [45]. The claimant had not had a chance to read it before doing so. She had not read it subsequently. She assumed, not unreasonably, that it made no changes to her terms of employment.

18. This document recorded that the claimant was employed as a Financial Controller; that her duties would be as advised by the Practice Manager; that her duties may be modified from time to time to suit the needs of business [42]; and that her normal hours of work were 19.5 hours per week. The claimant signed the new documemnt almost immediately upon being given it because she felt that she had to do so and she felt pressurised to do so. Before signing it and subsequently, the flexibility clause at [42] was not specifically brought to her attention. She was not given time to review the new document properly or take advice on it. She was not told of any changes between the original contract and the new document.

19. Because the claimant had worked for the surgery for a long time and had developed a lot of trust in the respondent, she assumed that the terms of new "contract" were the same as her original contract. She assumed that, if the new document contained any detrimental changes, that these would have been specifically brought to her attention. Had she known that new "contract" contained a flexibility clause, she would not have signed it because she was part-time and already undertaking an extremely busy role. Her role did not have capacity for more duties and she did not wish to increase her hours of work. She did not raise any concerns about this at the time because she did not know that the new document contained a flexibility clause.

20. Shortly afterwards, the then Practice Manager confirmed to the claimant that the respondent had rescinded the new "contract" because it contained errors. She told her that she should "scrap it". Specifically, it contained the wrong remuneration details and the wrong employee notice of termination period [42 and 44]. As she had not read the new document before signing it, the claimant had not noticed these errors. The decision to rescind the new "contract" was confirmed verbally to her by the then Practice Manager. There was no written record of this.

21. Several weeks later, the claimant received a new "contract of employment" [46-48]. This also contained the provisions referred to above. Again, the claimant received no notification that this contained any substantial or detrimental changes. The flexibility clause was not brought to her attention. The replacement document was left on the claimant's desk when she entered the office. She placed it in her bag and took it home. She did not sign it or read it at the time or subsequently. The respondent did not at any point ask her to sign or to return this document. She did not do so. She placed it in a drawer at home. She read it for the first time after the events relevant to this claim occurred.

22. On 21 August 2019, the respondent's then Interim Practice Manager approached the claimant and informed her verbally "in no uncertain terms" that the claimant would be taking on payroll duties. The claimant was told that this was because the respondent's Practice Co-ordinator, Mrs Fiona Gibson, who had previously undertaken payroll, was leaving the respondent's employment on 31 August 2019. It does not appear here or at any other time that the respondent was expressly relying upon the new flexibility clause that the 2018 documents had purported to introduce to the employment contract. No mention of any such reliance was made.

23. Dr Brown's evidence, which the Tribunal accepts, is that the partners had decided that Mrs Gibson would not be replaced at that time and that her duties would be divided among the remaining staff. It seems that as the claimant already undertook the financial duties of the practice the partners had decided that she would be best placed to undertake the payroll duties (possibly – although this is a disputed matter in these proceedings – alongside the Interim Practice Manager). The claimant did not accept that payroll duties were a natural extension of the work that she was already doing for the surgery at the time. It was very clear to the claimant that the Interim Practice Manager was not presenting this to her as a proposal upon which they would consult. Instead, she told her that this was a change that she was required to accept.

24. The claimant explained the difficulties that this would create for her, considering her part-time hours and existing duties. She further explained that she did not want to increase her contracted hours. She also explained that she was concerned that the additional duties would place her in a conflicted position.

25. Despite the claimant's protestations, the Interim Practice Manager informed her that she (the claimant) would be taking on the payroll duties. She did not engage with the claimant's concerns. She did not, contrary to what the respondent states in its response to this claim, tell the claimant that the surgery would put protocols in place to alleviate her concerns or that the Interim Practice Manager would be involved and would assist her with the payroll process (except on the first

occasion). She did not tell her it would be reviewed. The Interim Practice Manager recorded that it was "very obvious" that the claimant was not happy with this suggestion [147]. She did not tell the claimant that she would be taking other duties off the claimant, or that she would be sharing the payroll duties with the claimant, or that the claimant was only doing payroll on a trial basis. She did however say that, for just the first time that the payroll duties needed to be undertaken, she would do them with her.

26. The discussion about the payroll duties are captured in the Interim Practice Manager's handwritten note [74], reproduced at [75]. The notes correctly record that the claimant was unhappy. They state that the Interim Practice Manager and the claimant "would work together to do this". The claimant's interpretation, which the Tribunal accepts as being accurate, was that the Interim Practice Manager was not saying that they would work together on the payroll duties. She was saying that she would be carrying out pensions, annual leave entitlement and sickness monitoring (which are completely separate tasks), leaving the claimant with the responsibility of payroll. The Interim Practice Manager had never told the claimant that they would "work together" with the payroll duties, except in respect of the first time that this would be done.

27. On 27 August 2019, the claimant handed the Interim Practice Manager a letter [76 and 113] dated 26 August 2019. This formally set out the claimant's concerns regarding the above matters. Given that the Interim Practice Manager had not taken any action since the discussion on 21 August 2019 (that is, the plan remained for the claimant to take over payroll duties when Ms Gibson left), and because she had not engaged with the serious concerns that the claimant had raised, the claimant felt that she had no option but to raise her concerns more formally.

28. In this letter, the claimant explained her concerns about the increased workload and her concerns that undertaking payroll alongside handling day-to-day expenses of the practice would create a conflict of interest. The Interim Practice Manager had not discussed these concerns with her at length.

29. In relation to the conflict of interest, the claimant was concerned that where she was in the position of both the Financial Controller and the payroll administrator, there would be a risk of fraud accusations being made against her. She was not concerned that she would ever commit fraud. She was concerned that undertaking both roles could potentially leave her open to allegations of fraud.

30. In this respect, Mrs Gibson's duties required her to obtain colleagues' hours and submit these to the respondent's accountants. She would then receive salary calculations from the accountants that she would check against her own figures. Mrs Gibson would then confirm these figures with the accountants, who would produce pay slips. The claimant was then given a payment report and tax report in her role as Financial Controller so that she could make these payments. There was a clear segregation of these duties. If the claimant felt that there was an error of some description in Mrs Gibson's calculations (for example, an employee seemed to be due to receive a higher salary instalment than usual), she would question that with Mrs Gibson before processing the payments. By combining these processes,

the respondent was requesting the claimant in future should both submit and confirm salary figures as well as making these payments. In her opinion, and considering that the process would not audited or checked by any third party (including management), this would have placed the claimant in a compromised position.

31. This was informed by the claimant's understanding of established practice in the financial industry (not challenged in the Tribunal proceedings) that a Financial Controller is the Finance Director's second-in-command. They are responsible for the company's financial reporting and manage all of the company's transactions, from accounts payable to receivable payroll, and from control accounts to general operational finance. On the other hand, payroll managers, administrators and supervisors are required to control payroll duties. Tasks include ensuring that members of staff receive the correct amount of money.

32. Reference in the evidence has been made to the Foundations in Audit and Audit and Assurance, the Association of Chartered Certified Accountants (ACCA) warning that, within finance departments, appropriate controls should be in place to help minimise risks of fraud. In "Control objectives 2 and 3" [52D], ACCA state that payroll should be reviewed by a senior responsible official before the payroll cheque is signed and that two individuals, independent of the processing of wages, should be involved in the make-up of pay packets (Control objective 2). ACCA have said that the risk of fraud should be considered by the auditor when planning the work which is to be performed on the payroll. ACCA have said that a common feature that often facilitates these frauds is inadequate segregation of duties between various members of the finance team [52E]. Frauds can be difficult to prevent where there is a collusion amongst staff. ACCA have warned that, historically, organisations have lost significant sums when large number of staff came to expect the routine inclusion of unauthorised overtime in their pay.

33. The ACCA documentation at [52A-52H] assists the Tribunal to some extent, but it does not consider it necessary to rely upon this evidence. The Tribunal accepts the claimant's understanding that she should not undertake both these roles and that this understanding had been endorsed by the respondent's previous Practice Managers. As a result, the claimant explained that she believed that it was wholly inappropriate for the surgery to require her to be both the Financial Controller and the payroll administrator.

34. At around 11.00am on 27 August 2019, the Interim Practice Manager informed Mrs Gibson and the claimant that they would both be sitting with her the following day to understand how to undertake Mrs Gibson's payroll duties. At this point, the claimant politely reminded the Interim Practice Manager that that same morning she had given her a letter setting out her concerns about having to undertake this role. The Interim Practice Manager ignored this comment. The claimant was as a result very upset and anxious.

35. At around 2.50pm on 27 August 2019 (just before the claimant was due to leave work at 3.00pm), the Interim Practice Manager called the claimant into her office. As the claimant approached her desk, but before she was able to sit down, the Interim Practice Manager informed her in a raised voice that she should not have

written the letter. She tapped her finger on the letter in an aggressive manner. She then leaned across the desk in a threatening manner, banging her hand on the desk, saying "You are doing payroll". The claimant was upset by this and started shaking.

36. The Interim Practice Manager later acknowledged [148] that the claimant was "a bit upset". The Tribunal accepts that this somewhat understates the claimant's level of despair at that time. The Interim Practice Manager later acknowledged [147] that she was "very disappointed" to have received the letter from the claimant. The Tribunal accepts the claimant's assessment that that perhaps set the tone for the Interim Practice Manager's treatment of her during this meeting.

37. The claimant again explained why she was unable to take on this additional responsibility, reiterating her previous concerns. The Interim Practice Manager ignored this and continued to proceed on the basis that the claimant would be taking on these additional duties. The Interim Practice Manager did not tell the claimant that she would be taking other duties off her or that she would be sharing the payroll duties with her or that it would be for a trial period.

38. The claimant was very upset after this meeting. She returned to her office to gather her things. Mrs Gibson asked her if she was OK. She was unable to answer as she was too upset. Mrs Gibson caught up with the claimant outside the surgery and asked her again if she was OK. At this point she was crying and struggling to speak. However, she managed to explain to Mrs Gibson that she had been told that she had to take on her payroll duties and that this had not been discussed prior, nor did the respondent seem forthcoming in resolving the concerns the claimant had raised in relation to these duties. She also told Mrs Gibson about the exchange in which the Interim Practice Manager had pointed her finger aggressively and leaned forward and banged on the desk informing her that she would be doing payroll, and that she had written to the Interim Practice Manager to set out her concerns. She told Mrs Gibson that the Interim Practice Manager was very angry that she had put her concerns into writing and had told her that she need not have done so.

39. The claimant had made prior engagements to go shopping with her mother later that evening. However, she felt that she was not in a fit state to drive. They were unable to go. She was deeply upset all evening and that night, and she barely slept.

40. On 28 August 2019, the Interim Practice Manager asked the claimant to sit down with Mrs Gibson so that Mrs Gibson could explain how she processed the payroll. The claimant did so under protest. She was so upset that she did not comment or take notes during this meeting. Mrs Gibson took between 2 to 3 hours to explain how she processed payroll and how sickness and holidays impacted upon this. She further explained that this required time to locate the information from both staff and the "Intradoc" system.

41. After this, the Interim Practice Manager told the claimant that she could return to her desk while Mrs Gibson handed over her remaining duties to the Interim Practice Manager. The claimant was in the same room as Mrs Gibson and the

Interim Practice Manager while Mrs Gibson did so. The meeting took over 4 hours in total. The process appeared to be complex and time-consuming. During this meeting the claimant could see that the Interim Practice Manager looked flabbergasted about the volume of work that Mrs Gibson was passing on, particularly in regard to payroll. It was at this point that the claimant believes that the Interim Practice Manager became aware of the complexity of the role that Mrs Gibson was undertaking. Without knowing this information the Interim Practice Manager was unable to determine whether or not staff had the capacity to take these duties on. This showed that, until this meeting, she was not previously aware of how much additional work she was forcing the claimant to do.

42. On 29 August 2019, Mrs Gibson sent an email to all staff suggesting that the Interim Practice Manager and the claimant would be taking over the lead responsibility for the payroll [77]. However, the claimant did not believe that there was ever any intention for her and the Interim Practice Manager to share these duties. She does not believe that this is what Mrs Gibson meant to write. She understood that Mrs Gibson had put the claimant's and the Interim Practice Manager's names next to each other because she was aware of the claimant's concerns about undertaking payroll duties and that the claimant had not agreed to this.

43. When she left the surgery the next day on 30 August 2019, Mrs Gibson did not know if the claimant was taking on responsibility for payroll. The claimant believes that for this reason she stated that the Interim Practice Manager and the claimant would be taking over the responsibility for payroll so that other members of staff could contact the Interim Practice Manager in the event that the claimant was not taking on the responsibility for these duties. The claimant had not understood that this email was intended to mean that the payroll duties would be shared between the Interim Practice Manager and the claimant. That impression is confirmed by Mrs Gibson's evidence.

44. On 3 September 2019, the claimant approached the respondent surgery's Senior Partner, Dr Jon Brown, in order to escalate her concerns. She did so via the surgery's medical triage system. The Tribunal accepts that Dr Brown did not regard that as ideal and that he wished to keep a clear division in his dealings with the claimant first as an employee and second as a patient.

45. It was clear to the claimant that the action she had taken thus far had not made any difference. She felt that she had no option but to raise her concerns more formally. She told Dr Brown about what had been happening. Dr Brown did not acknowledge that he knew about these issues. He told her that he would discuss it with the partners at a practice meeting being held that lunchtime. He told her that he would get back to her later that day. He knew that she finished work at 3.00pm.

46. Dr Brown made some notes, which he sent to himself via email that day [79 and 80]. He acknowledged that the claimant was upset and tearful; that she had told him that she had not been sleeping; and that she had said that she had felt bullied. Although Dr Brown recorded that the claimant was struggling with "work", that is not what the claimant had told Dr Brown. She had told him that she was

uncomfortable carrying out the additional payroll duties. She had no concerns about her other duties.

47. On her way back to her desk, the claimant passed her colleague, Sheryl Ormand. The claimant was visibly upset. Mrs Ormand asked her "are you okay?" The claimant was unable to formulate any response due to how distressed she felt at that time. Mrs Ormand approached her in the office, gave her a hug and said words to the effect of "I know you might not want to talk about it, but are you okay?" The claimant started to sob and was unable to answer because she was so upset. Mrs Ormand suggested that they went outside for some fresh air. They did so. The claimant was still in tears and unable to compose herself. When she did calm down, she explained to Mrs Ormand that the respondent had asked her to take on additional payroll duties. She told Mrs Ormand that she felt that this would put her in a conflicted position. She informed Mrs Ormand that she had written a letter to the Interim Practice Manager the week prior expressing these concerns and that she had just come out of a meeting regarding the submission of that letter. She also told Mrs Ormand that the Interim Practice Manager was very angry that she had written this letter and that she had told her that she should not have put her concerns in writing. She told Mrs Ormand that during this exchange the Interim Practice Manager had pointed at the letter, banged on the desk and demanded that she would be doing payroll.

48. Throughout the day the claimant had to leave her desk on several occasions because she was worried and became upset. Her colleagues expressed their concerns and worries about her because this was completely out of character.

49. The practice meeting finished at 2.50pm that day. Dr Brown did not come and speak to the claimant before she left work at 3.00pm. No doubt this was because there was insufficient time to do so before Dr Brown was due to see patients. Nevertheless, despite being visibly upset, neither the partners nor the respondent's management enquired as to the claimant's wellbeing. She was left feeling worthless and devastated, with a complete lack of empathy and concern from the surgery. Following the practice meeting, the claimant could hear the Interim Practice Manager and others joking and laughing loudly in the room next to the office where she was sat. It is unlikely that this was directed at or concerning the claimant. However, given that they had just discussed that she was deeply upset, and that they knew she was still in the office, at the time the claimant felt that it was wholly insensitive. She was distraught that afternoon when she left the office.

50. Dr Brown noted [79] that during the practice meeting the Interim Practice Manager had told him that she had agreed to meet with the claimant to discuss a trial period and monitoring in respect of the payroll duties. He noted that they would look at removing some of her other duties to free up more time. These proposals had not been put to the claimant at this time. The surgery did not propose a trial period of the payroll duties nor had it discussed with the claimant the removal of any of her existing duties. If this is what the Interim Practice Manager told the partners at the practice meeting then that was not a truthful or accurate account.

51. The formal notes of the practice meeting are said to appear at [70]. The Tribunal observes that the notes do not appear at that point in the electronic bundle and that

they are said to be redacted for confidentiality in any event. So far as the discussion of the claimant is concerned, the relevant note is at [82].

52. It appears to the Tribunal, as it now appears to the claimant, that this note over-simplifies the extent of the payroll duties. The payroll duties did not simply involve collating and passing the payroll information to the accountants on a monthly basis. They also involved checking the information when it came back from the accountants and dealing with numerous staff queries. The notes also record that the Interim Practice Manager assured the claimant that aspects of her duties would be removed; that they would do the payroll together; that a trial period would be undertaken; and that the claimant had been asked to "give it a go and see how it worked". The Tribunal agrees with the claimant that none of this is correct.

53. As a result of the surgery's treatment of the claimant described above, she became too unwell to attend work. She did not attend work from 4 September 2019 onwards. On 6 September 2019 she was signed off sick with stress at work [83]. She did not return to work.

54. It is not disputed that prior to 4 September 2019 the claimant had an exemplary attendance record. Her absence arising from sickness had been less than 10 days over the last 20 years. She had never before suffered from any stress-related absence despite her responsibilities at the surgery often putting her under great pressure to meet deadlines, produce last-minute financial reports and/or handle urgent maintenance issues. No one has disputed the claimant's assessment of herself as a generally happy and resilient individual who normally took all these challenges in her stride. The claimant believes that the surgery's most recent treatment of her had broken down her resilience and had had a drastic negative impact on her health.

55. At about 11.30am on 4 September 2019, Dr Brown telephoned the claimant and asked if she was able to take his call because he knew that she had reported as sick. She told him that she was willing to take his call. He did not ask her how she was or enquire as to her general welfare despite the fact that she had reported as sick. He informed her that he had looked over the email circulated to her colleagues at the surgery and at the letter dated 26 August 2019 [76]. Dr Brown informed her that a colleague had been wrong to approach her about holidays and should have in fact gone to see the Interim Practice Manager. She responded that she knew this and had appropriately directed that colleague to see the Interim Practice Manager. She told Dr Brown that one of the contentious issues was that she felt that her name should not have been put down for payroll, and circulated via email to her colleagues at the surgery, because she had not agreed to undertake payroll duties. Dr Brown did not appear to know what to say in response and the conversation ended swiftly. He did not update the claimant on what had been said during the practice meeting. She was extremely upset and broke down following the telephone call.

56. On 9 September 2019, the Interim Practice Manager emailed Dr Brown and others stating: "Just to let you know that I have received a fit note for Carole – 6/9 – 20/9. Just as expected! What a pity!" [84]. One of the partners responded asking whether the note referred to work-related stress. The Interim Practice Manager confirmed

that it did. She used an exclamation mark in her reply. While the claimant did not see these emails until after she had resigned, she believes that their contents and the use of exclamation marks show that her concerns were not being considered seriously or professionally. The Tribunal agrees.

57. By email of 30 September 2019, the respondent's external consultants advised the surgery to support the claimant during her sickness absence [92A]. This was never done. There was no empathy or support offered to her by the surgery. There were no welfare calls and no enquiries about her wellbeing. It is clear from the documents that any concern being expressed was directed towards the Interim Practice Manager and her health rather than in the direction of the claimant.

58. On 20 September 2019, the claimant submitted a formal grievance dated 19 September 2019 [85]. The respondent's grievance procedure appears at [49] and its personal harassment policy and procedure is at [50-52].

59. In its response to the claim, the respondent surgery notes that the claimant did not raise any concerns as part of this grievance regarding the fact that the surgery sought to force her to sign a new contract without giving her sufficient time to review it. The claimant accepts that this is correct. However, this was because her concerns as of 20 September 2019 related to the surgery's forced changes to her duties and how the same had been handled.

60. On the same date the claimant provided an updated sick note. This confirmed that the reason for her absence was work-related stress [86].

61. On 24 September 2019, the Interim Practice Manager contacted Dr Brown and another partner to say that she had suspended the claimant from the surgery's bank account [89]. She was not aware of this email until after her resignation. She was extremely upset when she read this email and she was taken back by its inference. She found it distressing, especially considering her 28 years' service with the surgery, that the partners could not vouch for her integrity. This email felt like a very personal attack on her integrity. While the Tribunal can understand the claimant's interpretation of this action, it is unable to find as a fact that it did represent an attack on her integrity. It is as likely to be a pragmatic step to take in respect of an employee who was a key employee on sick leave who was a signatory for the purposes of approving the surgery's financial transactions.

62. On 24 September 2019, there was an exchange of emails between Dr Brown and the other partners regarding the claimant's grievance. Dr Brown referred to the Interim Practice Manager being "shocked" to have heard about her complaint. One partner stated: "I hope [the Interim Practice Manager] is fine as this must be very stressful for her. She did not come here to work to get a complaint against her" [90]. Another partner said, in respect of seeking support from the HR consultancy that provided advice and support to the respondent, that "as long as we have sought third party involvement we can't be accused of making any decisions ourselves or any bias". This is capable of suggesting that the partner wished to simply follow a process to protect the surgery, rather than adequately consider the claimant's grievance. The partner also said that she had had a few chats with the Interim Practice Manager and that she was "ok" [91].

63. Although the claimant did not see these emails until after she had resigned, her view of them now is that they demonstrate the partners' bias against her and their support to the Interim Practice Manager. As her grievance had not been concluded at this point, her view is that this was wholly inappropriate. Moreover, as Dr Brown was involved in these emails, the claimant believes that he could not have possibly considered her grievance independently. The Tribunal can understand how the claimant could view matters in that way.

64. In his notes following the practice meeting on 3 September 2019 [79], Dr Brown states that the claimant's letter of complaint was referred to the Interim Practice Manager, who contacted the external consultants for advice on the surgery's behalf. In her evidence, the claimant expressed her concern that her letter of complaint, relating to the actions of the Interim Practice Manager, was referred back to that manager for action. In the claimant's eyes, this demonstrates now that the surgery, and particularly Dr Brown, did not take this matter, and her subsequent concerns, seriously. The Tribunal can understand how the claimant could view matters in that way.

65. On 30 September 2019, Dr Brown wrote to the claimant inviting her to a grievance hearing arranged for 7 October 2019 [92]. Dr Brown had decided that he should hear the grievance because he was the senior partner. He did not think that there was anyone else in the practice who could hear the grievance. On 3 October 2019, the claimant confirmed that she would be attending the grievance hearing [94].

66. The grievance hearing was chaired by Dr Brown. It took place on 7 October 2019. During the hearing the claimant was clearly upset. She took short breaks to help her maintain some composure. The notes and documents for this meeting are at [96-113] and [114-125]. At this point, the claimant had no idea about Dr Brown's involvement in the surgery's decision to make her undertake payroll duties or his involvement in the above-mentioned correspondence regarding her grievance. Dr Brown did not give her the impression that he had been involved in the above. Her impression was that he sought to present himself as an independent manager.

67. On 7 October 2019, following this meeting, the claimant submitted a letter to Dr Brown [95] in order to provide some extra clarity in relation to her grievance. The meeting had left her confused. At that point, she was unsure if her bullying and harassment concerns would be dealt with alongside her grievance. This letter served to address her concerns and confusion in relation to this.

68. Although the claimant did not see this until after she had resigned, on 11 October 2019 Dr Brown emailed the Interim Practice Manager attaching a copy of the minutes of the investigation meeting that had been conducted with the claimant. In his cover email he said: "Sorry to bother you. [The HR Consultant] just wanted you to look at the minutes of the meeting so you could check it over for accuracy. Thanks" [137]. The same courtesy was not offered to the claimant in respect of the notes of her grievance hearing. In the claimant's view, this together with the language used in the email ("sorry to bother you") demonstrates bias against her and support to the Interim Practice Manager. As her grievance had not been

concluded at this point, the Tribunal understands her assessment that this was wholly inappropriate.

69. The Tribunal also notes Dr Brown's evidence that he met with the Interim Practice Manager to get her response and version of events [108-111].

70. Although the claimant did not see this until after her resignation, on 11 October 2019 the Interim Practice Manager emailed Dr Brown regarding the investigation into the grievance. In that email she said: "I know this isn't [what] you want on your hols!" [142]. The claimant now expresses her view that this is not the type of correspondence she would expect from the person accused of wrongdoing to the hearing manager if an independent investigation was being undertaken. Again, in her estimation, it demonstrates a bias against her and support to Interim Practice Manager. As her grievance had not been concluded at this point, this type of conversation between Dr Brown and the Interim Practice Manager was wholly inappropriate. The Tribunal agrees.

71. The Interim Practice Manager made notes in relation to the claimant's grievance [147]. The claimant contends in her evidence that these notes contain a number of inaccuracies. As the Tribunal, as part of its findings of fact, agrees with the claimant's assessment of these notes, it is appropriate to set out these points here.

72. It is correct that Mrs Gibson was leaving at the end of August 2019. It is correct that the Interim Practice Manager looked at the areas of work that Ms Gibson covered. However, this was not done until 21 August 2019, some 9 days prior to when Mrs Gibson was leaving the surgery. This is despite Mrs Gibson working a lengthy notice period. This perhaps explains the apparent stress that the Interim Practice Manager was under at the time and why she behaved so aggressively towards the claimant when the claimant, reasonably in her view, refused to accept the payroll duties.

73. The claimant's understanding is that the duties taken on by two other employees (identified in the notes) were not voluntary. The claimant was aware that the Interim Practice Manager had approached these colleagues and asked them to take on such responsibilities.

74. The Interim Practice Manager referred to the payroll duties as "recording any changes required to staff monthly salary, i.e., overtime, sickness, travel expenses, and sending to payroll [the respondent's accountants]". The payroll duties actually entail gathering information from department heads, collating this information, checking for inaccuracies, taking into account holiday hours and sickness absence, liaising with the accountants, answering queries from staff and the accountants, and submitting the figures so that final salary payments could be completed.

75. The Interim Practice Manager made reference to the fact that she went to speak with Dr Brown following the meeting in which she had asked the claimant to take on payroll duties. She stated that the claimant was "very unhappy" with the request and "expected him to hear from [the claimant]". Although the claimant did not see these notes until after her resignation, it is clear that when she spoke to Dr Brown on 3 September 2019 he already knew that she was upset about the Interim

Practice Manager's request (because she had told him so). Instead, on 3 September 2019, Dr Brown acted as if it were the first time that he had heard that the claimant had concerns. In the claimant's view, the fact that Dr Brown knew about the situation already, but did not seek to engage with her, demonstrates further his lack of empathy or concern in respect to her position.

76. The Interim Practice Manager stated that she "explained to [the claimant] that payroll was an area [she] was experienced in so fully understood what was involved". The Interim Practice Manager commenced employment with the surgery in or around April 2019. Between April 2019 and September 2019 the claimant never saw the Interim Practice Manager approach her or Mrs Gibson in respect of any payroll processes. She also never approached her in respect of any of the payments that she processed. Therefore, in the claimant's view, the Interim Practice Manager cannot be experienced in using the surgery's payroll systems. The claimant cannot say whether she was experienced in using payroll systems outside of the surgery but, even if she was, not all payroll systems are the same and the claimant saw no evidence of her being experienced in using the surgery's payroll systems.

77. The Interim Practice Manager stated that the claimant asked if the surgery would be taking any duties away from her. The claimant did not ask the Interim Practice Manager this.

78. The Interim Practice Manager stated that she suggested that maintenance was an area of work that could be distributed to someone else. This suggestion was never made.

79. The Interim Practice Manager stated that she reassured the claimant that they would be working on this together. There was no reassurance made that the duties would be undertaken as a joint task. The Interim Practice Manager told the claimant that she would assist her the first time she did payroll duties and that this would be a one-off. She did not state that they would be working together.

80. The Interim Practice Manager stated that she "didn't get any time to discuss the role further" and that she expected that she would have "the chance to speak with [the claimant] on the following Tuesday". This was not the case. If the Interim Practice Manager had wanted to speak with the claimant she could have done so. The claimant was in the office and available on that Tuesday. Her sickness absence began the following day.

81. The Interim Practice Manager stated that the claimant left a message stating that she was feeling unwell and would not be in work on 3 September 2019. This statement is inaccurate. The claimant was in the office all day on 3 September 2019. This was the date she spoke with Dr Brown. The Interim Practice Manager could have approached and spoken with her at any point during this day. The claimant left a message the following day, 4 September 2019, to say that she was feeling unwell and would not be in work that day.

82. Returning again to the history of the matter, the claimant received a response from Dr Brown by way of letter [136] that confirmed there would be no need for her to

submit any additional complaint. Her grievance, and bullying and harassment complaints, would be dealt with concurrently.

83. On 16 October 2019, Dr Brown confirmed the outcome of the grievance by providing a brief letter [161] and an investigation report [96-99]. The claimant opened the covering email on the morning of 17 October 2019. She proceeded to review the letter and the investigation report. She sent an email to Dr Brown that afternoon [164] and sought clarity as to the timeframe in which she must lodge an appeal, should she decide to do so.

84. The claimant had (and still has) a number of concerns regarding the contents of the investigation report. After reading the report, she was initially shocked to discover that it stated that Dr Brown had been involved in the decision to change her duties, had agreed with the decision and had been kept informed during the process. As such, the claimant considered that Dr Brown could not have approached the grievance in an impartial way as a grievance manager ought to do so. Additionally, given that Dr Brown did not disclose to her on either 3 or 4 September 2019, or during the grievance meeting, that he had been aware of and had contributed to this decision, the claimant questioned his trustworthiness. He had given her the impression he had not been involved in the Interim Practice Manager's decision when the claimant spoke to Dr Brown on those dates. It transpired that Dr Brown had been involved in the decision-making.

85. The claimant was also concerned that Dr Brown had made findings based on the account of the Interim Practice Manager alone. For example, he found that the implementation of the change was for a trial period with review. While this might have been the Interim Practice Manager's position, it was not one with which the claimant agreed. She had not been told that there would be a trial. She had been told that she would be required to undertake these additional duties.

86. Again by way of example, Dr Brown concluded that the completion of the payroll spreadsheet would take 5.5 hours per month. It was not shared with the claimant how this 5.5 hours had been calculated before Dr Brown reached this conclusion. It seems from Dr Brown's evidence that the Interim Practice Manager had told him this and that this had been confirmed by Mrs Gibson [109]. That is contradicted by Mrs Gibson's evidence to the Tribunal, which the Tribunal accepts as accurate. It is likely that Dr Brown was misled (in this and other regards) and that the information that he was given was simply wrong.

87. The claimant's comments regarding this calculation were not sought. The claimant believed that, having watched Mrs Gibson undertake this role for some time, and having attended the handover meeting with Mrs Gibson, the payroll duties were far more time-consuming than this. It was clear to the claimant during the handover meeting that the Interim Practice Manager only became aware of the true extent of these duties then. Any assessment that she made prior to then about the length of time it might take for an individual to undertake these duties was in the claimant's assessment completely unreliable.

88. Further by way of example, Dr Brown decided that the Interim Practice Manager had offered to remove some of the claimant's responsibilities to accommodate the

additional duties. While this might have been the Interim Practice Manager's position, it was not one with which the claimant agreed. The Interim Practice Manager had not made this offer to the claimant.

89. Finally by way of example, Dr Brown had been led to believe that the Interim Practice Manager would undertake the payroll activity jointly with the claimant. While that might have been the Interim Practice Manager's position, it was not one with which the claimant agreed. The Interim Practice Manager had not offered to do this, except to the extent that on 28 August 2019 she told the claimant that as a "one off" she would sit with the claimant while the claimant completed the payroll duties for the first time. In the claimant's opinion, given that Interim Practice Manager's role was an interim position involving working three days per week to provide cover for a full-time Practice Manager, the claimant did not believe that the Interim Practice Manager would be able to undertake this activity jointly with her.

90. The claimant's belief was that a fair and impartial grievance process would have involved the surgery sharing this evidence with her and listening to her representations before reaching a decision. This did not happen.

91. The claimant was also concerned that the serious issues that she had raised about the conflict of interest that would be created appeared to have been brushed to one side with the comment: "additional governance protocol can be introduced to ensure that [the claimant's] concerns are addressed". The claimant was not at any point during the investigation or investigation meetings privy to any conversation about any additional governance protocol. She did not know what this might entail, but she could not imagine that it would be sufficient to address the serious conflict that she believed would be created for the reasons that she had earlier explained in detail.

92. The claimant concluded that the contents of the report strongly suggested that Dr Brown was seeking evidence to justify the imposition of the changed duties, as opposed to having an open mind to evidence which would support the claimant's concerns. This was unsurprising, given his involvement in the change that was the subject of the grievance. The Tribunal agrees.

93. For example, Dr Brown stated that "this is a matter of interpretation between the two parties to the grievance as there are no available witnesses to the key elements of the grievance. The issues relate to a range of communications which have not been documented by management with letters or notes of meetings" [96]. He also stated that "the investigation has looked for evidence to support a view based on the balance of probabilities, however there is a lack of witnesses and in addition a lack of documentary evidence on the discussions which have been held" [98]. However, there were witnesses who could have supported the claimant's account, such as the colleagues to whom she had spoken about the interaction she had had with the Interim Practice Manager and the colleagues who had witnessed her upset and crying. In the claimant's view, the surgery could have interviewed these colleagues or obtained witness statements from them. The fact that the surgery did not do so demonstrated to the claimant that the respondent was not taking her grievance seriously, was simply following a "process" and did not have an open mind to the potential for the complaints to be upheld.

94. The claimant had been keeping an up-to-date timeline document. This was a contemporaneous record of the discussions and events at this time [180]. The surgery did not ask the claimant for any such contemporaneous evidence. Had it done so the claimant would have provided it with this document. She had never raised a grievance before or been in this position previously. She did not consider proactively suggesting that the respondent should obtain this evidence. In her view, it would have been unfair for the surgery to have expected her to have done so. She was an individual trying to pursue a formal grievance process without legal advice at the time. She was unwell. However, had the outcome of the surgery's investigation been shared with the claimant for comment before Dr Brown reached his decision, she might have thought to do so.

95. The report also disclosed that Dr Brown and a HR Associate from the external consultants had met with the Interim Practice Manager immediately after the grievance meeting on 7 October 2019 and that a follow-up telephone call took place on 9 October 2019. It disclosed that "a number of questions had been prepared for [the Interim Practice Manager's] approval in question and answer format". It does not disclose when or how these questions were constructed or by whom or when they were answered by the Interim Practice Manager. The Interim Practice Manager had prior knowledge of the questions being put to her. In the claimant's view, this was contrary to how an effective investigatory interview should be conducted.

96. The surgery's treatment of the claimant, culminating in the manner of the handling of her grievance, in the claimant's conclusion completely destroyed the relationship of trust and confidence to the extent that she had no confidence in the grievance process. Considering the surgery's treatment of her and her concerns, as well as Dr Brown's seniority within the practice and his involvement in the original decision to change her duties, the claimant did not believe that appealing against the decision would make any difference to the outcome.

97. Although the claimant did not know this until after she had resigned, it also appears from the grievance report [114-125] that it was actually produced by the HR Associate from the external consultants. The claimant understood that the HR Associate had been attending the grievance meeting to provide HR support. She expected that the report would have been produced, and the findings would have been determined, by Dr Brown as chair of the meeting.

98. As a result of the surgery's imposition of the forced changes to the claimant's duties without her consent; its handling of such forced change; its handling of her concerns about the change; the aggressive behaviour of the Interim Practice Manage; and the surgery's handling of her grievance – the claimant's trust and confidence in her employer was irreparably destroyed. She considered the surgery's conduct to amount to a fundamental breach of the express term concerning her duties and of the implied term of trust and confidence. The last straw for her was the surgery's handling of her grievance. Consequently, she felt forced to resign from her employment with the respondent.

99. On 22 October 2019, the claimant resigned with immediate effect. Her letter of resignation is found at [165]. She asserts that she did not waive any of the surgery's breaches nor that she delayed too long prior to resigning.

100. After the claimant had submitted her resignation, the respondent attempted to encourage her to reconsider her position [168]. However, in the claimant's eyes, the relationship of trust and confidence had been irreparably destroyed by this point. The surgery also suggested that matters be resolved through the grievance appeal process. However, for the reasons that the claimant explained in her letter dated 29 October 2019 [169], owing to the way that the surgery had dealt with her grievance initially, she had no confidence that an appeal would be dealt with on an impartial basis.

101. The surgery further suggested in a letter dated 30 October 2019 [172] that, as opposed to an appeal, an informal conversation could take place between the claimant and Dr Brown (and/or another partner). For the same reasons that the claimant had no confidence in the grievance appeal process, she had no confidence that an "informal discussion" would resolve her concerns. She explained this by way of letter dated 5 November 2019 [173]. Having now seen email evidence referred to above, it appears the emails from another partner mentioned earlier above, it now appears to the claimant that her concerns in this regard had merit. She believes that this offer was only made because the surgery wished to follow a "process" and because its advisers had advised that it do so and not because it genuinely cared about the damage that the respondent had caused the claimant.

102. The respondent confirmed that the claimant's termination date was 7 November 2019 by way of letter [174A]. This was confirmed by her P45 [195]. The claimant did not work for the surgery at all between 23 October and 7 November 2019. She had not secured an alternative job at the time of resigning.

Respondent's submissions

103. The respondent's representative submitted that the claimant's evidence is confused and evasive. The contract of employment issued in 2008 consisted of 10 pages. An updated contract of employment was issued in 2018 to more accurately reflect her terms and conditions of employment. The claimant did not read that document, but she signed it. Ignorance of its content is no defence. If she has signed the document then she is bound by it.

104. Within the contract of employment were two clauses dealing with her duties and her hours. There were a couple of errors in the first issue of the 2018 employment contract. The claimant says that she was told that that document was rescinded and would be reissued. A new document was issued, but there were no changes to the two clauses in question. The claimant did not sign that document. Instead she put it in her bag and took it home. She worked to this contract of employment thereafter.

105. The lack of a signature to that document is not relevant. She is bound by its terms. The claimant's own words in her resignation letter refer to the flexibility

clause that is within this document. The claimant did not object to the contract of employment or to any of its clauses. Instead she worked to it. The claimant accepted that it was her contract of employment and that she was bound by its terms. The 2018 contract of employment was in operation at the relevant time. Therefore, there has been no breach of an express term.

106. The amendment of the claimant's duties in August 2019 fell within the claimant's skill set. Dr Brown made that point in his evidence. It has not been challenged. The claimant opposed the change in her duties. She relied upon there being a conflict of interest and inadequate time to carry out those duties. She relies upon the commentary provided in the ACCA document, which does not amount to a formal accountancy standard or set of accountancy rules. It is a learning and development document describing best practice for student accountants.

107. Mrs Gibson's evidence is that the payroll duties took more than 5.5 hours per month. The respondent accepts that the claimant had genuine concerns about these duties without modification of her other duties. She brought a complaint and she objected to the change. There was a meeting with the Interim Practice Manager on 27 August 2019. This was a contentious meeting. The claimant then raised the matter with Dr Brown on 3 September 2019. Dr Brown in turn raised the claimant's concerns with the other partners. There was inadequate time to report back to the claimant that day. The claimant then went off sick on 4 September 2019. Dr Brown was not in a position to report back to the claimant during that subsequent sick leave.

108. The claimant raised a grievance on 19 September 2019. That grievance was dealt with by the respondent in a responsible and reasonable manner. It sought assistance from its HR consultants. Dr Brown then met with the claimant on 7 October 2019. The matters of grievance were then put to the Interim Practice Manager. That resulted in a detailed report being prepared. The respondent acted reasonably and proportionately.

109. The claimant did not take any comfort from the comments of the Interim Practice Manager. How the respondent would deal with the changes in the claimant's role were now in writing. Dr Brown proposed a resolution of the grievance. The respondent would pause the change in the claimant's duties and there would be further meetings with her. The claimant's grievance was an attempt to stop the changes and in that respect it had succeeded.

110. The claimant makes criticism of the respondent in that it did not ask the claimant whether she wished any witnesses to be approached. The claimant did not volunteer any names of potential witnesses. Dr Brown did not take the side of their Interim Practice Manager. He found that the complaint was simply not substantiated.

111. So far as the relevant law is concerned, the Tribunal must decide whether there has been a breach of an express term or a breach of the implied term of mutual trust and confidence. There has been no breach of an express term because the 2018 contract of employment permitted a variation of the claimant's duties.

112. So far as the implied term of trust and confidence is concerned, the respondent must act in a way that is in breach of it. It must have no justifiable or reasonable cause. This is an objective test. In contrast, the claimant's evidence explains how she felt. It is not a subjective test.

113. There has been no conduct on the respondent's part that would lead objectively to loss of trust and confidence. First, the change in duties was within her skill set. Secondly, the suggestion that there was a potential conflict of interest is shallow at best. Thirdly, the Interim Practice Manager would assist the claimant in respect of the additional duties. Fourthly, the Interim Practice Manager had said that there would be a trial period. Fifthly, the respondent would pause implementation so as to allow consultation and discussion. Sixthly, the respondent dealt with the claimant's grievance reasonably.

114. The respondent submits that it was entitled to implement the change in the claimant's duties. In the manner of doing so, and in the handling of the claimant's grievance, there was nothing that amounted to a breach of an express term or implied term.

115. With hindsight, Dr Brown might have reassured the claimant of his independence. He was supported by the HR consultancy. The partners had decided upon the change in question. Dr Brown approached it impartially. This is evidenced by the recommendations that he made. He did not side with the Interim Practice Manager on all matters.

116. Finally, the Tribunal should take account of the size and administrative resources of the respondent practice. It is a GP surgery with 25 employees and limited managerial resources. It was appropriate for Dr Brown to hear the claimant's grievance.

Claimant's submissions

117. The claimant's counsel expressed surprise at the respondent's suggestion that the claimant was in any way unclear or evasive. The key witnesses from both parties answered the questions put to them as best they could. Counsel noted that the Tribunal had not heard any evidence from the Interim Practice Manager regarding the events in 2019, despite being accused of bullying and harassment, or from the previous Practice Manager concerning the variation of contracts of employment in 2018. The respondent has not challenged the claimant on her evidence in respect of those matters and so the Tribunal can accept the claimant's evidence.

118. It is agreed that there was no flexibility clause in the 2008 version of the contract of employment. Instead, there was such a flexibility clause in both versions of the 2018 contract of employment. The claimant agrees that she did not read those documents. She had no reason to do so. She had no doubt at that time that the respondent was acting in good faith. The changes in her contract of employment were not drawn to her attention. She was given no notice of the changes. The May 2018 version of the contract of employment was signed by her, but it was then revoked or rescinded by the respondent. As a result, the 2008

version of the contract of employment remained in force. There were clearly errors in the May 2018 version of the contract of employment. The respondent cannot pick and choose the clauses that it seeks to rely upon.

119. Notably, there was no fresh consideration for any variation of the contract of employment in 2018. There is no evidence to support an implied acceptance of the July 2018 version of the contract of employment, which the claimant had not signed. It is a basic principle of contract law that any variation of the contract must be supported by fresh consideration.

120. Counsel referred the Tribunal to the IDS Handbook on Contracts of Employment at chapter 9.18 and also paragraph 1383 of Bloch & Brearley on Employment Covenants. There had been no change in the rate of pay in 2018. This was merely an updating of the contract of employment. However, the introduction of a flexibility clause was a significant new term to be introduced. The claimant had been employed by the respondent since 1991. This clause represented a significant change that would need to be supported by fresh consideration because it amounted to a detrimental change in conditions.

121. As to the suggestion that there was implied agreement to the change, counsel relies upon the analysis in chapter 9.20 and 9.24 in the IDS Handbook. Courts and tribunals are reluctant to find agreement to a variation of a contract of this kind in the absence of express agreement. That is particularly so regarding terms that do not have an immediate effect. Counsel referred the Tribunal to Solectron Scotland Ltd v Roper [2004] IRLR 4 EAT; Aparau v Iceland Frozen Foods plc [1996] IRLR 119 EAT; and Abrahall v Nottingham City Council [2018] ICR 1425 CA. The claimant submits that in this case there was no consideration for the variation of the contract of employment or, alternatively, the manner of the change was unsatisfactory.

122. Counsel submits that it is disingenuous of the respondent to rely upon what the claimant said in her resignation letter. The claimant said there that it was a breach of her contract of employment to expect her to take on new duties. There was no valid consideration for the change in her contract or her duties, in any event. The claimant did not understand the nuance of the law.

123. Even if the claimant were wrong on that, was the respondent capable of giving effect to the purported flexibility clause upon which it appears to rely? Counsel drew the Tribunal's attention to chapter 9.45 in the IDS Handbook and to the case of United Bank Ltd v Akhtar [1989] IRLR 507 EAT. The respondent did not give the claimant reasonable notice of reliance upon the flexibility clause, which does not permit it in any event to take action in breach of trust and confidence. The touchstone of a flexibility clause is whether its application is required as a result of efficacy and necessity. Here there was a breach of trust and confidence in the manner upon which the respondent relied upon the clause in question. There was no notice or consultation. The respondent has produced no evidence from the Interim Practice Manager in respect of it.

124. Dr Brown thought that the claimant had overreacted. Counsel asks the Tribunal to accept the claimant’s evidence. The Tribunal also has the benefit of Mrs

Gibson's evidence and in that regard the respondent was simply wrong as to the scope of the payroll duties.

125. The respondent has not taken into account what it should have taken into account. The result is an outrageous one. Dr Brown should have paused regarding the question of the time that the payroll duties would take. This is quite apart from also considering whether those duties could give rise to a conflict of interest for the claimant as Financial Controller. The result is that there is a breach of the contract of employment, whether an express term arising from the 2008 contract or an implied term of mutual trust and confidence arising from the 2018 version of that contract.

126. Dr Brown accepted that the claimant's account of how she was treated by the Interim Practice Manager could amount to bullying and harassment. There has been no evidence called to counter the claimant's account. The Tribunal is able to find what she says happened did happen. It amounted to serious damage to the parties' mutual trust and confidence. The claimant resigned in response. She did so without delay. She made a reasonable attempt to resolve the matter via the grievance procedure. However, the grievance procedure did not cure the earlier breaches.

127. In contrast, the respondent's handling of the grievance served to exacerbate the situation. Dr Brown thought that the claimant had overreacted and that influenced the way in which he conducted the matter. He should have followed the matter up when he telephoned her on 4 September 2019. The fact that Dr Brown was relying upon HR advice is not a defence. He could have told the claimant of his involvement in the change in her duties and/or ask a third party to deal with the grievance. Dr Brown simply failed to apply his mind to this question. He could have looked at the conflicting accounts and investigated the matter further.

128. The same is also true regarding the complaint about the bullying and harassment. Dr Brown has not applied his mind to the question of who was telling the truth. Just as an employment judge has to do so in deciding where the truth and facts of a matter lie, so should an investigator of a grievance ask the question: who is telling the truth? If he had done so, he would have heard evidence from Mrs Ormand and Mrs Gibson and he would have taken further evidence from the claimant.

129. The respondent relies upon its investigation report and the table that appears therein. The respondent can take no comfort from that table. That table merely records the Interim Practice Manager's comments in response to the claimant's grievance. That is not the same as the respondent adopting and setting out the same as if they were the respondent's recommendations and conclusions. Counsel did not hesitate in suggesting that the Interim Practice Manager had lied to her employer. She was responsible for the original breach of trust and confidence in respect of the change in job duties and then again in respect of how the claimant's grievance was handled thereafter. There is no reassurance for the claimant to be drawn from this material.

130. Counsel drew the Tribunal's attention to [169] and [173] of the electronic bundle and to the claimant's resignation letter. The claimant's feelings on these matters is a relevant consideration. The claim plainly demonstrates a constructive dismissal.

131. As to the ACCA document, that is relevant evidence of best practice to be taken in tandem with the claimant's own evidence in respect of the alleged conflict of interest. Dr Brown also accepted that there was a need for separate governance and an appropriate protocol to support any change in the claimant's responsibilities.

Respondent in reply

132. In reply, the respondent's representative referred again to the claimant's acquiescence in the 2018 contractual changes. He pointed to the significance of the claimant's signing the May 2018 version of the proposed new contract of employment. He underlined the fact that the claimant had that document in her possession for some 18 months and that she had worked to that contract of employment. The consideration for the change in her contract was the respondent continuing to pay her salary and to provide her with hours of work.

Relevant legal principles

133. The Tribunal draws upon chapter 9 of the IDS Handbook on Contracts of Employment.

134. A contract of employment may be varied by mutual agreement, supported by consideration (although consideration might not be an issue that causes courts and tribunals too much concern); by a variation clause within the contract itself; by collective agreement; or by unilateral variation arising from termination of one contract replaced by another. Strong evidence of mutual agreement is required to support a conclusion that there has been bilateral variation. The employee must be aware of what it is later said that he or she is agreeing to. The circumstances in which an employee is said to have agreed to a variation may be relevant, for example, as to a vitiating factor, such as duress, mistake or misrepresentation.

135. However, agreement might be capable of being implied (or, indeed, not implied) from the circumstances. Nevertheless, courts and tribunals have generally been reluctant to find that employees have consented to contractual changes in the absence of an express agreement to that effect. This is particularly so in the case of terms that do not have immediate effect and which are detrimental to the employee. See Jones v Associated Tunnelling Co Ltd [1981] IRLR 477 EAT (change of shifts); Solectron Scotland Ltd v Roper [2004] IRLR 4 EAT (redundancy terms); Abrahall and others v Nottingham City Council and another [2018] ICR 1425 CA (pay freeze); Anglia Regional Cooperative Society v O'Donnell EAT 655/91 (mobility clause); Aparau v Iceland Frozen Foods plc [1996] IRLR 119 EAT (mobility clause).

136. A flexibility clause might be implied into the employment contract in order to promote business efficacy, but that is unlikely to be sufficient to provide cover for a unilateral variation of terms of employment, especially those with immediate effect.

137. What of the position where there is an express flexibility clause? The question will always then be one of construction and interpretation – does it cover the flexibility required of the employee and does it give the employer sufficient discretion to make the required change in duties?

138. Nevertheless, even where there is an express variation clause permitting an employer to require flexibility of the employee, tribunals and courts are alert to any unfairness that such clauses might result in. Such clauses are to be interpreted narrowly and the employer's discretion in relying upon such a clause is implicitly fettered (although not necessarily by reference to a reasonableness requirement): United Bank Ltd v Akhtar [1989] IRLR 507 EAT. The implied term of mutual trust and confidence also plays a moderating role here. Courts and tribunals will also imply terms requiring contractual discretion to be exercised in good faith and in a way which is neither arbitrary, capricious nor irrational.

139. The Tribunal next turns to the relevant legal principles on constructive unfair dismissal. It draws upon the commentary in Harvey on Industrial Relations and Employment Law.

140. For the purposes of unfair dismissal, an employee is dismissed by her employer if the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct (section 95(1)(c) Employment rights Act 1996).

141. A unilateral change of terms is almost invariably such a constructive dismissal. However, the employer must be guilty of conduct that goes to the root of the employment contract or which shows that the employer intends to be no longer bound by one or more essential terms – a repudiatory breach (this is not a question of mere reasonableness): Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 CA. However, as the case of United Bank Ltd v Akhtar [1989] IRLR 507 EAT illustrates, when relying upon a term requiring flexibility of some description, reasonable notice of any change may be implied and the employer must have regard to the implied duty of mutual trust and confidence.

142. It is the employer's conduct which is under the spotlight here rather than the employee's. So, for example, an employee's failure to pursue a grievance procedure in response to an alleged contractual breach is not a material factor. In addition, the employee's resignation may be in response to a particular incident or it might be a reaction to the "final straw" in a series of events. See Omilaju v Waltham Forest LBC [2005] IRLR 35 CA; Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 CA. Even if an employee has affirmed a previous contractual breach by continuing to work, she can rely upon the final straw as reviving a previous breach or breaches. See most recently: Williams v Alderman Davies Church in Wales Primary School [2020] IRLR 589 EAT.

143. Central to the present case is the implied term of mutual trust and confidence. The leading authority is Malik v BCCI SA [1997] IRLR 462 HL. The employer shall not without reasonable and proper cause conduct itself in a manner calculated and

likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

144. The fact that a dismissal is constructive does not inevitably mean that it is unfair, although that is often its effect. The Tribunal must consider the test of unfairness in section 98.

Discussion and conclusion

145. The original document dated 2008 recording the claimant's employment relationship with the respondent is headed "Contract of Employment" [32-41]. It also refers to it being a statement issued under the Employment Rights Act 1996, thus also serving the purpose of being a statutory statement of employment particulars. It is signed by a partner and by the claimant (confirming her acceptance of her terms of appointment).

146. It is a relatively sophisticated document, running to 10 pages and 32 clauses. It deals with job title, permanency, location, date of appointment, continuity of employment, professional registration, remuneration, increments, hours of work, annual leave, terms and conditions (incorporating a staff handbook), periods of notice, sick leave, pension, disciplinary and grievance procedures, conflicts of interest, standards of business conduct, confidentiality, whistleblowing, data protection, standing orders, standard financial procedures, professional memberships, criminal records information, occupational health, fitness for employment, personal property, health and safety, accidents, working time, property, uniforms, protective clothing ID badges, driving, IT, research and smoking. There is a limited mobility clause, but no job flexibility clause or other form of variation clause.

147. In contrast, both versions of the 2018 document [42-44 and 46-48] purport to be a "Statement of Main Terms of Employment" which, together with the employee handbook, formed part of the contract of employment, setting out particulars of the main terms on which the respondent employed the claimant. The font size is smaller, but it runs to only two and a half pages, comprising 15 unnumbered clauses. Provision is made for signature by both parties, but the claimant's signature is required only to "acknowledge receipt of this statement" and to agree that it is a relevant agreement for the purposes of the Working Time Regulations. It covers much, but not all, of the same ground as the 2008 document. It may be that some of the 2008 content has been relegated to the employee handbook [see possibly 49-52], for which a separate document records the claimant's acknowledgement of receipt [45].

148. The first version of the 2018 document is signed and dated 2 May 2018 by the claimant and on behalf of the respondent. The second version is unsigned by the claimant, although signed on behalf of the respondent.

149. The disputed clause in the 2018 document is headed "Job Title" and reads: "You are employed as Financial Controller and your duties will be as advised by the Practice Manager. Your duties may be modified from time to time to suit the needs of the business".

150. In the Tribunal's judgment, subject to any purported amendment in 2018, the 2008 document accurately captures the claimant's contractual terms and conditions. It is not merely a statutory statement of employment particulars, but much more akin to a service agreement. Subject only to any annual updates of salary, it serves to capture her part-time status, her working hours, her job title and a wide range of contractual conditions not otherwise to be found in the staff handbook, which is otherwise incorporated by reference, as is usual.

151. What then of the purported amendments in 2018?

152. In the Tribunal's judgment, the first 2018 document did not have the effect of amending the 2008 document for the following reasons. (1) It is more in the nature of a statutory statement of employment particulars rather than a service agreement or the like. (2) There is no legal significance in the claimant's signature to it, other than to acknowledge receipt. (3) Her signature cannot be read as accepting its terms as accurate or as having the effect of amending her existing terms. (4) In any event, it was signed under pressure which, even if not amounting to duress, served to undermine any suggestion that she had read and understood and accepted its terms. (5) Before she signed it, she was implicitly led to believe that it effected no changes to her existing terms. (6) The intended variation of her contractual position was not intimated or explained to her. (7) Within a short period of time she was told that the document was revoked and that she should scrap it.

153. The second 2018 document was not signed by the claimant, either simply to acknowledge receipt or more significantly to accept its contents. She took no steps in relation to it and she was not pressed by the respondent to do so. She did not obviously work to its terms, but continued her employment as if the 2008 document remained the repository of her terms and conditions of employment, which in the Tribunal's judgment it did. Either the first 2018 document had been withdrawn or it did not serve to effect a contractual variation in any event. If so, the position remained governed by the 2008 document and the second 2018 document did not disturb that position.

154. If the Tribunal is wrong in that analysis, then it is necessary to go further. While it places little if any weight on the question of consideration for a variation, the Tribunal would be slow to find that the claimant accepted the 2018 documents by continuing to work with the respondent. She had not accepted the respondent's purportedly express power to vary her duties at some future time. This was a detrimental change in her contractual position, which had not been drawn to her attention; to which she had not agreed; and the significance of which could only be as to the future as opposed to any immediate import.

155. There is little or no evidence to suggest that when the respondent sought to impose the payroll duties upon the claimant in 2019 that it did so by express reliance upon or reference to the variation or flexibility clause in either of the 2018 documents. In any event, while if operative the clause is capable of a construction and interpretation covering the flexibility now required of the claimant and gave the employer sufficient discretion to make the required change in duties, the Tribunal is alert to any unfairness that such a clause might result in. It is not here necessary to

interpret it narrowly. However, the respondent's discretion in relying upon such a clause is implicitly fettered. The Tribunal would expect that the respondent would give the claimant proper notice of a change in duties, followed by appropriate consultation and response to any concerns raised by the claimant. This is also part and parcel of the implied term of mutual trust and confidence. The Tribunal also seriously doubts whether the respondent exercised any contractual discretion afforded to it in good faith and in a way which is neither arbitrary, capricious nor irrational.

156. In summary, therefore, the attempt to impose a change in the claimant's duties of employment in 2019 was not licensed by any variation of her employment contract in 2018. Even if it had been, the respondent did not act towards the claimant (and any question of variation or flexibility in her job duties) with appropriate regard to mutual trust and confidence.

157. The Tribunal now turns to whether the claimant has established a constructive dismissal when she resigned her employment.

158. In the Tribunal's judgment, there was a series of breaches, dating from 21 August 2019 and culminating in Dr Brown's grievance decision on 16 October 2019. They included the imposition of new job duties without proper notice or consultation; the Interim Practice Manager's wholly inappropriate conduct towards the claimant in respect of that matter; the failure of the Interim Practice Manager to engage with the claimant's understandable concerns; Dr Brown's failure to engage with the claimant's concerns; a rather one-sided and flawed grievance procedure; and a failure to test the evidence of the claimant in preference for accepting the Interim Practice Manager's (what the Tribunal finds is an) inaccurate account.

159. Those breaches individually and cumulatively amounted to a breach of the express term as to the claimant's job duties and of the implied duty of mutual trust and confidence. Whether those breaches are taken individually or cumulatively, the claimant did not waive the breaches nor did she affirm the contract by her words or actions nor did she delay before resigning in response to them. Whether the grievance decision is to be regarded in law as the "final straw", or whether it was a fundamental breach in its own right, the claimant was entitled to terminate her contract of employment, with notice or without notice as she did, in circumstances in which she was entitled to terminate it without notice by reason of the employer's conduct. The claimant's resignation amounted to a constructive dismissal.

160. The respondent has not seriously attempted to argue that the dismissal was a fair dismissal under section 98(4). The Tribunal is prepared to accept that the respondent had a reason capable of justifying the claimant's (constructive) dismissal, namely, its need to reallocate the payroll duties, and that that reason amounted to some other substantial reason for the purposes of sections 98(1) and (2). However, the dismissal of the claimant does not begin to meet the test of a fair dismissal in section 98(4) in the circumstances described in the Tribunal's findings of fact, even taking account of the respondent's size and administrative resources. The dismissal was both substantively and procedurally unfair. It cannot be said that the respondent acted within the range of reasonable responses.

161. Accordingly, the claimant was unfairly and wrongfully dismissed by the respondent and her claim is well-founded.

Remedy

162. The question of wrongful dismissal aside, the parties were otherwise agreed as to the terms of remedy. Once the claim had been amended to include notice pay, however, there was no disagreement as to the sums in question.

163. The respondent is ordered to pay to the claimant the total sum in compensation of £20,836.86 comprising (1) a basic award for unfair dismissal of £6,446.70; (2) a compensatory award for unfair dismissal of £11,762.40; and (3) an award for wrongful dismissal of £2,627.76.

164. The recoupment regulations do not apply to these awards.

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Judge Brian Doyle
DATE: 12 February 2021

JUDGMENT WITH REASONS
SENT TO THE PARTIES ON
Date: 11 March 2021

FOR THE TRIBUNAL OFFICE