Case Nos:2302095/2019
2302107/2019
2303310/2019

EMPLOYMENT TRIBUNALS

Claimants: Ms Vidgen
Mrs H Hudson
Ms L Payne

Respondent: K2 Smiles Limited

Heard at: **London South (by CVP)** **On:** 10, 11, 12, 13, 14 May and 24 June 2021

Before: Employment Judge N Walker (sitting alone)

Representation
Claimants: Mr A Wrigley, Friend
Respondent: Ms A Beattie, Litigation Manager

RESERVED JUDGMENT

The Claimants were unfairly dismissed by the Respondent. The Claimants' claims under the Transfer of Undertakings (Protection of Employment) Regulations 2006 fail and are dismissed.

REASONS

The Claim

1. The Claimants had all brought claims of unfair dismissal. The First and Second Claimants brought ordinary unfair dismissal claims. The Third Claimant alleged she had been constructively dismissed. In addition, the Claimants argued that their dismissals were unfair under regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and the Third Claimant alleged her dismissal was unfair under regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

The Evidence

2. I was provided with a large main bundle and a supplementary bundle from the Claimants. In the course of the hearing, I was supplied with additional documents relating to the data protection policies within the Respondent company at my request.

3. On behalf of the Respondent, I heard from Mrs Radha Patel, Practice Manager for the Respondent dental practice and a joint owner of the Respondent company, Samantha Wood, a consultant with Croner and Mr Kartik Patel, the Principal Dentist at the Respondent who was a joint owner of the Respondent company with Radha Patel.

4. Each of the three Claimants gave evidence and in addition the Claimants had asked for witness summonses against two individuals. In the end, we heard from only one of those being Mr Rudston, a consultant with Croners, who assisted the Respondent.

5. The hearing was a remote public hearing, conducted using the cloud video platform, (CVP), under rule 46. The parties agreed to the hearing being conducted in this way. In accordance with rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. Members of the public attended. The parties and members of the public were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal.

6. From a technical perspective, there were only a few minor difficulties. The Claimants' representative, Mr Wrigley, was unable to connect correctly at one point. We paused the proceedings until the Clerk had been able to assist Mr Wrigley to connect effectively.

7. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the Tribunal.

8. The participants were told that it is an offence to record the proceedings.

9. The Tribunal ensured that each of the witnesses, who were mostly in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party, while giving their evidence.

Facts

10. The Respondent became the employer of the three Claimants following the acquisition by the Respondent of a dental practice. Each of the three Claimants had worked for some considerable time in the predecessor practice which had been run by Mr Wrigley and his wife. Mr Wrigley did not give evidence but did assist the Claimants by acting as their lay representative throughout.

11. According to her original contract of employment with the Wrigley Dental Practice, Julia Vidgen had started as a dental nurse and receptionist at the Wrigley Dental Practice in July 2003. I was told that she had worked there continuously apart from two periods of extended leave when she travelled and worked abroad.

12. Helen Hudson had started work as a dental nurse and receptionist at the Wrigley Dental Practice in April 1999. Her employment was continuous until the practice was sold to the Respondent. In the documents she usually appears as Helen Robinson.

13. Laura Payne had started as a dental nurse and receptionist at the Wrigley Dental Practice in 1996. Again, her service was continuous until the practice was sold.

14. On 21 July 2017, the Respondent company acquired the Dental Practice. It was an acquisition of the assets, and it is accepted by everyone that this acquisition constituted a transfer of an undertaking pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006, ("TUPE"). In consequence the Claimants all had continuity of service throughout and certain rights pursuant to TUPE. The transaction was amicable and the Employee Liability Information which is required to be provided by law was provided. Specifically, this information would have included the identities and ages of the employees and the particulars of employment that the employer is obliged to give pursuant section 1 of the Employment Rights Act. There were no disciplinary or grievance proceedings nor any likely court or tribunal claims and there were also no collective agreements. Mr and Mrs Patel as the shareholders of, and senior employees in, the Respondent received copies of the contracts of employment for the employees.

15. The Respondent is a small company. After the Respondent acquired the Practice, Mrs Wrigley continued to work until December 2017. Each of the Claimants had a contract which described their roles as both dental nurse and dental receptionist. They were all part-time. There was one other individual, Julie Safavi, who was a dental nurse and dental receptionist and also TUPED over with the Claimants. Mr Patel was the primary dentist and Mrs Patel managed the Practice.

16. The bundle included the GDC log for each Claimant for the previous two cycles. The summary of Ms Vidqen's log for the cycle from August 2014 to July 2019 showed that she had undertaken 61 of the required verifiable CPD as against 50 that were necessary and of the 100 general which were required, she had logged 102. The log stated no CPD hours were outstanding for that period. The same log for Ms Hudson for the cycle from August 2013 to July 2018 showed that of the required verifiable of 50 CPD hours, she had undertaken 61 and of the general, which required 100, she had logged 102. Again, it stated that no CPD hours were outstanding. The log for Ms Payne for the period from August 2013 to July 2018 showed 61 verifiable CPD hours had been logged and 102 general hours. Again, none were outstanding. The bundle contained the more recent certificates for each of the Claimants from the GDC stating that they were entered in the Dental Care Professionals Register and entitled to use the title "Dental Nurse" for the registration period and against Qualifications it stated: "Verified competency in Dental Nursing". The bundle included those certificates for Ms Hudson, for the periods 1 August 2017 to 31 July 2018 and 1 August 2018 to 31 July 2019, for Ms Vidgen for the periods 1 August 2017 to 31 July 2018 and 1 August 2018 and 31 July 2019 and for Ms Payne for the periods 1 August 2017 to 31 July 2018 and 1 August 2018 to 31 July 2019.

17. On 22 June 2017 Mr Wrigley emailed Mr and Mrs Patel about the CPD hours and explained that all for the staff were registered with the GDC up to 31st July 2017 which took them past the sale date. He explained that registrations all needed to be renewed prior to 1 August 2017 to avoid them being deregistered and unable to work. He then explained exactly how that could be done online by Mr and Mrs Patel and gave them the GDC login details and passwords for each of the Claimants. He also explained that each the year that they were registered Mr and Mrs Patel had to update the number of hours of verifiable and non-verifiable CPD. Had already done this for each of them up to including the current 2016 -17 year. He explained that all the staff had the same 5 year cycle from August 2013 to July 2018, except Julia whose cycle did not end until July 2019. The staff, except for Julia had already done their full CPD requirement. Julie needed to do a further 26 verifiable hours and 25 non verifiable hours before her cycle ended. He explained "you will see confirmation of all this in each of their online accounts". He then explained that the GDC was planning changes to the whole CPD system in 2018 so that it was all likely to change sometime next year. He concluded "that means that in effect all you have to do with all four members of staff is to log into their accounts, reregister them for the 2017 -18 year and pay the required fee for each.

Contractual Terms

18. Each of the three Claimants had been employed by Mr and Mrs Wrigley, trading as the Wrigley Dental Practice. Each had a contract which was headed Statement of Terms and Conditions of Employment. Relevant clauses of those contracts included the following:

18.1 Clause 3 – this clause addressed remuneration and included a provision for an hourly rate of pay. Each standard working day was to be paid at the rate of 8.5 hours. The contract stipulated:

"*any expenses reasonably incurred by the employee in the execution of their employment duties will be paid for or reimbursed by the employers. This includes GDC registration fees, CPD costs and fees for any vaccinations required by the employer. All such costs should be agreed in advance with the employer*".

18.2 Clause 4 – this clause addressed hours of work. It set out the hours that the employee was due to work when the contracts were entered into, which may have changed since then. It also provided as follows:

"*In the interest of good patient care there needs to be some flexibility in the above hours. Should a patient's treatment require it, you may occasionally have to work beyond the above hours but this will also be kept to a minimum and should never be more than 15-30 minutes beyond your normal end time. If you have to work overtime you will be remunerated at your usual hourly rate for every complete extra 15 minute period worked. In every morning and afternoon session, time is allowed for a 15 minute break for which you will be paid as normal. However, this break is not guaranteed as you may need to continue to work through it if patients need to be seen. If so, no additional payment will be made. If another member of staff is on holiday or absent due*

to illness you may be asked to undertake different duties and/work different hours than normal. You will always be given as much prior notice as possible of this."

18.3 Clause 6- this clause addressed the job title and duties and each contact set out the both the job title of dental nurse with an explanation of the duties as well as the job title of dental receptionist with as an explanation of the duties. The contract then said:

"Note: Many of the above functions of a dental nurse and receptionist can overlap. In these circumstance staff employed to assist the dentist may assume many of the responsibilities referred to under the two separate headings above. Flexibility in work descriptions above is a norm in the profession and is necessary for the smooth functioning of a practice."

18.4 Clause 9 – this clause addressed continuing professional development and provided:

"You will endeavour to keep up to date with all new techniques, materials and procedures. To achieve this, you will be trained in-house and outside the practice as required. Where necessary your training will include information technology, working on computers. All regulatory requirements for training, CPD and qualifications must be met as required by the GDC. Failure or refusal to comply may lead to dismissal."

18.5 Clause 12 – this clause addressed Restrictive Conditions and provided:

"When you leave this practice, or while working for the practice, you will not work in any other dental practice of a third party, within one mile of this practice for one year."

18.6. Clause 13 addressed Holidays and concluded with the following sentence:

"Holidays must be taken in the particular year and cannot be carried to the following year, unless authorised by your employer."

18.7. Clause 18 – this clause was headed Disciplinary and Grievance Procedure and provided:

"the ACAS Code of Practice for Disciplinary and Grievance Procedure will apply and is deemed to be incorporated into the agreement. If you have a grievance or complaint you must raise it with your employer before taking any action. Your complaint will be considered promptly and in a sensitive way at a mutually convenient time. You will be permitted to bring a colleague or friend with you".

18.8. Clause 20 - addressed Gross Misconduct and provided:

"In the event of gross or serious misconduct you may be dismissed without any notice and without any pay in lieu of notice.

Examples of gross misconduct were given and included serious insubordination, suspension or erasure of your registration with the General Dental Council as well as bringing the employer or practice into serious disrepute.

18.9. Clause 25 - headed Variation and provided:

"*the Employer reserves the right to vary this contract as and when reasonably necessary in the light of changes of circumstances, law or current practice. The Employer will give to the Employee as much prior written notice as is practicable of all variations and in any event not less than three months' notice of such variation."*

19. As part of the transaction, Mr Wrigley emailed Mrs Patel on 22 July 2017 providing her with the staff pay details after he had paid them for the final time. He also explained that:

"Though not included in their contracts so not required for you to emulate and totally at your discretion, I have generally given them each a £250 Christmas bonus, a 4-5% annual pay rise at the start of every new tax year in April".

Also in that letter Mr Wrigley referred to the CPD position again, explaining that he had generally coordinated the CPD for the staff. He explained how they had usually done courses online which are free but if there any costs, his practice paid for them in accordance with their contracts and explained: "*We have generally taken the approach that we pay for any costs that they incur for anything they have to do in connection with their jobs, such as vaccinations, uniforms, indemnity cover etc.*".

20. At first the Claimants continued to work under the original contracts of employment which they had entered into with the Wrigley Dental practice. In April 2018, Mrs Patel provided the Claimants with a new contract of employment. Essentially, she had copied the original contracts but revised the holiday entitlement to hours, rather than days. In doing so, she used an online calculator. She did not realise that that calculator was set up to calculate hours by reference to the 28 days or 5.6 weeks holiday which is the statutory entitlement. In fact, the Claimants were all entitled to six weeks holiday pro-rated to reflect the fact that they were working on a part time basis, so that the hours of holiday provided in the new contract was slightly below their actual entitlement. The only other change was an additional clause to reflect the fact that she had auto enrolled the Claimants into a pension scheme through NEST.

GDC and CQC requirements

21. The three Claimants, as dental professionals were required to be registered with the General Dental Council ("GDC"). The GDC, like most professional bodies, had a continuing professional development system. There were two versions over the relevant time. Under the first, dental professionals were required to undertake a minimum amount of Continuing Professional Development, ("CPD") during a five

year CPD cycle. The minimal amount for a dental care professional like the Claimants, was at least 150 hours of CPD every five years, of which at least 50 hours needed to be "verifiable" CPD. They were also required to keep a full record of all CPD activity for five years after the end of the CPD cycle. The reason for this was they might be selected for an audit and would be required to produce evidence to show they had met the CPD requirements. A CPD record should contain a description of each item of CPD completed and whether it is verifiable CPD as well as the number of CPD hours for each item and documentary evidence of each item of verifiable CPD. For verifiable CPD, the Claimants were expected to keep documentary evidence and should have written information from the provider to confirming they had undertaken the CPD, describing the concise educational aims and objectives, clear anticipated outcomes and quality controls.

22. The GDC had a web based system for logging the CPD which involved the Claimants having to log on to a system and input information onto the GDC record. In practice Mr Wrigley usually did this for them. When the Respondent became the employer, Mrs Patel completed the GDC certification for that year, having received the log in details from Mr Wrigley.

23 The GDC guidance on professional development for dental professionals explains that, usually at the end of each five year cycle, they carry out a CPD audit and they may require dental professionals to send them their full CPD record including documentary evidence of verifiable CPD to check that they had met their requirements. For this reason, they asked dental professionals to keep their full CPD record for five years after the end of the cycle. The guidance explains that if dental professionals did not meet the CPD requirements, the General Dental Council may take them off the register. If this happened, they would not be able to practise in the UK and would not be allowed back on the register until they could satisfy the GDC that they had met the CPD requirements for restoring their name to the register.

24. Regulations entitled "The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014" were also applicable. Regulation 18 addressed staffing, providing that there must be sufficient numbers of suitably qualified competent skilled and experienced persons deployed in order to meet the requirements of this part. Regulation 18(2) states:

> *"Persons employed by the service provider in the provision of a regulated activity must-*
>
> *(a) receive such appropriate support, training, professional development, supervision and appraisal as is necessary to enable them to carry out the duties they are employed to perform,*
> *(b) be enabled where appropriate to obtain further qualifications appropriate to the work they perform, and*
> *(c) where such persons are healthcare professionals, social workers or other professionals registered with a healthcare or social care regulator, be enabled to provide evidence to the regulator in question demonstrating, where it is possible to do so, that they continue to meet the professional standards which*

are a condition of their ability to practise or a requirement of their role".

25. CQC Guidance on this regulation indicates that the providers must deploy sufficient numbers of suitably qualified, competent, skilled and experienced staff and should have a systematic approach to determining the range and numbers of staff they need. Persons employed by the service provider should be supported and be skilled and assessed as competent carry out their roles. Where appropriate staff must be supervised until they can demonstrate the required or acceptable levels of competence to carry out their role unsupervised. Staff should be supported to make sure they could participate in necessary training and all learning and development and required training completed should be monitored and appropriate action taken quickly when training requirements are not being met. Providers must support staff to obtain appropriate further qualifications that would enable them to continue to perform their role and must not act in a way that prevents or limits staff from obtaining further qualifications that are appropriate to their role.

26. Regulation 19 states that persons employed for the purposes of carrying on a regulated activity must have the qualifications, competence, skills and experience which are necessary for the work to be performed by them. Guidance on Regulation 19(1)(b) indicates that providers must have the appropriate processes for checking that people have the qualifications required for a role and for assessing that they have the competence, skills and experience required.

27. Guidance on Regulation 19(4) indicates that persons employed must be registered with the relevant professional body and providers must have a process to check that staff have appropriate and current registration with a professional regulator. In a similar way to other organisations overseeing professionals, the GDC maintains an online register which could be searched to verify whether dental professionals are registered with it.

28. A document entitled "Provider and CQC Inspector FAQs for meeting CQCs requirements of employment for Regulation 19 explains the sort of things that are required to meet regulation 19 and states:

> *"In so far as it is reasonably practicable to obtain, satisfactory documentary evidence of any qualification relevant to the duties for which the person is employed or appointed to perform."*

It explains that this documentary evidence

> "*may be in the form of a certificate or could be written confirmation from the awarding body that a qualification has been achieved. Providers can also check professional qualifications and professional registration status online with the relevant regulatory body ….and should do this where a person has stated they are on a professional register".*

29. One of the answers to an FAQ about whether there is a requirement for full employment histories and evidence of conduct for existing staff retrospectively, says:

"No. Inspectors must be proportionate about past recruitment practices, especially where people were recruited many years ago.

30. While this refers to conduct, it sets the approach of the CQC and it continues explaining the provider is required to undertake sufficient checks so they can evidence the applicant is of good character, has the necessary qualifications, competence, skills and experience necessary for the work to be performed, is able to properly perform the tasks. It also explains that if providers have any current concerns about performance, abilities, physical or mental health of any of their staff, the inspector will want to see what steps they have taken to address these, or to mitigate risks to the people who receive support, such as regular supervision and provision of opportunities for learning and development. It expressly states*:*

"This is more important than plugging employment gaps into staff files".

31. The CPD arrangements under the General Dental Council were amended in 2018 and the new rules were referred to as Enhanced Guidance. The Enhanced Guidance applied from 1 August 2018 to dental professional such as the Claimants. It was very similar to the previous requirements in many ways. It required dental nurses to have a minimum of 550 hours of verifiable CPD per five year cycle. In terms of spreading activity over the cycle, the guidance acknowledged that it may not be possible for professionals to do CPD in every year of their cycle but to encourage them to do regular activity there was a requirement to do a minimum of 10 hours CPD for every two consecutive CPD years. It was possible to declare one year of the cycle with zero CPD as long as the professionals were doing at least 10 hours every two years.

32. The Guidance referred to the CPD record stating that keeping a CPD record is an important part of maintaining the registration and said:

"You must keep a complete CPD record which is made up of a plan which the GDC refers to as your personal development plan, your log of completed activity and the evidence (e.g. certificates) you have collected from each activity."

It also explained:

"You must keep all the evidence you collect for the duration of your five year cycle, and for five years after the completed cycle, in case the GDC requests to see your CPD record."

33. The CPD year for dental care professionals ended each year on 31 July and the declaration could be made up 28 days after that. Dental professionals were required to make an annual statement, which could be made at any point in the year and updated throughout the year. At the end of the cycle every five years, there had to be an additional statement which included declaration of the total number of hours in the five year cycle, a declaration that the person had kept a CPD record and a plan and a declaration that they had completed and recorded CPD which was relevant to their current or intended field of practice and that the statement was full and accurate. The guide specifically noted:

"*You will not be routinely asked to provide your CPD record or evidence when making any of your CPD statements*.

It continued:

"We will request this from you if you have not met the requirements of the scheme.

It carried on saying it could also be requested:

"if you are randomly selected as part of our regular sampling to check the requirements are being met".

34. It is clear from the rules that the GDC did not require anyone other than the Claimants themselves to retain their records of CPD and that the Respondent could satisfy itself, by checking the GDC register, that the Claimants had the requisite professional qualifications and had registered the required amount of CPD. As for the CQC, their explanatory information shows that they did not expect practitioners such as the Respondent to examine the historic CPD records of their staff.

Subsequent events

35. Mr and Mrs Patel introduced full computerisation of the Practice, new Practice procedures and protocols and undertook a major refurbishment of the Practice. There was inevitably a period of adjustment. The Claimants have some complaints about the manner in which they were sent home if the work was short and could be condensed into a shorter working day, but these are not the subject of these proceedings.

36. In September 2018, some 15 months after the transfer, the Respondent engaged two full time dental trainees. The training period for the trainees was 18 months. There was some turnover amongst the dental trainees. The trainees assisted in the Practice. At some point the Respondent engaged specialist consultants to advise on ways to improve the Practice and they produced a report I shall call the Horton Report which is in the Bundle, and which made various suggestions including suggestions for training the staff.

Management Update Sheet and Staff Response

37. On 30 September 2018, the Respondent issued a document called Management Update Sheet which was addressed to the staff collectively but was handed to them individually. The Claimants' perception of this was that it raised a variety of complaints about the staff in general and they also considered it to be unnecessarily formal, and confrontational. The three Claimants and another dental nurse called Julie Safavi, decided to respond collectively and say they thought their reply letter was a constructive response while still addressing issues that they thought the Respondent had raised unfairly. The Respondent replied collectively with a further Management Update Sheet dated 14 October 2018, which stated that they treated the staff response as a series of individual grievances and made

it clear that they would require separate written grievance letters to address concerns individually and set out the information such letters should contain. The October Management Update continued with various practical instructions and ended with a section headed "Discipline". That section explained that the disciplinary process would be adhered to as previously mistakes were being overlooked as part of the transition period to train everyone. It said:

> *"As registered dental nurses, you are all required to uphold the 9 GDC principles as well as continue your own professional development.... Finally, we are required to have a complete set of training records from your last cycle. Please could you organise this by scanning (not photocopying) all training certificates from your last cycle and place it in your personal file of the drop box. This will help both yourself and management to establish which areas you individually need support in, so we can all grow together.*

38. Following receipt of that Management Update, the three Claimants and Julie Safavi, each wrote a grievance confirmation note confirming that that letter was written collectively and represented their genuine feelings about their working situations. They also each said; "*I am happy this to go in my personal employment file and for it to be used as structured training to target these issues*".

39. Having received the confirmations about the grievance, on 23 October 2018, Mrs Patel met with Helen Hudson, and they had a grievance discussion. Mrs Patel often made notes of meetings or events, but she did not ask the other persons present to sign and confirm the notes were accurate. As a result, I have no confirmation that they were entirely correct. In fact, I understand the Claimants dispute that, but I assume some of her comments reflected the events.

40. The notes of that meeting show that Ms Hudson was concerned at that time about various matters including the new dental trainees and whether they were there to replace her so the notes say; "*she feels like she is being ushered out by the new members who are younger*". She also complained about there being no pay on certain occasions when the work was completed. Mrs Patel referred her to her decision not to engage in marketing activities using social media. There was also a discussion about a proposal that the Respondent had made to Ms Hudson to enrol her on the National Nursing qualification which she declined because she did not want to study due to having a personal life according to the notes. I understand that in practice, she had insufficient time to accommodate the demands of the nursing course around her family.

41. The notes say:

> "*Explained to Helen that the half days have been shut down as there isn't anything I can give her to do as she has told me that nursing is what she prefers and can do confidently. If there aren't any patients for the dentist and nurse - what do you want me to allocate to you? in times of financial pressure.*
>
> *Helen explained that the company's financial problems are not her problems being a month before Christmas.*

Explained that she has between now and 30 October to book her afternoons up so she can continue to work otherwise can/may go home on those afternoons".

42. The notes continued with a discussion about the fact that Ms Hudson had never been trained or qualified to nurse but was still on the GDC register without a training record based on the experience that was gained with her previous employer. Ms Hudson changed the subject to discuss how she felt after the appraisal in July 2018 and the notes indicate she felt unwanted, to which Mrs Patel reassured her that she has never been the case and she would like her to grow. The notes indicate that Mrs Patel had reassured Helen to say that her job had never been at threat however her attitude towards work is unacceptable. There was a discussion about how they could move on with Ms Hudson responding that they should work on it, but she did not reply when asked how she would like to do this to which Mrs Patel proposed they draw a line under all previous behaviours and start again which Ms Hudson agreed.

43. Meanwhile there is an undated letter in the bundle from Ms Payne to Mr and Mrs Patel stating that she appreciated the working practices over the last year had been a work in progress but felt the system was working well which was why the Management Update Sheet was a shock to all of them and came across as more of a disciplinary than an update. Ms Payne said she thought a number of issues had been resolved and hoped they could continue to grow together as a team.

44. On 26 October 2018 there was a team meeting. It seems Mrs Patel was trying to ask the staff to confirm they were happy with the situation and to withdraw any complaints. There are notes which I understand are in Mrs Patel's handwriting. The notes indicate she explained she was using this meeting as she would like to talk as a team to see who had a problem and where. Her notes indicate that she had a one to one with everyone and talked to them individually but to finish the procedure off she needed a written letter to say they were happy with the working practices.

45. After that meeting on 28 October 2018, Ms Hudson submitted a letter to say that the issues from a letter of 9 October had been discussed and dealt with at the meeting on 26 October.

46. The bundle contains a note of a meeting with Julia Vidgen on 29 October 2018 which appears to record a discussion with Ms Vidgen regarding the Management Update Sheet dated 30 September, the staff reply of 9 October and some of the issues arising out of it which indicated that Ms Vidgen had confirmed that the 9 October letter was constructed by all of the staff collectively and was not meant to be a grievance. It also confirmed that individual issues had been resolved.

Request for historic CPD Certificates

47. As noted, the Management Update dated 14 October 2018 included under the heading "discipline" a statement "*we are required to have a complete set of training records from your last cycle"* followed by an instruction that the staff members scan copies of their last CPD records and file them in a dropbox folder. I have not found any requirement for a dental practice to have a complete set of

training records from the last cycle in any GDC or other regulations or guidance. However, it seems the purpose was as set out in the Update, in order to devise a training plan for the future. The training went in five year cycles, and this appears to have been a reference to the records, not only the current cycle, but the prior one before the Respondent was the Claimants' employer.

48. Doctor Patel also produced a note on "CQC regulation 19: fit and proper persons employed" in October 2018 which was a copy of the CQC guidance on Regulation 19. It started explaining that the guidance had been produced to aid understanding of what documentation is required by employers. It specified that persons employed for the purposes of carrying on a regulated activity must be of good character and have the qualifications, competence, skills and experience which are necessary for the work to be performed by them amongst other matters. It then referred to the evidence required which included personal development planning and CPD. It continued referencing the information which must be available in relation to each such person employed and referring to information specified in schedule 3 and such other information as is required under any enactment to be kept by the registered person in relation to such persons employed.

49. There was a second page addressing Schedule 3, which had the sub-heading "*Regulations 4 to 7 and 19(3) Information required in respect of persons employed or appointed for the purposes of a regulated activity*". This information included proof of identity, and sone information relevant only in specific situations. At point 6 it said, "*Insofar as it is reasonably practicable to obtain, satisfactory documentary evidence of any qualification relevant to the duties for which the person is employed or appointed to perform*" and under that it listed "*GDC cert*" and "*Qualification certificates*". This information would have been readily available to the Respondent who could check the GDC records from which they would see the Claimants had logged the necessary CPD and were certified by the GDC. Even if this information was not all publicly searchable, they had the Claimants' individual login information and could use that to access the records.

50. There are in the bundle a number of notes made by Mrs Patel. It is not suggested that these were made contemporaneously and where they refer to meetings with other people, they have not been signed as accurate notes by the other party, so I do not treat them as completely accurate. However, they often list in summary events that had occurred. Mrs Patel made a note covering events from 14 October to 30 October. Her notes reflect the request in the statement to staff dated 14 October and said that she had asked for CPD logs for both non verifiable CPD and certificates for verifiable CPD as some staff had come to the end of their cycle in August 2018. It recorded that the deadline had been set for 30 October to complete an internal audit and risk assessment on staff training to bring about a change in culture from the old CPD system to the enhanced CPD scheme. This was a reference to the fact that the CPD system had changed to the Enhanced CPD and a new document issued describing the Enhanced CPD scheme. Her note recorded the wording I have detailed above about the set of training records demanded in the 14 October management update. It then continued referencing events at the end of October stating that in the week of beginning 29 October, three of the four staff members explained that their previous employer had kept their CPD logs and certificates for them at which time they were

urged to get hold of their own records from him, on the basis it was their responsibility to provide evidence of training completed when asked by either management or GDC. This of course was not correct, the only responsibility for staff was to provide the training records to the GDC if they carried out an audit.

51. The log stated that the following day, 30 October, only one of the four staff had produced to management of full evidence in an unorganised format and that member of staff was asked to organise it in the form of a log sheet. The deadline was extended for that member of staff to 12 November. It then recorded that Laura had produced evidence for verifiable CPD possibly dating back to 2010, Julie had provided one piece of evidence for three hours from 2013 and Helen had been unable to provide any documentation.

52. The Claimants all allowed Mr Wrigley, their former employer, to organise and retain all their CPD records and he had kept them after he sold the Practice. They had to ask Mr Wrigley for their records. On 31 October 2018 there was an exchange between Helen, Mr Wrigley and Mrs Patel. Put briefly, Mrs Patel was chasing Helen for the records and asking her to ask Mr Wrigley to look for them and to email the items to her as she had repeatedly said he had kept the records for her. Mr Wrigley confirmed to Helen that he had just emailed Mrs Patel and copied her in, and it was not a problem and whatever she wants/need so no worries at all. At this time, although all the Claimants had been asked for their records, and none of them had been able to produce the full set, Mrs Patel only pursued Helen for further records. However, as Mr Wrigley held the records, this involved communication with Mr Wrigley. At first it seems from the emails that Mr Wrigley assumed these records would have been amongst the due diligence documentation provided to his solicitor so Mr Wrigley emailed Mrs Patel indicating he thought that the records should have been in the due diligence sent over to the solicitors. If there was anything missing, he asked Mrs Patel to tell him, and he would dig around in the old practice files. He confirmed that he handled all the admin side on behalf of the Claimants and kept copies of all the hours they did, and also ensured they met all GDC requirements and submitted the relevant declarations at the end of each year and CPD cycle.

53. Mrs Patel replied very soon afterwards thanking Mr Wrigley for contacting her regarding Helen's personal development. She explained that they had asked if "the girls" (a term I am told the Claimants used to refer to themselves and which Mr Wrigley also used) could provide them with whatever training records they had to hand so that we could sit down and formulate training schedule for their personal enhancements and support them as dental nurses and any other possible future roles. This partly accorded with the explanation in the Management Update. I was told during evidence, this request was initially made to enable Mrs Patel to carry out a gap analysis of the Claimants' training, which I understand would have enabled Mrs Patel to identify what was missing or needed updating. In her email to Mr Wrigley, she explained:

> *"for this to be possible it has become necessary to track back through the years and discover what they have learned, be it compulsory, additional or nothing at all. I have spoken to my solicitor and they have re-printed all the "due diligence" and re-sent all the paperwork over to me, which only contained their training logs for 2016 - 2017.*

She then said:

> *"The others have provided me with lots of previous records/certificates that were not part of the due diligence and dated back as far as 2010."*

54. Her email continued explaining:

> *"I have asked Helen for any records/certificates she has from her last cycle 2013 - 2018. I would have asked you directly but didn't want to impose on your retirement with anymore paperwork. However, where Helen has asked you to help organise this will her behalf, it would be much appreciated by us all".*

55. Mr Wrigley replied to that email late on 31 October explaining to Mrs Patel that was no problem and if she sent him copies of whatever records her solicitor had already sent her for Helen's current cycle, to avoid duplicating anything, he would try to fill in whatever gaps there are up to when she took over. He explained that he was going away for a few days but would be back on Monday 12 November and would get it to her as soon as possible after that.

56 Mrs Patel did not accept the offer to locate the records when Mr Wrigley returned from his trip. Her response, on 1 November, was to thank him for this but say that Helen had missed the deadline, which was 30 October and that she had given everyone ample time to organise it. She explained that a one-to-one meeting with Helen had been scheduled for 12 November and she would appreciate the records before then to give her time to prepare the training schedule to support her growth. If she was unable to receive her previous training logs by this date, it meant making everyone's life a little bit more difficult. She asked that she hoped Mr Wrigley would understand her dilemma and the need to comply with this particular part of the GDC, CQC…. regulations. As I have noted, no part of the GDC or CQC regulations require a new employer to see the old CPD records, and again I understand the purpose of the request was to enable Mrs Patel to carry out a gap analysis, as the Respondent was considering ongoing training requirements. The request was not essential. Devising a training programme could be done in other ways. As I have noted, the Horton Report had suggested a training programme.

57. Mr Wrigley replied confirming he understood the issue but he appeared to think this was being asked as some sort of regulatory requirement as he said he was surprised that GDC had set a deadline for this of 30 October as the CPD cycle for dental cycle always ended and started on the 31st of July each year. He went on at some length, concluding that he accepted that they needed to ensure the staff will comply with everything in the same way as they always did, and it was important they had access to the relevant records for the girl's current CPD cycle.

58. There was a further response from Mrs Patel on 1 November, in which she explained why they wanted the records. She said the deadline was an internal exercise and was being carried out to help herself and Mr Patel take the business and the members who are employed with us forward. This explanation accorded with Mrs Patel's reference to wanting to carry out a gap analysis. Mrs Patel explained to Mr Wrigley that this involved Helen taking control of her own personal

development in the light of the enhanced CPD scheme which came out on Aug 18 for DCPs, as all other registered professionals do. She explained that she understood he had taken control of Helen's registration and that she had repeatedly mentioned that he used to do it. She also said it was nice that you helped her with this, but it really was her responsibility to handle it going forward to uphold the standards which are required by us and her governing body.

59. She then said:

> *"I have the log and certificates for Helen's non verifiable and verifiable hours respectively for 2017- 2018 but require evidence for all the hours for previous years by 9/11/17". Again, whatever you have to hand, be it compulsory, additional or nothing at all to help us help Helen plan for her future with us".*

Meeting with Ms Hudson on 5 November 2018

60. Ms Hudson, in her witness statement, described how, after work on 5 November 2018, she alone was called in to attend what was described as an urgent formal meeting by the Respondent at which she was advised that if she did not provide the CPD records being demanded of her, she would be left with various options, all of which effectively would mean that she would lose her GDC registration as well as her employment and career. She said at the meeting she was advised to contact the GDC. She did contact the GDC after that meeting who, it seems, reassured her that she was not at fault. Another of Mrs Patel's notes records her version of that discussion which she states was an urgent meeting with Helen "who had asked her previous employer". Ms Hudson asked if she could have it in writing after speaking with the GDC who stated to her that my request to see the previous records was disrespectful and disgusting. Ms Patel notes that thereafter, management called the GDC and spoke to Michael Everate to explain the situation and understand how I can best support my staff moving forward. The discussion summary was provided to Helen as asked for. The note set out the summary of the discussion prepared for Ms Hudson and described it as follows:

> *"Discussion took place to explain how serious this has become as the task set was not all meant to be a strenuous exercise. The task set was to provide evidence of CPD from the last cycle. After failing to complete the task, we fear that no/limited CPD has taken place across the duration of your career. We now ask for all records dating as far back as the first cycle and explained how you have always been responsible to provide them when asked."*

61. It continued stating that Ms Hudson had explained these responsibilities were never communicated to her by her previous employer and all declarations and CPD logs and evidence were kept by him. It continued:

> *"We stress, the seriousness of submitting false declarations to the governing body and how your previous employer was completely wrong to do this for you. We do not want you to lose your career over this and want to support you through it as you are a valued team member, but you will have to talk to the GDC together with management to move forward. We will support you by speaking to the GDC on your behalf to explain that you are a long standing*

team member that the company values, how we have recently taken over and explained the importance of having a PDP's (which have been created) in place to enhance your skills and knowledge through CPD, and how you now understand your role and obligations etc.

Going forward you have a couple of options:

1. *Provide evidence in the form of a log sheet for non-verifiable CPD and certificates for verifiable CPD by 16 November 2018 to remain as a dental nurse.*
2. *Remove yourself from the register and be on the desk if not registered as a nurse.*
3. *Remove yourself and retrain as a nurse to re-register.*
4. *Think about how dentistry might not be for you anymore.*

62. It is clear from Mrs Patel's notes that a threat was made to Ms Hudson about her continued career. It is also clear that Mr and Mrs Patel were suggesting she had made false declarations to the GDC. After Ms Hudson approached the GDC, Mrs Patel then contacted them herself. She also began to chase the other two Claimants for their records when previously she had expressly told Mr Wrigley that the others had provided her with lots of previous records/certificates that were not part of the due diligence and dated back as far as 2010.

<u>Renewed Demands to all Claimants for historic records</u>

63. Mrs Patel's notes indicate that a meeting was held with Julia on 7 November to explain the above, and on 8 November Laura had requested her records from Mr Wrigley. However, I saw no evidence that the other Claimants had been treated in the same way as Ms Hudson or threatened with the loss of their jobs. Mr Wrigley was bemused by the enquiry for records for Ms Vidgen and Ms Payne as he recalled that Mrs Patel had said she had all records she required for everyone other than Helen. Meanwhile Helen had requested her log of training and obtained it from the GDC which set out the CPD hours she had declared for the previous cycle between 1 August 2013 and 31 July 2018.

64. There followed a bit of a to and fro, with Mrs Patel sending out an email containing an extract from the GDC requirements for dental professionals to each of the Claimants, which explained that they were expected to keep their own records for a period of time after the CPD cycle had concluded as the GDC had the right to audit the cycle and could ask for the full records. Mr Wrigley meanwhile was away from home but still managed to email Mrs Patel explaining that Laura had been in touch with him to say she had been asked to find all her previous CPD records which had confused him because Mrs Patel had said that the other Claimants had already provided her with all the records, and it was just Helen who hadn't done so. He was also confused by the fact that the cycle had ended so that the previous CPD hours did not count towards the new cycle. He confirmed he had all of the previous CPD records and as they went back ten years there was an awful lot of them, and it would be a laborious exercise to scan or copy them for all of the girls. He concluded asking that saying hope this reassured Mrs Patel but if there was anything she still needed to do then she should let him know.

65. The to and froing continued with Mr Wrigley asking for guidance from the GDC and the CPD enquiries staff at the GDC replied. Their reply made it clear that the records only needed to be kept for 5 years prior to the current cycle. Mr Wrigley queried the guidance and got a further reply which stated;

> "*the GDC does not require practice owners or managers to be involved in their staff's fulfilment of the CPD requirements. Practice owners and practice managers are not in any way expected to be able to see or confirm the existence of their staff's CPD records, either for current or previous CPD cycles.*
>
> *The GDC considers staff's adherence to and managing of their CPD requirement to be the sole responsibility of each registrant.*"

66. Mr Wrigley had been abroad when the initial requests for the documents had been made, but he had returned and having made enquiries of the GDC he then sent an email on 30 November to Mrs Patel explaining that he was first trying to establish whether any of this was necessary as he didn't think it was. He wanted to save himself the considerable hassle of having to get over 10 years of paperwork out of storage and scan it all into the computer. He set out clearly his understanding that the GDC had not asked for any the records and the CQC hadn't either and the previous CPD which the girls themselves had done was of no use to Mrs Patel in trying to plan their future training needs at the practice. They would still have to meet all of the new enhanced CPD requirements no matter how many hours of previous CPD they had done, even in terms of the core subjects. He continued querying that he didn't understand why she now needed all the records for Laura Payne, given that she had previously said she had already been given them and he asked for the reason. He explained that he was not trying to be awkward and would readily provide the girls with all the records they needed if the GDC requested them, but unless or until they did, he didn't understand what the point was of doing so.

67. On 19 November 2018 Mrs Patel wrote to the GDC fitness to practice team. She identified each of the three Claimants and their addresses and said that it had been mentioned that their previous employer had on occasions provided answers to them in order for them to complete the CPD task as well as completing their GDC declarations on an annual basis and holding their CPD certificates for them. This appeared to be a reference to one email in which Mr Wrigley had listed out how to log on to the GDC website in order to deal with CPD and also identified the answers. Mr Wrigley did not give evidence, but I was told by the Claimants that this was a training exercise and not used as verifiable CPD exercise. There is no evidence this happened on more than one occasion.

<u>Invitation to meeting on 4 December to consider dismissal for some other substantial reason.</u>

68. Mrs Patel then sent a letter dated 20 November to Ms Hudson asking her to attend a formal meeting to be held on 28 November. The letter recounted Ms Hudson having confirmed that her professional responsibilities were never communicated to her by her previous employer and all declarations and CPD logs and evidence were kept by him. It continued referring to her having been

unsuccessful in retrieving them by 16 November, which was the extended deadline date she had been given. The letter recorded that a significant part of her role required her to be responsible for keeping completing CPD and keeping evidence for it in order to be able to make all declarations to the GDC and said:

> *"the GDC make it absolutely, blatantly, obvious that it has always been your responsibility to provide CPD records to anyone with reasonable reason when asked".*

69. I can find no basis whatsoever for the assertion contained in this letter that the GDC required a dental professional such as Ms Hudson to provide her CPD records to anyone when I asked. The reference to "reasonable reason" does not appear anywhere in the GDC documentation. The only requirement the GDC had was for the records to be provided to the GDC if they elected to audit them. The letter continued that they had discussed on 5 November, the impact of not providing evidence for both aspects of verifiable and non-verifiable CPD and restated the four alternatives that had been put to Ms Hudson previously and which I have quoted above. The purpose of the meeting was to discuss the Respondent's concern that due to the above, it might not be in a position to continue Ms Hudson's employment as a dental nurse with the company. She was advised that the meeting might result in the termination of her employment for some other substantial reason although her reception duties would be unaffected at this point.

70.The meeting was to be conducted by a consultant and Mrs Patel would be present to taking notes. The Claimant was told that she was entitled to be accompanied by a work colleague or accredited trade union official of her choice. The letter enclosed a copy of the notes of the meeting on 5 November and documentation of events between 4 October and 16 November 2018. The letter concluded suggesting that if Ms Hudson had any queries or was able to identify a possible alternative solution, she should contact Mrs Patel and gave her mobile phone number.

71. Very similar letters were sent to Ms Vidgen and to Ms Payne on 20 November, although there is no reference in their letters to the meeting on 5 November, but rather to informal meetings. However, their letters did include the four options and alleged that they had been discussed. All of the Claimants were told that the Respondent may not be the position to continue their employment as a dental nurse and they were advised the meeting may result in the termination of these duties, although their reception duties would remain unaffected at this point. The meetings were re-arranged for 4 December, and it was planned they would all take place one after the other with Ms Vidgen's meeting happening at 1 p.m., Ms Hudson's meeting at 2 p.m., followed by Ms Payne's at 3 p.m.

72. On 25 November Mr Wrigley wrote to Mrs Patel copying each of the three Claimants and setting out in some detail his explanation as to why the records not yet been provided. He said that he was very happy to provide the records just as long as there was a compelling reason to do so but they hadn't replied to his email of 13 November. He expressed his disappointment that they decided to take what appeared to be potentially very serious disciplinary action against the girls and explained that they could not comply with the request because he was holding the records. He stressed that he did not want to be awkward about this nor did he want

to interfere in the way the practice was run. He explained that the reason for his reluctance to provide the records was the considerable effort and time that doing so required from him and he was particularly loathe to have to do so as a result of what appeared to be a mistaken belief that the GDC required Mr and Mrs Patel to have copies of the records when quite clearly, they did not. He pointed out that the GDC did not have any requirement for DCPs (which I understand means a dental professional such as the Claimants) to have to provide copies of their CPD records to their employers. He stated that the GDC's only requirement in terms of keeping the records was that they be made available to the GDC itself, if and when they requested them. He stated that as he had repeatedly said, in the event that the GDC ever happened to make such a request he would immediately provide them as it was the legal requirement that the girls had to comply with, but until they did he saw no point in having to go to the time and trouble of copying the records. He also questioned why the initial request was only for Helen's records, but now the request was for the records for all three.

74. By a letter dated 26 November 2018, the GDC responded to Mrs Patel's written notification regarding fitness to practice stating that it was unclear as to whether the matter required their attention as a fitness to practice issue. They noted the previous owner appeared to say he had all the CPD records but did not want to get them out of storage. They encouraged the matter to be resolved locally by continuing to engage with the employees. They did say that if there was any evidence that the three dental professionals were dishonest in the way they obtained their CPD or CPD evidence, they asked for the evidence. They referred to the fact that Mrs Patel had said the previous employer on occasions provided answers to them in order to complete the CPD task as well as completing their GDC declarations on an annual basis and holding their CPD certificates for them. They asked for further details and noted that a trainer/coach does sometimes give answers as part of training and learning processes.

75. By an email dated 27 November Mr Wrigley wrote again to Mrs Patel stating that he understood from Ms Payne that she had asked her to explain to Mrs Wrigley that Mrs Patel had taken legal advice and was told that she should not reply to any of his emails. He found that surprising given that Mrs Patel was asking Mr Wrigley to provide her with the CPD records, and he had told her he was willing to do so just as soon as Mrs Patel confirmed who had told her that she was required to have copies of them and why. He said if Mrs Patel wasn't going to be replying to him at all from now on, he could not see how they were going to make much progress. He continued stating that if Mrs Patel wanted to resolve this, he asked her to provide him with written confirmation from whoever it was that was advising her and insisting that she had a legal or professional responsibility to hold copies of all the girls previous CPD records. He referenced the fact that he understood she was now saying that somehow Mr Patel's own GDC registration was at risk as a result of this. He could not see how that could possibly be the case or who would tell her such a thing and it was obviously a serious matter if that was the case, so he asked for the details and if it was true, he would confirm and he would forward the staff CPD records straight away.

76. Mrs Patel made another brief note of events from the 20 November to 30 November which indicates that she spoke to each of the Claimants about the matter and specifically that she was told by Ms Payne that the reason that she was

unable to retrieve the records was due to them wanting a response from Mrs Patel explaining who and why this information is needed. The notes say that she had explained to Ms Payne:

> *"that is it a local policy to ensure registrants are fit to practice as per regulation and encourages her to retrieve the records where solicitors who managed the practice sale deem that speaking with the seller is unwarranted as we have done our best to help staff within an over exceptional time frame."*

77. It is clear from the exchange of emails and the notes that the only reason the CPD records were being demanded was Mrs Patel's own policy that she wanted to review the records. The reference to a local policy can only mean that. The reason given by Mrs Patel for not being willing to speak to Mr Wrigley to explain this, according to her at this time, was that she had apparently spoken with her solicitors who told her it was not necessary. In later emails she did not pursue this suggestion, giving an entirely different reason.

78. On 30 November Mrs Patel sent the GDC officer who had written to her, a copy of an email from Mr Wrigley to the Claimants and another person dated 19 July 2014 in which he had told him they needed to do a particular course again and given them an online link to do it. He had explained that they needed to register first. He had told them how to do it and he had told them that they needed to select a particular course and he had tell them they could either do the course or cut straight to the text at the end and answer the 10 questions correctly and then add set up the answers. he had told him that they could then select print certificates and give it to him or tell him they had passed, and he would print it for them. As I have noted, when this was put to the Claimants, they said it was a training exercise and not an exercise for which they claimed CPD points or any CPD benefit. A covering letter from Mrs Patel explained that the previous employer found this situation unnecessary, and they had been compelled to remove the staff from their nursing duties effective from 4 December to ensure they were not a danger to the public and so they could uphold Regulation 19 devised by the Care Quality Commission. The letter stated from the point at which they took over the practice, all previous staff records/folders had been removed by an unknown source and all emails, sent/from Mr Wrigley's practice email had been deleted. The suggestion that there was something sinister in this is difficult to comprehend since the lack of prior records would be expected. Mr and Mrs Patel did not purchase the shares in a company. Rather, they purchased the assets of the dental business. The Respondent's liability towards the staff arose by virtue of TUPE. The Respondent had no right to the previous records or emails belonging to the former owner of the business. The letter went on to state that since taking over the practice, many aspects of their knowledge in topics set out in CPD requirements was lacking, further questioning their capability to fulfil their role as a registered dental nurse but did not explain what scenarios had triggered that view and what knowledge of topics was lacking. No details of that nature were given at all.

79. The GDC officer's email response dated 30 November to Mrs Patel was that:

> "*the General Dental Council requires dental professionals to keep records of historical CPD to provide evidence if we audit them directly. The GDC does*

not require employers to audit their employees or keep a record of employees CPD".

80. He then referred to the concerns expressed in Mrs Patel's letter that many aspects of knowledge in topics set out in CPD requirements was lacking further questioning their capability to fulfil their role as a registered dental nurse and asked for details of the specific concerns they had. He also asked if Mrs Patel clarify if she believed their gap in knowledge effects their fitness to practice pointing out that having some gaps in knowledge doesn't automatically make a registrant unfit to practice.

81. On 1 December 2018 Mr Wrigley wrote to Mrs Patel a lengthy email explaining that he understood she wasn't going to be replying to him or forwarding any written documentation to support her insistence that the Respondent was professionally or legally required by the CQC, GDC and or others to have the historical CPD records for the staff. In all the circumstances, he thought it would be helpful if he attended the planned meetings next week in order to support the Claimants and also to clarify various things that seemed still to be a cause for confusion. He assumed that Mrs Patel would have no objection to his doing so but if she did, he wanted her to let him know. He thought his presence might finally bring things to a satisfactory resolution for all concerned. Mr Wrigley reiterated that it was his view supported by considerable advice from the GDC, CQC, DDU and others that the action that the Respondents were taking was not only totally unnecessary but completely unjustifiable both legally and professionally. He stated:

> "*your repeated and inexplicable refusal to provide any of the girls or myself any written evidence to support your stated position, namely that you are now **required** by the GDC, CQC and/or others to have access to their CPD records and that they are also **required** to provide them for you, despite your having been assured that if you did so the records would be immediately forwarded to you by me, seems entirely self defeating to me and also only acts to reaffirm and strengthen my belief that my the advice I have been given is completely correct.*"

82. Mrs Patel finally replied to that letter on 1 December, writing that the reason she hadn't continued correspondence was that her solicitor who handled the purchase confirmed that no correspondence had been received from his solicitor. She said she was disappointed as Mr Wrigley's initial email said the solicitor would send across any missing documents. The result of this and those which she had with staff led her to feel that further correspondence with Mr Wrigley was not helping the matter further to achieve the goal:

> *"which has only and always been to obtain their rightful records. We do not understand why you hold a copy of it and the staff don't? This is a mystery for all of us? We have in no way treated any member staff badly and have only ever communicated their responsibilities to them.*
>
> *The reason for my request to obtain the records has always been to ensure that we meet our compliance tasks that set by the CQC to ensure we can*

confidently protect the staff as per our own insurance policy. The GDC states that they may or may not insist on up to 7 years' worth of records."

83. The reference to the insurance policy was the third reason given by Mrs Patel for requiring the historic CPD records. Her first reason had been to carry out the gap analysis. The second reason had been a suggestion that there was a GDC obligation. Now Mrs Patel was suggesting that they had to meet compliance tasks set by the CQC by virtue of their insurance policy. At no time had the GDC ever said that the Respondent, as a subsequent employer, might need to see up to seven years' worth of historic records. In fact, as I have noted, the previous day, on 30 November, the GDC has written to Mrs Patel saying that the GDC *"does not require employers to audit their employees or keep a record of employees CPD"*. There was no CQC requirement other than to verify staff were qualified which, as I have noted, could be done by reference to the GDC register.

84. Mrs Patel continued by stating that she continued to hope that Mr Wrigley could still help them and the girls by simply providing them or her with anything that he had:

"*even a simple document to say they had completed x, y and z in the past correlated to the number of verifiable hours would be sufficient.*"

She explained that the formal meetings have been scheduled to help them all move forward from this and for them to understand their responsibilities going forward. She did not feel that it would be helpful for Mr Wrigley to attend a situation that didn't concern him. Mrs Patel said the staff have been advised that they may be accompanied by a work colleague or an accredited trade union official of their choice. She concluded that she understood the girls had a loyalty to Mr Wrigley as their longstanding employer and finally said:

"*If you truly would like to help the staff, can you please provide them with their rightful CPD records to finally end this. "*

85. This was followed on 2 December by another long email from Mr Wrigley the key points of which was that he thought that they could all move on if the Respondents confirmed that they didn't now require the records. He would be happy to confirm that the annual and end of cycle declarations were accurate and that all completed CPD records of the staff were held by him and would be made available to the GDC if and when they should ever require it. He also explained that he had genuinely assumed all the previous staff CPD records were included with all the other vast amount of paperwork they exchanged during the practice sale but it turned out that the reason why they weren't was that the solicitor for the Mr and Mrs Patel did not ask for the previous CPD records and his did not provide them, not because they were in some way negligent, but simply because normal practice does not require that they are transferred.

86. In the event, the formal meetings were not cancelled, and matters became even more fraught.

87. On 2 December, Ms Hudson wrote to Mrs Patel referencing the emails she had read yesterday and stating she was bemused by the quote "*we have no way*

treated any member of our staff badly". Ms Hudson explained that Mrs Patel had made her life a misery over the past few weeks as well as the other Claimants and an additional member of staff. She said:

> "*You have singled me out, ignored me, told me I have a negative attitude and let's not forget you told me how uncaring and thoughtless I am when I questioned how professional your constant moaning about your financial situation was, which I think, quite frankly I/we had a right to bring up in that meeting. You started the CPD issue with me weeks before the other girls, despite me telling you numerous times that Julia and Laura were in the same position as I was. Alistair also questioned this, and your reply (all via email) was "I have lots of paperwork provided by Julia and Laura". This, we all know is an absolute lie. A couple of CPD certs does not, in anyway constitute 10 years' worth of CPD evidence.*
>
> *I sat with you on reception and told you how I felt I was being targeted, then miraculously, a few days later Julia and Laura were asked to produce all of their records. Again, this was done in a really informal way rather than how I was asked in an urgent meeting sat down at the end of the day face to face AND with Kartik present."*

88. On 2 December Mrs Patel also replied to the officer at the General Dental Council who had written to her thanking him for the prompt response. She stated:

> *"Where previous GDC guidance suggests that registrants may be audited by GDC, local rules and policies have only tried to ensure this is case for them whilst upholding regulation 19 provided by the CQC.*
>
> *Since taking over the practice, many questions about their roles and responsibilities have been asked to determine strength and weaknesses and gaps in their knowledge by informal conversations.*
>
> *Where you have kindly mentioned that the GDC does not require employers to audit their employees or keep a record of employees CPD, this is most definitely an employment related concern rather than a fitness to practice issue and will be handled internally to produce a local resolution. We felt we had a responsibility to let you know about the historical dimensions of this where we cannot rectify it retrospectively. So going forward, I leave it in your hands to decide if these registrants need auditing."*

89. This response to the GDC by Mrs Patel is an express acknowledgement that the GDC does not require employers to audit their employees or keep a record of employees CPD. Again, she refers to local rules and policies which can only mean her own requirement. Notably there is no detail of any problem of the nature indicated previously when Mrs Patel had written to the GDC on 30 November, that many aspects of the Claimants' knowledge in topics set out in CPD requirements was lacking.

90. The bundle contains a series of messages between Mr Wrigley and Mrs Patel described simply as copies of messages in the index. I believe they are text messages. A message on the 2nd of December from Mrs Patel said:

"I need to contact the HR company before calling the meeting off (which I never dreamed of in the first place). If you do speak with the girls please let them know that I have and will always have their best interests at heart to develop them further so a/some members don't have to ever say "Alistair did it all" and if the meeting goes ahead then to accept responsibility for training as per our directions in the future. I am trying to now damage control, retain and retrain staff in a new angle for them to take some responsibility. …Nobody doubts that they are wonderful ladies however work is work and things need to be organised. For their sakes and ours.

Please now be assured that my intentions are not in any way malicious towards a single member of staff and just want them to go forward and be successful dental nurses of the modern age...."

91. This message appears to explain to some extent Mrs Patel's motivation for calling the hearing on 4 December, which she seems to say was to change the culture regarding training and ask the Claimants to organise their own CPD in a different manner. She refers that to them as wonderful ladies. she maintains she just wants him to go forward and be successful dental nurses of the modern age. Nothing in this message suggests that the Claimants were in any way not competent as dental nurses or that the situation was such that their dental nursing duties should be terminated on the grounds of some other substantial reason.

92. Mr Wrigley's response indicated he didn't understand what exactly Mrs Patel was saying in her message. He did appreciate that she appeared not to want to go forward with the hearings on for December. He said it was entirely up to her to decide whether she now immediately emailed/texted the girls to tell him that the whole process including the meetings is now cancelled. He suggested she did it immediately. Mrs Patel responded saying a lot of what I have said was due to be discussed as part of meeting on Tuesday and she would appreciate it if he could aid the situation now that he knew her intentions for them to grow.

93 Mr Wrigley replied again asking her to stop sending messages like that, pointing out that Tuesday's meeting was a disciplinary one in which she tells them they may be sacked. Mrs Patel replied stating she had only ever tried to resolve the situation and she did not appreciate feeling bullied into cancelling a meeting that would help their growth with us in the future. She understood what he was doing but she asked him to stop being so aggressive as this was exactly what caused the situation to spiral out of control. Mr Wrigley replied that was enough and he was not bullying or being aggressive and that accusation was both a joke and an insult. He was just simply insisting she finally made a decision of her own free will. Mrs Patel's response was:

"the initial request made to obtain their previous CPD has and continues to be a polite request and nothing more! Please deal with this fact as you so wish."

It is important to take note of the fact that in this message Mrs Patel refers to the demands for the historic CPD as a polite request rather than a mandatory instruction.

94. In the light of the confused messages between Mrs Patel and Mr Wrigley indicating that Mrs Patel did not want to hold the hearing on 4 December, it seems that on 3 December, Ms Payne sent an email on behalf of all three of the Claimants asking for a joint reply by return of email specifically stating:

> "*Before we reply formally to you regarding tomorrow's disciplinary meeting, we are somewhat confused that your recent written exchanges suggest that you may be seeking further advice about it today to decide potentially to either change or cancel the proposed action altogether. Please can you therefore kindly confirm whether or not you have decided to proceed as planned and whether tomorrow's meetings will still purely be a disciplinary one regarding our alleged failure to provide you with copies of our historical CPD records. We will then respond accordingly however you decide to proceed…"*

95. Mrs Patel wrote asking the Claimants to attend the meeting stating that they had an independent consultant attending. There was a further request for clarification and Mrs Patel replied saying:

> *"As you will be aware, unless you are able to provide evidence of your CPD, then the disciplinary hearing still stands and will go ahead.*
>
> *I can confirm that Samantha Wood is an independent, impartial HR Consultant, who will hold the disciplinary meeting on behalf of the company. I will also be in attendance as note taker."*

96. The three Claimants then wrote to Mr and Mrs Patel explaining they were writing jointly regarding the decision to instigate formal disciplinary action based on what Mr and Mrs Patel considered to be their failure to meet their professional obligations to provide them with their historical CPD records that relate to the time before they took over ownership of the practice in July 2017. They said they had delayed responding formally until now as they'd hoped that, whilst discussion was continuing between you, us and Alistair, a solution could be found to convince you that there was no need or justification for you to continue with the action you have started. Since it was clearly the disciplinary action and hearings on Tuesday would go ahead as planned, they commented setting out their position.

97. The Claimants rejected the accusation that they were required in anyway professionally or legally to forward to the Respondent any of their previous CPD details and said this view was fully supported in writing by the GDC and others. They believed it was self evident that they had not in any way breached any of their terms of service or professional responsibilities so there was no justification for the disciplinary action.

98. The Claimants explained they were confused by recent correspondence that seemed to suggest that the Respondent did not plan on actually holding the meeting at all, and if it go went ahead it was about how they could help them and allow them to grow and understand their responsibilities going forward. As they now had clarification that the purpose of the meeting was a disciplinary one they wanted to ensure that that was what it was as they said it can only be one or the other and not a combination of the two to suit you.

99. As the matter was to be a disciplinary hearing and not a mediation meeting, they asked the Respondent to arrange for one single hearing at which all three could attend as they were charged with exactly the same failure with regard to historical CPD records. They pointed out they were not members of any trade union or other professional body which could help represent them in the meeting and they had each asked Mr Wrigley to attend and he had agreed to do so. They explained he was the employer for many years and he had the delegated responsibility for keeping the record of their CPD hours. He had been in extensive correspondence regarding the issue and had confirmed exactly what their professional and legal responsibilities were with the GDC and others. They also asked for confirmation that Mr Patel would be attending the hearing as he was the principal dentist and the only GDC registered member amongst the practice owners. They wanted to audio record the hearing so there was an accurate record of what was said and by whom. They thought a physical recording would provide a more accurate and impartial record. Finally given the various inaccuracies contained within the note summarising the sequence of events that led to the position, they wanted all contact regarding the issue to take place in writing, not verbally, in person or by phone, and all be directed to the three of them jointly rather than individually.

100. Mrs Patel replied on 4 December at 9.29 in the morning, which was after the two Claimants who were working that day, Ms Hudson and Ms Payne, had started their work. Her reply stated this was not a disciplinary hearing in the strictest sense. She confirmed it was a formal meeting the outcome of which could be dismissal for some other substantial reason. She said that employees must have an individual meeting otherwise it was unfair, and she also said the ACAS Code of Practice states they can be accompanied by a colleague or trade union representative. She said as Mr Wrigley was neither of these, he could not be in attendance. She said they could not bring each other as there was conflict of interest and each of their circumstances might be different. She said this information was required to be protected under Data Protection. Mr Patel was not to be present because he may be needed to consider any potential appeals.

<u>Ms Hudson's leaving the Practice on 4 December</u>

101. Another event that became a disciplinary matter was Ms Hudson's departure from the Practice premises on the morning of 4 December. Mrs Patel has made another note recording a sequence of events. Her note records that on the 4th of December at 9:35 a.m. Ms Hudson asked Laura Payne to speak with her and staff room and says Laura walked over to the staff and at the point when Mrs Patel walked in to make tea. It says Laura explains that the email sent doesn't make any sense. It is explained to Laura verbally (with Helen present) (presumably by Mrs Patel) that the meeting is being held to move forward and shouldn't be a cause for concern. The note says:

> "*who has explained what to you should be disregarded as that information is not coming from either me or Kartik and is possibly inaccurate. Helen asks (very emotional/aggressive tone) how do you expect us to go back to normal after this? She is asked to calm down and wait for the meeting. She explains that she can't work in the surgery in these conditions and is offered/asked if*

there is anything else she would like to do instead like admin/reading/learning. She says she can't work and says she is going for a walk. Helen did not return to speak to management – deemed – AWOL".

102. As I say, these notes prepared by Mrs Patel were not confirmed and I am not able to satisfy myself thar the contents are accurate, but I assume there is some indication in them of what happened. I have a detailed note made by Mrs Hudson in preparation for the investigatory meeting at which this allegation was to be put her and that note details her account of the event. It records how she was anxious to find out Mrs Patel's response with regard to the disciplinary hearings later that day and took advantage of a brief respite between patients to go to the toilet and review her emails, which otherwise she was not allowed to do. Having seen the email from Mrs Patel, she felt it necessary to tell Ms Payne she should look at it as well, as she was on reception and would not have seen it. Ms Hudson's account of events was that Mrs Patel found them both in the staff room reading that email and berated them for checking the emails, when they were checking only the email that had been sent by her and that they needed to read and consider before their hearings later that day. Ms Hudson burst into tears. She felt she was no longer able to carry out her duties. After Ms Hudson left, she telephoned her husband and once she had calmed down, she went back to the Practice premises, but by this stage (about 20 minutes later) Mrs Patel was no longer present. Mr Patel was working in surgery with the trainee dental nurse so that she could not disturb him. At this point, she left again and went to the coffee shop nearby, where at some point Mr Wrigley and Ms Vidgen joined her as they were all waiting for the afternoon hearings which were due to start at 1:00p.m.

103. I am satisfied from all the evidence available to me that Ms Hudson was tearful and very upset when she left the Practice. Mrs Patel's note indicates that Ms Hudson was emotional and the fact she was asked to calm down suggests she was not calm at the time she left the Practice premises. I am also satisfied that she was so upset, she did not feel she could work safely or effectively in the dental surgery or cope with the admin or reading she was offered instead. I note that she went to the cafe and met Mr Wrigley. I am satisfied this was after she had called her husband and returned to work but been unable to find Mrs Patel. This does not detract from her being too distressed to work when she left the Practice.

104. The email from Mrs Patel prompted a further email from Mr Wrigley written on behalf of the Claimants, subject to the fact he been unable to speak to Laura Payne. His response was to question the assertions made by Mrs Patel. At the conclusion of the email, he explained that the three Claimants and Mr Wrigley would attend for the first meeting today at 1:00 p.m. together and they would go ahead if that was accepted but if that was not agreed then they would refuse to attend the hearings at all. He then suggested that the hearing proceeded as planned in their absence as they were no longer prepared to have this dragging on any longer. In view of the fact they did not want any unseemly confrontation at the Practice, as they had no wish to embarrass the Respondent or the patients, given that the Respondent had chosen to hold meetings at the Practice while it was still in operation, Mr Wrigley also said if you refuse permission to allow me to enter the practice I would of course respect that and try not to do so.

<u>4 December 2018 meeting with Ms Vidgen and Ms Hudson</u>

105. Two Claimants, Ms Hudson and Ms Vidgen, attended for the formal meeting at 1 p.m. together with Mr Wrigley. As I have noted, Ms Vidgen was due to have the first meeting at 1:00 p.m. and Ms Hudson's meeting was due to take place after that at 2:00 p.m. I was told that Mr Wrigley did actually have the CPD records with him that day and intended to hand them over if he had been allowed into the meeting, but he was refused access. Ms Wood, the Croner consultant who was present to oversee the meeting concluded that he was neither a Trade Union representative nor a colleague and that he had no right to attend. Additionally, she suggested he was intimidating. These two Claimants' failure to attend this meeting formed the subject of later disciplinary allegations so that it is important to consider the facts.

106. Mrs Patel has made a note of the point when Mr Wrigley walked in with Ms Vidgen and Ms Hudson. As before there is no indication these notes are entirely accurate. However, they do indicate that Ms Wood refused Mr Wrigley the opportunity to attend because he was neither a trade union representative nor a colleague. They also show that Mr Wrigley said he was there as a friend which of course was the contractual entitlement. She notes:

> "*Julia invited in and asks if Alistair is welcome. We reply that he is not welcome in the meeting.*
>
> *Alistair insists that a supportive companion is allowed into the meeting with the agreement of both parties. Samantha states that there is not a supportive companion allowed to this meeting. Alistair asks is that down to Radha? The allowance to this meeting is a TU official or a colleague and as you are neither then I am afraid you will not be able to attend this meeting. Alistair asks so Radha is refusing to give me permission to be in attendance of this meeting? Samantha – Absolutely."*

107. In response, Ms Vidgen then said she would not be attending to which according to Mrs Patel's note, Ms Wood said what they would do is make another appointment. At that point, it is suggested that Mr Wrigley interrupted and informed Ms Vidgen and Ms Hudson that isn't what you want, and you want them to proceed to a hearing. She noted that Samantha Wood informed Mr Wrigley that she will not be discussing this with him any longer and that it was not his employment issue and it isn't your practice. She said:

> "*I am here as I have been appointed to help and assist. We now inform the employees that we will reschedule another meeting and if you do not attend the next meeting then a decision will be made based on your non attendance. This seems a very easy matter to discuss and it have absolutely does not [sic] anything to do with your previous employment and your previous employer. Alistair has no duty of care to you and that actually stopped when you signed over the practice.*
>
> *Alistair mentions that he is there to support them as a friend. Samantha responds to say that any individual cannot be supported by a friend. You're putting these ladies' employment at risk by trying to involve yourself in something that you're not involved in.*

Alistair responds that there is no point in rescheduling it and that you can do whatever you want. The approach will be that they are not attending.

Samantha informs them all that we feel uncomfortable to make a decision based on what Alistair says on behalf of the employees.

Radha comments to say that I am just the note-taking today and informs Alistair that he is not welcome on my property and to leave.

Julia and Helen agree to leave and not be in attendance of the meeting."

108. The previous email from Mr Wrigley made it clear he had no wish to create any form of disruption at the Practice in front of patients, and show that he was sensitive to that risk. They are not consistent with anyone being intimidating. The Claimants had, as I have noted, a clause in their employment contracts which the Respondent now accepts entitled them to bring a friend to any disciplinary hearing. That was a contractual entitlement which enhanced the ACAS code of conduct. Mr Wrigley was undoubtedly being brought as a friend and the refusal to allow him admittance to that meeting to accompany them as a friend was a breach of contract. Mrs Patel's notes do not indicate that Mr Wrigley was intimidating, only that he was insisting that Ms Vidgen and Ms Hudson would not attend the meeting if he was not also in attendance.

109. There is no indication that Ms Hudson's meeting took place. Her meeting was due to take place at 2:00 p.m., with Ms Payne's meeting following on. She had been present with Ms Vidgen and Mr Wrigley. She had left the Practice with them when Mrs Patel insisted Mr Wrigley leave. Ms Payne's meeting was brought forward and started at 1.15 p.m. At 2.16 p.m. that day Ms Hudson sent an email to Mrs Patel asking if she was required to work today from 3p.m., until the end of the usual working day. There was no acknowledgement or reply to that email.

<u>4 December meeting with Ms Payne</u>

110. The Third Claimant, Laura Payne, decided she wanted to go ahead with the meeting as she was unhappy about the pressure of the continuing dispute, and so her meeting took place with her on her own. Ms Wood, a Croner consultant, presided, and conducted the meeting. Mrs Patel took notes which show that it started at 1.15 p.m. It had originally been called for 3 p.m. It therefore took place within a short while of the first meeting being aborted. Mrs Patel took notes and the Ms Wood, the Croner consultant prepared a report. Mrs Patel's notes do not correspond with the report in several respects. Mrs Patel's notes indicate that she talked about the transaction under which the Respondent acquired the Practice and said that all the training records should have been transferred along with the personnel files and later that under TUPE she is missing some information and the previous employer is not providing it. None of this was mentioned in the report. The report states that Laura produced evidence for verifiable CPD dating back to 2010, however she was still yet to complete training for 2017 -2018. Later in the report it refers to the insurance and indicates that Mrs Patel will ask her insurers if they satisfied the current provision of records from 2010 that Ms Payne provided. According to the report, there was little emphasis on the missing historic information but more of a focus on current training. It was decided that Ms Payne

had not completed all of the CPD requirements for a recent period and she would need to do some extra work to catch up, which she agreed to do within two weeks and did achieve. It is not particularly relevant, but it does appear that was an inaccurate assessment of the enhanced GDC rules which allowed a two year period for completing a minimum amount of work on CPD. Ms Payne could have done those CPD exercises in the subsequent year, but nevertheless the outcome was one in which some degree of accommodation was reached. Ms Wood produced her written report which was given to Ms Payne. It recorded the fact that Mrs Patel explained that Ms Payne had produced evidence for verifiable CPD dating back to 2010 but was still yet complete training for 2017 to 2018. While I understand Ms Payne had provided a few records which were historic, I believe that Mr Wrigley still held the majority of her records, but the focus of this meeting was not on the past, but on the recent CPD training year. The report made recommendations which were that, having given full and thorough consideration to the information presented:

> *"LP should be invited to a further formal meeting by letter if she fails to complete the required GDC CPD 12 categories set on the training matrix by RP within the 14 day timeline agreed at this meeting. Paragraph*
>
> *If LP is invite to a further former meeting, she should be advised that her position could be terminated for some other substantial reason, namely failing to comply with the continuous training and registration with the General Dental Council regulations. LP should also be advised of her right to be accompanied."*

<u>Suspension of Ms Vidgen and Ms Hudson</u>

111. Later that afternoon both Ms Vidgen and Mr Hudson were sent letters by email suspending them. The suspension letter addressed to Ms Hudson said the suspension was pending investigations into leaving work without permission and refusing to attend a formal meeting. The letter to Ms Vidgen was identical except that it said the suspension was pending investigations into refusing to attend a formal meeting. I have noted that in correspondence with the GDC on 30 November, Mrs Patel had said that they were having to remove the Claimants from their nursing duties from 4 December. Given that she had already determined that she would do so in her communication with the GDC, it seems that the explanation in the letters that suspension related to the refusal to attend the formal meeting was not accurate.

112. Mrs Patel made another note of events, referencing her efforts to call Ms Vidgen and Ms Hudson to tell them that they were being suspended and the confirmation letter was being sent by email. It also reflects conversations with two remaining staff members, Julie Lean, another dental nurse/receptionist who had been able to provide all of her CPD records and Ms Payne. Both were told that the situation vis a vis the other two Claimants was confidential. Thereafter there was a note from Mrs Patel to herself dated 7 December 2018 at 8:20 p.m. which read

> "*Conclude that this behaviour cannot go on as it is causing unnecessary strain for current members of staff*."

Investigation into the failure to attend the 4 December meeting

113. Thereafter by letter dated 12 December 2018, Ms Hudson was invited to investigation meeting to be held on Friday 28 December, to be chaired by Ms Wood to give her an opportunity to provide an explanation for the following matters of concern which were that on Wednesday 28 November 2018 she left the Company's premises without authority or reasonable excuse, and that the same day she refused to attend a meeting where she had been required to attend. The letter stressed that this was not a disciplinary hearing in the statutory right to be accompanied did not apply. The meeting had to be rearranged as Ms Hudson was not due to work on 28 November and it was re-fixed for 7 January 2019. A similar letter dated 12 September was sent to Ms Vidgen. The matter of concern was limited to her refusal to attend a meeting on Wednesday 28 November 2018. Both letters erroneously stated the date of the meeting as 28 November rather than 4 December. This was subsequently corrected in some later correspondence.

114. Both meetings were re arranged for 7 January and both Ms Vidgen and Ms Hudson wrote similar letters asking for reassurance about the meeting on 7 January, particularly wanting to audio record the meeting and to be accompanied. Their requests were largely refused. However, the letters sending out the revised date had made it clear that the purpose of the meeting was to give these two Claimants the opportunity to provide an explanation for specific matters of concern, which in the case of Ms Vidgen was the refusal to attend meeting on 4 December, and in the case of Ms Hudson was that refusal and additionally leaving the Company's premises without authority or reasonable excuse. In answer to the Claimants' email to Mrs Patel, asking for the reassurance detailed above, Mrs Patel replied to both of them saying yes to the question about whether only issue to be discussed is the one specifically detailed in the letter and no other issued will be discussed. Mrs Patel added, "*This has nothing to do with the training certification issues*".

115. On 5 January 2019, Ms Vidgen prepared a written response to the investigation meeting stating she decided the best way for her to respond was writing to avoid any misunderstandings or confusion about what she wanted to say and she proceeded to set out her answer to the matter which was raised as requiring investigation, namely her refusal to attend a meeting on 4 December that she had been required to attend. In summary, the reason why she said it did not proceed was not because she refused to attend it but because Mrs Patel and the HR consultant repeatedly refused to conduct it properly and fairly in accordance with her employment contract and statutory employment rights. This was a reference to the refusal to allow Mr Wrigley to attend with the Claimants.

116. On 6 January Ms Hudson emailed Mrs Patel stating that her refusal to allow her to record the meeting or be accompanied was her decision but she would be somewhat limited in what she was willing to say and discuss and she also said that she would be making her own notes throughout the meeting. Ms Hudson also prepared a written response to the allegations in her investigation letter. Ms Hudson's written response addressed both the allegation that she had left work as well as the allegation that she had refused to attend a meeting. The date of those events had not been corrected in her correspondence, but she assumed that was an error and addressed them as though they were referring to the events on 4

December. As I have noted above, she explained the events on the morning of 4 December when she left the premises and how distraught she was at the time and that she was not fit to work. She also explained in similar terms that the reason that she did not attend the meeting was because of the Respondent's refusal to allow her to be accompanied by Mr Wrigley and conduct it properly and fairly in accordance with our employment contracts and statutory employment rights.

Investigation meeting with Ms Hudson on 7 January 2019

117. Ms Wood prepared a report of the investigation meeting into the charges put to Ms Hudson. Somewhat surprisingly, the background events recorded that Ms Hudson attends the dental surgery for work on 4 December but walked out at 10:30 that morning and did not return to work or attend for meeting but later in the notes there is a reference to Ms Hudson having attended for the meeting but left again. The notes address an account of events and references to various emails as well as to evidence from Mr Patel and other staff members. Despite the clear statement in the invitation letter and the assurance given by Mrs Patel, Ms Wood did not regard the meeting as confined simply to an investigation into the issues which had been identified in the correspondence with Ms Hudson. She pursued questions about the CPD records and specifically made findings and recommendations about allegations to be put to Ms Hudson at a disciplinary hearing which included allegations about the CPD records. One of her findings related to Ms Hudson having explained that she could prove her CPD was done as the GDC had sent her log to her. Ms Wood's findings include the surprising statement:

> "*Having sent this email HR did not provide the log the GDC sent which would have been considered as sufficient for the practises due diligence".*

That log was always available to Mrs Patel who could see it just by checking the GDC web site and, if that was not a public document, she had Ms Hudson's log in details so she could easily have checked that. In fact, the dispute, as it had become, had never been about the GDC log, but was about Mrs Patel's determination to obtain the underlying evidence of the historic certificates for the training.

118. It is not clear that Ms Wood took into account the notes prepared by Ms Hudson in advance of this investigation meeting. Ms Wood does refer to the various emails between Mr Wrigley and Mrs Patel which she says that she had read. Her assumption from them was that there was a dispute between Mrs Patel and Mr Wrigley, which she thought justified excluding Mr Wrigley from the meetings. She does not appear to have considered the content fully or she might have appreciated that the dispute was over the relevance of historic CPD training records and Mr Wrigley had made valid points. The notes of the interview with Ms Hudson show that she explained that her contract included the entitlement to bring a friend with her to disciplinary and grievance hearings. Notwithstanding that, Ms Wood made a series of findings which included a finding that as Ms Hudson had refused to answer a number of questions relating to Meeting/CPD, she could only assume on the balance of probability that she was aware that it was not a reasonable request to bring Mr Wrigley to the meeting.

119. Ms Wood also made findings based on information from Mr Kartik Patel who informed her, according to her notes, that proof of adequately trained and capable staff is a requirement of the GDC and part of the employees' contractual obligations. Ms Wood relied upon this in finding that the Practice liability/insurances are invalid if CPD/evidence of professional registration cannot be provided. This was another wholly erroneous conclusion. The evidence of the two Claimant's professional registration was clearly available to the Respondent on the GDC website. The demand from the Respondent, made by Mrs Patel, was not for the GDC registration but for copies of the historic certification of the individual training modules that the two Claimants had carried out.

120. As regards Ms Hudson leaving this shift, Ms Wood noted that Ms Hudson admitted that she walked off her shift at 10:30 a.m. and that she went and sat in a coffee shop with Ms Vidgen and Mr Wrigley and spent 2 1/2 hours away from the business without authorisation. The notes record Ms Hudson's explanation that she admitted it wasn't right to walk off the shift but didn't feel in a fit state to be a dental nurse. However, as she acknowledged that she didn't suffer from stress or anxiety or a mental health condition and as she admitted going to meet her friends in the coffee shop, Ms Wood concluded on the balance of probability that the act of walking off shift was a planned action and an act of insubordination.

121. There also appears to be some errors in the findings, as Ms Wood's notes record that when asked she asked Ms Hudson when she next contacted the organisation or came in after walking off site without authorisation her response was "*I haven't*". That was not what her own notes say. The notes attached of her discussion with Ms Hudson show that in response to the question: "*when was the next time you contacted the organisation?*", Ms Wood's notes record that Ms Hudson replied:

> *"Meeting happened, didn't attend, emailed Radha, said do you require me to come back to work? In the afternoon about 2. I offered myself to come back to work, I didn't hear anything. Went home after that."*

The notes also show that Ms Hudson explained she had left the surgery and called her husband and when she had calmed down about half an hour later, she had returned to the surgery, but Mrs Patel was not there. She had explained that only then did she go to the coffee shop where her friends met her as they had been told something had gone on. The conclusion that it was a planned action and insubordination is also difficult to understand given that Ms Hudson explained she was in tears.

121. Similar questions were put to Ms Vidgen. Ms Wood did not restrict her questioning to the matters listed in the invitation letter. Ms Vidgen did refer to her prepared statement, but Ms Wood reached similar findings to those described above. Ms Wood's recommendation was that there be a disciplinary hearing for each of Ms Vidgen and Ms Hudson. She recommended a series of charges be put forward which related not just to the non-attendance at the hearing on 4 December, but also to the CPD records.

<u>Disciplinary hearings</u>

122. The original invitation letters dated Friday 18 January required attendance on 5th February. On 5 February, Ms Hudson and Ms Vidgen each submitted written responses to the allegations, having not got confirmation that Mr Wrigley could attend. The disciplinary hearings were then re-arranged as it appears the Respondent realised that there was a contractual right for a "friend" to be a companion. The follow up letter which notified the revised hearing date referred to the original charges but, on this occasion, confirmed that Mr Wrigley could attend as a companion. Those letters set out the role of the companion in accordance with the ACAS code of conduct in relation to disciplinary matters.

123. Ms Hudson's written response explained that she been prevented from being accompanied in breach of her contractual employment rights and had no confidence the hearing would proceed in a proper or fair way. She set out her explanation and written responses to the allegations made against her. She did not deny leaving the Practice premises without authorisation on 4th December but said the circumstances were entirely reasonable and appeared to being ignored in the investigation report. She did not refuse to attend the hearing on 4th December and in fact did attend but was refused the right to be accompanied by her colleague or her chosen companion. She did not regard it as a reasonable request to proceed with the hearing when her contractual rights were going to be completely ignored. She also pointed out that other requests for the decision to be reviewed before the hearing were also ignored. She addressed the substance of the allegations regarding the CPD records stating that the employer already had evidence of her CPD records that the employer required in order to meet all her professional and legal requirements. She acknowledged there were other CPD records going back some 10 years, but said no GDC registrant is required to provide those records to their employer. She referred to the fact she had written confirmation of this from the GDC. She said she would still provide them if there was written evidence that the employer was in some way required professionally or legally to have access to the records, but the employer chose not to do so and thus it was not reasonable to demand access to those records. She also said that she denied ever breaching GDC record rules relating to CPD and this had been confirmed in writing by the GDC and forwarded to her employer. She had always complied with the CPD requirements and always maintained registration with GDC. She said she had never put the patients, the practice or herself at risk of harm or loss of insurance and resented the allegation that she might do so and had never been provided with any proof that the employer was required to have access to the staff historical CPD records. Ms Vidgen submitted a very similar written response.

124. Having apparently realised that the two Claimants were entitled to bring Mr Wrigley with them to a disciplinary hearing as a friend, the Respondent changed the hearing date to 12 February with the hearing to be conducted by Barnaby Rudston, another consultant from Croner. The hearing was to be audio recorded and a copy of the transcript to be made available. The matters of concern and the procedures were, it said, explained in the original letter of 18 January. The letter of 5 February expressly acknowledged that the Claimants could provide written submissions to the consultant by 5:00 p.m. on the scheduled date of the hearing if they wished to do so. They were, however urged to attend the hearing in person.

125. By emails dated 11 February 2019, both Ms Hudson and Ms Vidgen explained to Mrs Patel that they had taken advice regarding the proposal to re-arrange the disciplinary hearing which was originally scheduled for 4 December and then for 5 February, but which was cancelled at the last minute on both occasions due to the "now admitted failure" to respect their contractual right to be accompanied by a friend of their choice. They explained how they had been dismayed about the way in which the Respondent had failed to follow correct disciplinary process and meet their own statutory and contractual obligations towards them and as a result of this and various other factors they had been advised that it was no longer reasonable for them to be expected or required to continue to engage in the process. They each said they would not be attending the hearing proposed for 12 February.

126. On 20 February, Mrs Patel for the Respondent sent out letters of dismissal which enclosed reports by the consultant Mr Rudston and stated that having carefully reviewed and considered the contents of the report she agreed with the findings and recommendations and had decided summarily to dismiss each of the two Claimants with immediate effect. The right appeal was set out.

<u>Croner Disciplinary Hearing report</u>

127. It is important to note some points about the report. The background was set out and the allegations were listed. The report noted that neither Ms Vidgen or Ms Hudson attended the scheduled hearing although the hearing had been re-scheduled to allow each of them and their companion, Mr Wrigley, to attend. It also noted that each letter said that the hearing would go ahead in the absence of the individual and the Croner consultant would make an informed decision based on the evidence they had before them. The minutes stated the meeting was audio recorded for note taking purposes and copies of the transcribed notes were made available in the document. There was a list of the documents considered as part of the disciplinary procedure.

128. Although the list of documents which were said to be considered as part of the disciplinary procedure include a reference to a statement from Ms Vidgen dated 7 January 2019, which I can only assume must be a reference to the statement supplied on 5 January 2019 by Ms Vidgen, nowhere in the notes does Mr Rudston refer to the points made in the written response to the allegations submitted by Ms Vidgen. Mr Rudston, on questioning, could not remember whether or not he had seen the written responses. He had referred to "various emails" without specifying the dates or number of emails, so it was not possible to be certain which of those had been supplied to him. His report into the allegations against Ms Hudson was exactly the same, referencing a statement dated 7 January, but making no comment on the contents. Mr Rudston did think that if he had seen the two Claimants responses, he would have made a reference to them specifically, since they were the Claimant's defences to the allegations. It is therefore clear that even if Mr Rudston did have those documents, he did not consider them at all.

129. The notes take a somewhat unusual format in that Mr Rudston appears to have asked a series of questions and noted "no comment has been made by JV" or in the case of the hearing for Helen Hudson, the same wording for HH, even though the individual was not present.

130. Mr Rudston's assessment of the allegations depended on his understanding of the Respondent's entitlement to the records they had requested and the reasonableness of their requests to have them supplied. In evidence, Mr Rudston said it was his view that it was the same as an employer of forklift drivers requiring a copy of their licence to drive a forklift truck.

Julia Vidgen – disciplinary hearing on 12 February 2021

131. The first charge was that on the 4th of December Ms Vidgen refused to obey reasonable instructions to attend a meeting. Mr Rudston found that meeting was arranged due to Ms Vidgen's inability to provide CPD evidence it was reasonable for her to expect her to attend. He found that she did attend, and the allegation was not upheld.

132. The second charge was that on 4 December Ms Vidgen refused to obey reasonable instructions in bringing Mr Wrigley with her to the meeting. Mr Rudston found she had the right to be accompanied by a friend, work companion or trade union official in her employment terms and conditions and that Mr Wrigley acting in the role of friend should have been acceptable and therefore the meeting should have continue as scheduled, so he did not uphold that allegation.

133. The third allegation was that Ms Vidgen refused to obey reasonable instructions in not bringing evidence of her CPD to the workplace as requested by Mrs Patel. Mr Rudston cited the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (Part 3) page 73, that Regulation 19 required persons employed for the purpose of carrying on regulated activities must have the qualifications, competence, skills and experience which are necessary for the work to be performed by them and that certain information must be available in relation to each such person employed, being such other information as is required under any enactment to be kept by the registered person in relation to such persons employed. It also provided at 19(5) that where a person employed by the registered person no longer meets the criteria in 19(1), the registered person must take such action as is necessary and proportionate to ensure that the requirements in that paragraph are complied with and if that person is a healthcare professional social worker or other professional registered with the healthcare or social care regulator inform the regulator in question.

134. Despite there being no enactment that required the Respondent to keep the historical CPD records for staff, and clear evidence from the GDC that it did not expect employers to delve into the historical records, Mr Rudston concluded it was a reasonable request to require Ms Vidgen to provide evidence of CPD to the workplace and recommended that allegation be upheld.

135. In relation to the allegation that Ms Vidgen was in breach of the GDC rules relating to CPD, Mr Rudston referred to different regulations. In this case, he referred to the GDC standards and guidance - standards for the dental team. His notes indicate he was referring to standard 6.2 but he seems to have cited standard 6.1.6 which says according to his notes;

As a registered dental professional, you could be held responsible for the actions of any member of your team who does not have to register GDC (for example receptionists, practice managers or laboratory assistants). You should ensure they are appropriately trained and competent.

136. Mr Rudston found that the GDC rules relating to appropriate training and competence of employees such as receptionists was clear, and it was entirely reasonable for Mrs Patel to request copies of CPD from Ms Vidgen. Despite there being no guideline from the GDC to say that employers should have historical records, and indeed an email dated 30 November 2018 from the GDC to Mrs Patel which said the obligation to keep historical records was that of the dental professional, and that the GDC does not require employers to audit their employees or keep a record of employee CPD, Mr Rudston said in his report the wilful withholding of such documentation would represent a breach of GDC guidelines. Presumably Mr Rudston was unaware of that email.

137. Mr Rudston went on to conclude and that he could not uphold the allegation regarding the risk of a breach of health and safety legislation and the risk of being uninsured, since he did not have a copy of the insurance policy and could not assess it.

138. In relation to the allegation that there was a wilful refusal to provide the required CPD, which could bring the organisation into disrepute, he found that it could do so, if it should become known that the Respondent was operating outside of GDC compliance, and he recommended this allegation be upheld.

139. Mr Rudston's overall conclusion was that there had been a fundamental breach and that the terms and conditions provided for dismissal without notice for gross misconduct, so he recommended summary dismissal.

<u>Helen Hudson – disciplinary hearing on 12 February 2021</u>

140. The allegations put to Helen Hudson, then Robinson, were the same with one addition. Ms Hudson was also alleged to have left her workplace without permission on 4 December 2018.

141. On that allegation Mr Rudston found that the absence was unauthorised and, as Ms Hudson did not have permission to be absent from work at the time, this allegation was upheld.

142. On the rest of the charges, Mr Rudston followed more or less an identical pattern of wording but in relation to two allegations he made different findings. In relation to the allegation that Ms Hudson did not attend the meeting on 4 December, he found she did not attend, whereas he had found that Ms Vidgen did attend. Presumably this was because Ms Hudson did not go back at 2:00 p.m. when her meeting was due to start having already attended at 1:00 p.m. with Ms Vidgen and being told her companion would not be allowed to be present. In relation to the allegation that Ms Hudson was in breach of GDC rules relating to CPD, he referred to a different requirement, being the GDC standards and guidance for the dental team standard 7.3 which he said was as follows:

7.3.2 You should take part in activities that maintain, update or develop your knowledge and skills. Your continuing professional development (CPD) activity should improve your practice.

143. Inexplicably, Mr Rudston relied on this clause as a justification for it being a reasonable for Mrs Patel to request copies of CPD from Ms Hudson. Again, he found that wilful withholding of such documentation would represent a breach of GDC guidelines.

Dismissal

144. Both Ms Hudson and Ms Vidgen were dismissed by Mrs Patel in reliance largely on Mr Rudston's recommendations. However, Mrs Patel made that decision. In her witness statement she says that it was the cumulative effect of the allegations that amounted to gross misconduct, and she specifically says: "*there was no other way for me to move forward with the Claimants as I continued to schedule and reschedule meetings to initially discuss retrieval of CPD records and then an investigation of their behaviour and then it became more about Mr Wrigley's attendances as a friend*". She further differentiates the position from the third Claimant, Ms Payne who attended the formal meeting, understood her mistakes, completed the core training, organised professional indemnity insurance and started to move forward to take responsibility for her career. She says this was entirely different to the First and Second Claimants.

145. It does not seem likely that Mrs Patel genuinely thought Mr Rudston's conclusions were all valid. She had a much deeper knowledge of the background facts, so that she knew much of what Mr Rudston recommended was not an accurate assessment of the facts. By way of example, Mrs Patel was well aware of the reasons why she had asked for the historical CPD documentation at the outset and of the correspondence from the GDC. She knew that there was no GDC requirement to produce these records to an employer. She had taken to referring to "local policies" as the reason for the request because there was no GDC policy to this effect. She had sent text messages to Mr Wrigley referring to the CPD requests as a polite request. She was aware by this time that there was a contractual right to be accompanied by a friend and refusing Mr Wrigley access to the meetings was a breach of contract. She also knew that Ms Hudson had been in tears and distressed on the morning of 4 December when she left the Practice premises and temporarily unfit to work in that state.

146. The statement by Mrs Patel in her witness statement by Mrs Patel is illuminating. What she describes there is the fact that the third Claimant, Ms Payne, complied with her instructions and as she put it "understood her mistakes". The reason for the dismissal she describes in her witness statement was about control over her staff. I have also to bear in mind, however, that from an early stage there as evidence that Mr and Mrs Patel wished Ms Hudson to leave. The records I have recited indicate that Ms Hudson was told her behaviour was unacceptable. Mrs Patel records how Ms Hudson felt they were trying to push her out. Mr and Mrs Patel subjected her to a surprise meeting on 5 November 2018, in which they put options to her for her resignation as a dental nurse, suggesting she was in serious trouble with the GDC. At first, the only CPD records which were pursued were those of Ms Hudson. While Ms Hudson was the only dental nurse who had

provided no records, in Ms Hudson's case, there was a trail of evidence that the Respondent wanted to terminate her employment long before the formal meetings.

Ms Vidgen's appeal

147. On 21 February 2019, both Ms Vidgen and Ms Hudson emailed Mrs Patel, asking for clarification about which charges were considered to be gross misconduct. The reply, on 22 February, was that Mrs Patel had checked with the consultant who had confirmed that every point upheld represented a fundamental breach. On 25 February 2019, both Ms Hudson and Ms Vidgen submitted appeals to Mrs Patel. Ms Vidgen's appeal cited five reasons. First, she maintained her total innocence and pointed out she had all times remained fully registered with the GDC and complied with their requirements to their complete satisfaction. She pointed out that Mrs Patel had access to her CPD log that was held by the GDC and knew this to be the case. She did not consider that the accusations, even if they were true which she said they were not, amounted to gross misconduct. She referenced the fact that Mrs Patel and her representatives had failed to follow correct procedures and had failed to respect her right to be accompanied by a friend of her choice. She pointed out the Respondent appeared to have failed to consider her written response to the accusations and much of the relevant documentation. She said the conduct of the process had been far from impartial, consistent, or unbiased and the investigation had been conducted in the manner of a disciplinary hearing in all but name. She believed the process was fundamentally flawed and unfair and asked for a full and independent review of the process to be carried out.

Ms Hudson's Appeal

148. Ms Hudson's appeal was largely identical to Ms Vidgen's appeal. Ms Hudson referred to Ms Hudson having to leave the practice briefly on 4 December without permission but pointed out she had admitted it and explained why she felt obliged to do so. That point was made by Ms Vidgen as well as an indication of why the allegations did not amount to gross misconduct.

Appeal process

149. The appeals were arranged with another Croner consultant and were expressly stated to be conducted by way of a review of the original decision. Letters confirming the hearing date were sent out on 28 February with the hearing date fixed for the following day,1 March 2019. The Claimants were given inadequate notice and both Claimants asked for the initial appeal hearing date to be moved to the week commencing 25 March as they had holidays, voluntary work, childcare commitments, and Mr Wrigley was unable to attend on the first date.

150. The Respondent rescheduled, but not to the requested time. Instead, the Respondent applied only the statutory 5 working days counting from the day following the original scheduled hearing, so the hearings were fixed for Monday 11 March. The reason given for the refusal to reschedule to the week commencing 25th March was given in a later email and was that the Respondent would be liable to pay back pay for the duration if the individual was reinstated. There were several exchanges of emails and on 10 March, Ms Hudson wrote again asking to be able

to attend in person with her chosen representative which would necessitate the meeting being moved to the week of 25 March. She said she was happy to waive any pay owed to her by the company between 11 and 25 March should she be reinstated. Despite this Mrs Patel insisted that she would not accommodate that request. Neither Ms Vidgen nor Ms Hudson attended the appeal hearings as Mr Wrigley was not available to join them.

151. By letters dated 20 March 2019, both Ms Vidgen and Ms Hudson were told that their appeals had failed. The grounds of appeal were summarised as follows:

(1) You believe the allegations brought against you to be unjust
(2) You believe the accusations do not amount to gross misconduct
(3) You believe that the company has failed to follow the correct procedures and as result have failed to respect your statutory and contractual rights
(4) You believe that the decision has failed to consider highly relevant documentation and correspondence
(5) You state that the disciplinary process has not been impartial, consistent, or unbiased
(6) You believe the decision to be fundamentally flawed and unfair.

152. The reports prepared by the Croner consultant who assisted with the appeal, Ms Kate Westwood, are in one case incomplete in the bundle but, as they as the two reports are more or less identical, it is possible to surmise what is missing. It is clear that Ms Westwood took each allegation in turn and raised them in a similar fashion to Mr Rudston, as if the employee was present, when they were not. She recorded the lack of response as no answer. She concluded on every point that the Respondent company had acted correctly.

153. Mr Kirik Patel, who was apparently not present during the appeal meetings, received a copy of the report and accepted the recommendations which were the appeal was not upheld and the decision to terminate should stand. Mr Kirik Patel may not have known all the detail of Mrs Patel's communications with the GDC and others, but he must have known the gist of it.

Laura Payne

154. Ms Payne had continued to work for the Respondent. There are documents in the bundle indicating that, from time to time, Mrs Patel held a one-to-one meeting with her and the form she used for them had a question about problems at work. The response noted against this for Ms Payne on 19 December 2018 was that she would like to know what the outcome for their staff members will be but understood that the Respondent will not know until they attend the formal meetings. On 4 January 2019, the answer was "no problems at work". On 8 February 2019, the answer to that question was "no personal problems at work". On 7 March 2019, the answer to that question was again, no problems, and it went on to say: "Happy with Kartik and Radha, happy with breaks". The forms used also had a question about any welfare support required in which Ms Payne provided some information about her husband's condition. Mr and Mrs Patel were both aware that Ms Payne's husband was suffering from cancer and was severely ill throughout this time and unable to work. His illness inevitably put significant pressure on Ms Payne.

Additionally, in consequence of his illness, she was the sole breadwinner for her family.

155. In addition to carrying out additional training, Ms Payne had also been required to arrange her own insurance for her work at the Respondent, which she had done. While Mrs Patel had reimbursed her for the cost, she had insisted that Ms Payne take out the insurance in her own name.

156. On Wednesday 13 March 2019 Mrs Patel sent an email to Ms Payne which explained she had issued new contracts for the entire team to take effect from 1 April. It continued "As discussed, please find attached the handbook which should be read in conjunction with your contract. You will receive a hard copy of the handbook in the form of booklet when it is printed later this month". It then asked her to sign one of the contracts and return it to her by the 18th of March 2019 (which would have been a Monday) and retain the other for her personal records. As noted above, under the original employment contracts which were in place prior to the TUPE transfer, and repeated in the first new version issued by Mrs Patel, the Respondent contracted to give not less than three months' notice of any variations to the employment contract. In this case, Ms Payne was asked to return the signed contract within five days and no specific changes were identified to Ms Payne. Ms Payne's evidence was that in fact she was assured by Mrs Patel that there were no significant changes. Ms Payne signed the new contract on 22 March 2019.

157. By an email dated 31 March sent at 7.43 in the evening, Ms Payne wrote to Mrs Patel, addressing her email to both Mr and Mrs Patel. She said she had now had time to consider the terms of the new contract and staff handbook which were due to come into effect the following day. Given their content and importance she felt she needed to get proper professional advice before she was in a position to agree to them which she would try to do early the following week. She asked if they would confirm by return of email that they agreed to a delay in bringing the terms and conditions of the new contract and staff handbook into effect for the time being. Ms Payne sent a chaser email the next day at 1.37 asking Mr and Mrs Patel if they could confirm that they delayed the introduction of the new contract.

158. Mrs Patel's response sent at 1.55 p.m. the next day was that she understood Ms Payne would like independent advice on her contract but said at the point which we both signed the contract, you assured me you were happy with it and therefore has subsequently come into effect as of first April 2019. She stated:

> "*I feel it may be beneficial for you and I to meet to discuss any concerns you have period that way we can discuss your concerns, identify if there is a fundamental error on any of the paperwork, explain any policies you are unsure of. I will seek to rectify any fundamental errors without delay to save you the time, effort and cost of seeking legal advice.*"

She then suggested they met on Wednesday 3 April to discuss this in more detail.

159. At 7:25 p.m. on 1 April Ms Payne resigned by email. She explained her resignation stating that she had been disappointed to be advised that they had refused her request to be allowed more time to consider the terms and effect of

the numerous changes they were proposing to introduce in the new staff contract and handbook. She had now taken further advice and it was her firm opinion that what they had done amounted to multiple and significant breaches of her longstanding contract with both the previous practice owners and themselves, and she could not be reasonably expected or required to continue with her employment under such circumstances. She referred to the fact that, having taken several other concerns she had regarding various aspects of the way the [business] is being run in recent months, she regretted to inform them that she was left with no choice but to resign as a dental nurse and receptionist with immediate effect. She continued explaining:

> "*After almost 25 years working at the practice, I assure you that I have not taken this decision lightly and only take it now after many months of agonising over what I should do. Sadly, the simple truth is that your conduct towards me and others has caused the job that I have loved for so many years to no longer be enjoyable such that where I once looked forward to coming to work I now approach it with anxiety. The way that you have handled trying to get me to accept the terms of the terms of a new contract, despite my clear reluctance to do so and without explaining to me how it would be to my considerable detriment is just the latest example of this and made me realise that remaining as your employee at the practice has now sadly become an impossibility.*"

159. In response, Mrs Patel sent a letter dated 2 April 2019 and which she referred to the fact that she had emailed saying that she would seek to rectify any fundamental errors without delay. She believed the decision to resign had been reached in haste without affording her a discussion as to which part of the contract was fundamentally incorrect and without allowing her an opportunity to remedy it. She had reviewed the contract and noticed the start date was incorrect. This would have made the notice period incorrect as well and she has amended the contract to reflect it and sent the revised version. She asked Mrs Payne to reconsider her resignation. She asked her to meet on 3 April as part of the company's grievance procedure so they could discuss any further parts of the contract which Ms Payne believed to be incorrect, and she could seek to remedy them where appropriate. She was prepared to arrange an alternative date the following week if that was more suitable. Presumably, since it was going to be treated as a grievance hearing, she said Mrs Payne could be accompanied by a work colleague or an accredited trade union official her choice. She also asked her again to reconsider and retract her resignation.

160. Mrs Payne replied on 2 April stating:

> "*Please be assured that my decision was certainly not reached in haste but as I explained was only taken after much careful thought over the last several months. The terms of the new contract and staff handbook you insisted bringing into force yesterday were just one, albeit very significant, of many factors that I considered in reaching my decision as it clearly represented breaches of my existing contract with K2 Smiles - and still does*".

She declined to reconsider her decision to resign. There followed an email exchange in which Mrs Patel accepted the resignation and requested the keys and uniform to be returned. Mrs Payne replied by email on 4 April stating:

> *"I also feel that it is important to again make it clear to you that, as I explained in my letter of resignation, the final straw that caused me to make my final decision was not just simply due to errors in my contract as you are trying to infer. It was instead clearly seeking to change numerous clauses of my pre-existing contract and working arrangements, as well as to introduce totally new ones, which were clearly going to be to my detriment. You failed to highlight or explain these to me prior to requiring me to sign it. You then also refused my request before it came into effect to delay the introduction of the new contract in order to give me time to seek further legal advice. Instead you chose to go ahead and bring it into immediate effect the next day on 1/4/19. Finally, as I also explained in my resignation letter though this was a significant contributory factor, it was just the latest in a series of other issues and events over the last several months, so it was all of these and not just the issue of the contract alone which collectively contributed to my eventual decision to resign*".

<u>Differences between the old and new contracts and handbook</u>

161. During the course of the hearing, I was taken to the various changes in the contract and handbook. Ms Payne, as the third Claimant had supplied further and better particulars setting Mrs Patel in her witness statement commented on them and Ms Payne was taken to many of them in the course of cross examination.

161.1 The new contract put the Claimant's job title as dental nurse, whereas previously had it been dental nurse and receptionist. The Respondent argued that said that Ms Payne did not enjoy being based on reception and preferred to be a dental nurse, however there was no discussion about this, and it was not drawn to her attention. The previous contract had had a job description and full duties which she might be asked to carry out included in the contract, but these were no longer included.

161.2 The dates were incorrect. The contract indicated that Ms Payne's employment with the Practice under this contract commenced on 24 July 2017. However, it then said your period of continuous employment began on 1 April 2019 and the statement date was said to be 1 April 2019. 24 July 2017 was the date when the Respondent took ownership of the Practice. The period of commencement of continuous employment should in fact have been from 1 September 1996. Had the new dates in the contract been enforceable, the effect would have been that Ms Payne lost protection from the right to claim unfair dismissal and would have received significantly reduced redundancy payments and reduced notice pay.

161.3. Ms Payne was allegedly concerned that there was no right to an annual pay rise or Christmas bonus although this had been provided in the past. However, no such bonus was specified in any of the written contracts, and we know from Mr Wrigley's email dated 22 July 2017, that he referred to this as his usual practice but said it was discretionary.

161.4 There was no reference to the costs of CPD and GDC registration being paid by the Respondent. These were referred to in the Practice training policy. Mrs Patel argued that had she recently paid this sort of cost and had this been pointed out to her, she would have rectified it.

161.5 The new contract contained a clause that if Ms Payne was late for work, an amount equivalent to the number of minutes she was late would be deducted from her pay. Mrs Patel argued that Ms Payne was frequently early for work, and it would be highly unlikely this would ever have been invoked. However, it was a noticeable change and suggesting that it would not be likely to arise is not an adequate explanation.

161.6 The clause on Hours of Work had been amended. In the further and better particulars Ms Payne complains about the 15 minute tea break but her previous contract provided this was not guaranteed. The new wording watered this down somewhat. Importantly, the new contract included a requirement for working beyond normal working hours and provided that it would be remunerated at the usually hourly rate for every complete extra 30 minutes worked. Under the old contract Ms Payne was remunerated for every complete 15 minutes extra worked. Mrs Patel argues that Ms Payne was not expected to and did not need to work overtime apart from exceptional circumstances and that her timesheet for the last three months showed that there was only one occasion where she worked more than 15 minutes overtime. However again this was a noticeable change which could have impacted her.

161.7 Under Ms Payne's original contract with the Practice, holiday entitlement was six weeks. Mrs Patel made an error in the new contract when she changed the entitlement from days to hours and this was replicated again in the new contract in April 2019.

161.8 The new contract provided that if reinstated on appeal, the period between dismissal and reinstatement was to be treated as suspension without pay. Mrs Patel argued that this was a new clause, but it was unlikely that it would have arisen, and it would only operate if she was successful with an appeal. This may be true, but it was a detrimental change set against a time when Ms Payne had seen her colleagues dismissed on the basis of allegations that she thought made no sense and were unfair.

161.9 There was a new Handbook. This was a new development, and the clauses would all have been new although many of them would have been procedural and some were policies. In the further and better particulars, Ms Payne complains about a number of issues, most of which were minor, but some had a more material effect. She complained about being required to give at least four weeks notice of holidays. There is no distinction in the handbook between short holidays of a day or so and annual holidays of a couple of weeks. She complained about being required to reserve sufficient annual holiday entitlement to cover the time between Christmas and new year which was not a public holiday. However, during cross examination, she could not recall how Mr Wrigley had dealt with this issue. The handbook

made no mention of being paid when staff are required to attend team meetings outside normal working hours. Mrs Patel said that in practice she would have paid if that had happened and as a matter of law it might have been difficult for her to argue that she should not have paid for training time of that nature.

161.10 The old contracts had a restriction on additional employment. A non-competition restriction appeared in the Handbook, although the new wording was different. The original contract had a restriction on working at any other dental practice within one mile of the practice. That is a relatively small distance, and it would have been easy to identify any dental practices within that range. It would also have been relatively easy for Ms Payne to travel beyond that distance to work at a new practice. The new contract restricted working in business or employment which was similar on competitive with practice, without any specified area restriction making its impact potentially broader and more uncertain.

161.11 The Handbook contained a right to open an email received at the Practice including that addressed to employees. While the Handbook suggested private mail should not be sent care of the business address, I am told that it was standard practice for the GDC to encourage the use of the Practice address for its correspondence with individual dental professionals which would mean that the Respondent had the right to open that mail. The handbook also included a right of search and said that the Respondent might carry out searches on its premises including the contents of parcels entering or leaving the premises and lockers and workstations including desk drawers. Employees could refuse to give consent but an unreasonable refusal to consent might be viewed as misconduct. The right search only arose where the Respondent had reasonable grounds for suspecting that the Claimant or another individual may have committed a criminal offence or any serious breach of contract or practice rules but nonetheless, this was a relatively draconian new requirement. Mrs Patel argued that she did not think that Mrs Payne would find herself in a situation where that would be applicable, but the fact that a clause is only operable in relatively extreme circumstances cannot mean that it does not amount to a detriment.

161.12 A significant change was to the disciplinary procedure in the Handbook which did not now include the right to be accompanied by a friend. It mirrored the wording in the ACAS code of practice, providing for companion to be a colleague or trade union representative.

162. Mrs Patel argued in her witness statement that the purpose of the new contract and Handbook was to update them in accordance with current employment law. It is, however, clear that the many of the changes were not required by changes to the legislation and were simply designed to give the Respondent greater control in some situations. For example, the removal of a contractual right to be accompanied by a friend would have a damaging effect on an individual working in what was a very small dental practice who was not a member of a trade union. As has been seen, the Respondent objected to certain colleagues attending indicating there was a conflict of interest and given the small

number of staff, it left little or no one available to be a companion at any such meeting. In consequence the option to bring a friend was particularly valuable.

163. I have considered carefully why Ms Payne resigned. I am mindful of the emails that she wrote at the time. The new contract and the failure to explain how it had been changed was the ultimate problem. However, the next day Ms Payne wrote that the final straw that caused her to make her decision to resign was not just due to the errors in the contract as Mrs Patel defined them, but rather seeking to change numerous clauses and working arrangements which were going to be to her detriment and failing to highlight her explain them prior to asking her to sign it. She also complained about Mrs Patel's refusal to postpone the contract's coming to effect in order to give Ms Payne time to get legal advice. However, she clearly referred to the series of issues over the last several months on both emails.

164. I consider the last two emails written by Ms Payne's reflect the general sentiment she held. I asked her to explain what it was that led her to resign when she was giving evidence. The evidence she gave was that it was basically the events leading up to 4 December and the outcome for her colleagues on 4 December and then when she was presented with a new contract with differences that was the final straw. She complained it was different and it was not explained to her at the time she was given that new contract. The problem on 4 December she explained was not being able to be represented by her friend, Mr Wrigley. In her witness statement, Ms Payne referred to the new contract and said that the next day of work would have been after the new contract would have already come into effect and she did not want to risk being deemed to have accepted the new terms by working under them as her trust and confidence in the Respondent as her employer had already been severely damaged by their conduct towards her colleagues and herself over the preceding months. She decided she could no longer reasonably be expected to continue to work under such conditions.

165. I conclude Ms Payne resigned because of the sequence of events. These started with the Respondent's actions in calling her to a disciplinary hearing about her CPD records, and the breach of contract in refusing to allow Mr Wrigley to attend the hearing on 4 December. Thereafter, although she continued to attend the meeting and worked on, when she was given the new contract and urged to sign it in a relatively short time without being told what the differences were between that and her previous contract and then when the Respondent refused to postpone it coming into force when she requested that, having realised it had significant differences which she wanted to consider, she found that a bridge too far. I reject the assertion that she resigned in part because of a written warning as Ms Payne did not mention this as a reason for her resignation when I asked her. Additionally, in cross examination, when asked about the written warning, she could not recall having one. Therefore, even though it could be said that she did have a warning, she clearly did not take that matter into account when she came to resign.

The Issues

166. The issues agreed by the parties are as follows. I raised some additional questions towards the end of the hearing before the parties gave submissions and

the Respondent addressed those additional matters in submissions, but these are the issues.

First and Second Claimant's claim for unfair dismissal under section 94 of the Employment Rights Act 1996 ("ERA 96")

What was the reason for the dismissal?

167. The Respondent says that it dismissed the First Claimant for conduct and set out a series of reasons.

a. On 4th December 2018, Ms Hudson leaving her workplace at the Respondent without permission and as a result was an unauthorised absence;

b. The Claimants unreasonable failure to attend a meeting with the Respondent on 4th December 2018;

c. The Claimants refusal to obey the Respondent's reasonable instruction by failing to provide evidence of the CPD they had completed to the Respondent;

d. The Claimants breach of the General Dental Council ("GDC") rules relating to CPD;

e. By the failure of the Claimants to provide evidence of their CPD to the Respondent, the potential to bring the Respondent into disrepute should it had been made known that the Respondent was operating outside of GDC compliance.

168. Were these the reasons?

169. If so, was the dismissal fair pursuant to section 98(2)(b) of the ERA 96?

170. In particular, did the Respondent have a genuine belief based on reasonable grounds after carrying out as much investigation as was reasonable in the circumstances that the Claimants had committed the misconduct as alleged?

171. If so, pursuant to section 98(4) of the ERA 96, was the Respondent's decision to dismiss the Claimants for these reasons reasonable in all the circumstances of the case, including the size and administrative resources of the Respondent and the substantial merits of the case?

First and Second Claimant's claim for unfair dismissal under Regulation 7 of the Transfer of Undertakings Regulations 2006

172. Was the sole or principal reason for the Claimants dismissal because of the transfer of undertakings from Alastair and Parinaz Wrigley, trading as The Wrigley Dental Practice to the Respondent in July 2017? Or;

173. Was the sole or principal reason connected with the transfer, which was not an economic, technical or organisational reason?

174. The sole or principal reason for the dismissal which the First and Second Claimant rely on is that the dismissal was because they were not afforded the contractual pre-transfer right to be accompanied to a disciplinary hearing on 4th December 2018 by their chosen companion and this caused the proceeding events which were relied upon by the Respondent when dismissing the First and Second Claimants.

Third Claimant's claim for constructive unfair dismissal

175. Was the Third Claimant unfairly dismissed pursuant to section 95(1)(c) of the ERA 96?

176. The Third Claimant relies on the following alleged breaches:

a. In December 2018, subjecting the Third Claimant to a formal meeting for the inability to provide the Respondent with her CPD records;

b. The Respondent failing to allow the Third Claimant's chosen companion to attend with her to the formal meeting with the Respondent on 4 December 2018;

c. The Respondent issuing the Third Respondent with a written warning;

d. In March 2019, the Respondent imposing on the Third Claimant a new contract of employment and employment handbook to take effect on 1st April 2019, which contained terms which were to the Third Claimant's significant detriment, as particularised at pages 98-104 of the joint hearing bundle;

e. The Respondent denying the Third Claimant's request to delay when the new contract of employment and employment handbook came into effect in order for the Third Claimant to seek legal advice regarding its contents.

177. If the Tribunal establishes that these acts occurred, did they amount to a repudiatory breach of an express term(s) and/or the implied term of trust and confidence? In that, did the Respondent a) have reasonable and proper cause for its conduct; and b) if not, was the conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?

178. If so, did the Claimant;

a. Resign in response to those breaches or for some other reason; and/or;

b. Affirm any breach through her actions or by delay?

179. Pursuant to section 98(4) of the ERA 96, if the Third Claimant is found to have been dismissed, was this dismissal reasonable in all the circumstances of the case, including the size and administrative resources of the Respondent and the substantial merits of the case?

Third Claimant's claim for unfair dismissal under Regulation 7 of the Transfer of Undertakings Regulations 2006

180. Was the sole or principal reason for the Third Claimant's assertion that she considered herself constructively dismissed for the alleged repudiatory breaches by the Respondent set out in paragraphs 8(a-e) above and the two further alleged breaches below because of the transfer of undertakings from Alastair and Parinaz Wrigley, trading as The Wrigley Dental Practice to the Respondent in July 2017? Or;

181. Was the sole or principal reason connected with the transfer, which was not an economic, technical or organisational reason? The Third Claimant relies on paragraphs 8 (a-e) above and the additional breaches of:

a. Changing the Third Claimant's contract of employment in April 2018, which reduced her annual leave entitled by one day;

b. The Respondent deliberately concealing the contractual change to annual leave entitlement in or around April 2018;

Third Claimant's claim for unfair dismissal under Regulation 4(9) of the Transfer of Undertakings Regulations 2006

182. Did the transfer in 2017 as outlined above, involve a substantial change in the Third Claimant's working conditions to her material detriment, such that the Third Claimant is entitled to treat her contract of employment as having been terminated and as having been dismissed by the Respondent? The Third Claimant relies on paragraphs 8 (a-e) above and the additional material detriments of:

a. Changing the Third Claimant's contract of employment in April 2018, which reduced her annual leave entitled by one day;

b. The Respondent deliberately concealing the contractual change to annual leave entitlement in or around April 2018;

Submissions

Claimant's submissions

194. The Claimants' representative referred to the case of Rose v Leeds Dental Team UK EAT/0016/13/DM.

195. The Claimant's representative argued that having gone through the evidence, it was not clear what any of the Claimants had done wrong and it was not clear why the disciplinary process had been invoked. The Claimants argued that the allegation of gross misconduct was simply not applicable.

196. Taking the cases in turn, in regard to Helen Hudson, her representative argued that she had taken a 20 minute break and regardless of who or what had caused her to do it, it was clear she had left in distress. Both Mr and Mrs Patel knew that she was upset. They then felt it appropriate to charge her for that alone when she had never done anything similar in 20 years. The sanction they decided on his instant dismissal without notice. Leaving work as she did and that did not justify dismissal.

197. The evidence bundle included emails from Mrs Patel saying that she was trying to help the staff grow and help their careers. As a dental professional, given her distress, the only option for Helen was to remove herself for the sake of the patients and other staff and herself.

198. In relation to Julia again it was not clear what she was guilty of. There wasn't a reason for a verbal warning and the only thing she had done was to offer her support her professional colleague. Her colleague was being unfairly targeted.

199. In relation to Laura who had worked for the longest time, she had problems at home. She was the only wage earner and so she waived her right to be accompanied. Laura had a new contract issued. At the time that Laura couldn't get legal advice and so the Respondent forced the contract on her with 21 changes, some of which were small but some big. Laura thought that working under contract meant being committed to it and there were things such as a change of dates which if applied and accepted meant all her rights had gone. Because of that Laura was dismissed, despite a perfect disciplinary record.

200. To argue that some of the changes wouldn't be likely to lead to a detriment is illogical. It's unreasonable for the employee to have to demonstrate it caused a real disadvantage when the potential is there.

201. Looking at the difference between the treatment of Laura who did attend without her representative and the treatment of the other two dental nurses who refused to attend without their representative, the Claimants submitted that the Respondent did not have a real issue about the non-production of the CPD records, but was simply demanding that their practice was going to be different and insisting that the employees respect that.

Respondents' submissions

202. The Respondent first addressed some queries which I had raised about the GDPR. They argued that the instructions requiring the training records fell within the provisions of a legitimate interest which can be broad and that the request was proportionate and adequately targeted, to meet the request.

203. Turning to the substantive issues, the Ms Hudson failed to attend a meeting on 4 December. It was a reasonable to instruction to do so as there was a clear requirement that the Claimants held their training records. The Claimants all said that they did adhere to these requirements but that they just stored them somewhere else. The records were not in their possession and not in their control. It was Mr Wrigley's decision as to whether he would provide them and the of the

Claimants behaviour was not consistent with somebody having control over their own records. The Claimants had already asked Mr Wrigley to provide them and he failed to do so.

204. The Respondent argued that Mrs Patel's witness statement explains how she provided an explanation to the Claimants and the others. The Claimants have suggested Mrs Patel did not provide enough information to understand why she was requesting the CPD records, but the Respondent argued this was not the case. It wasn't that the Claimants refused to provide their records, they had no control over them. It was reasonable for the Respondent to ask them to attend a meeting to discuss it. The Claimants knew that both the Respondent and Mr Wrigley considered that failure to meet the requirements of the GDC potentially amounted to a dismissible matter according to their contracts. The CP Training policy explains how important it is that the GDC requirements are met. The Claimants were not able to provide the records. Control cannot be delegated to someone else. They were refusing to supply their records.

205. In the course of this hearing, the First and Second Claimants said that on 4 December they had the records with them. They went to the meeting and brought them along but did not provide them to the Respondent. It was completely unreasonable to do that. The First and Second Claimants relied on the fact that Mr Wrigley was not allowed to attend with them. The Respondent's representative made submissions about the relevance of the case of Total V GB Oils which I had raised with her and argued that it was different and could be differentiated. She argued that there two completely different rights. She argued that one is a statutory right, and one is an implied term.

206. The Respondent argued that Mr Wrigley was an inappropriate person to have as a companion at the hearing, quite separately from the question of whether the Claimants were entitled to ask for him to attend. Prior to the hearing Mrs Patel was telling them I feel like you are bullying me. Don't know why you have to be so aggressive. It was reasonable to make the decision to exclude him. The Respondent wanted a constructive meeting with the employees without Mr Wrigley as they believed it wouldn't be constructive if he was there and he spoke for them. He acted like representative. There was no suggestion the Claimant's would be struck off the record.

207. Ms Wood's evidence was that Mr Wrigley was rude and aggressive and intimidating. It would lead to a potentially hostile meeting which would not be good.

208. As regards the breach of GDC rules, the Respondent had shown that the Claimants didn't meet the requirements to hold their own records. Failing to evidence their training had the potential to bring Respondent into disrepute. That would be the case if it came to light. Allowing dental nurses who were not compliant with GDC rules to work at their practice, if it got out, would bring the organisation into disrepute.

209. Turning to the second Claimant leaving her workplace, having established that it was reasonable to invite someone to attend a meeting and not to allow a friend to come, it was not sufficient for her to leave her duties. It was suggested in evidence that Mr Patel allowed her to go. That was not put to Mr Patel in cross

examination. He was not able to speak to that. The Respondent's case is that she left without permission and despite being told to do admin or reading she left. She just walked out. The Respondent does not know if she came back in. Even if she did, she went and then said everything was covered so she didn't have to be at work. Her duty was to stay, and she walked out so that was misconduct.

210. In terms of the Burchell test, the Claimants admit that they did not produce the CPD records. Ms Hudson admits that she had left the Practice premises. Not holding onto the CPD records was a breach of the GDC rules and all were grounds for dismissal. That belief was reasonable.

211. In terms of section 98(4) whether the decision to dismiss was reasonable in all the circumstances, this was a very small business – a small dental practice. The Claimants had walked out and refused to attend a meeting on 4 December. There was an investigation on 7 January. They had already said they would be limited in what they could say. They wouldn't speak about it as you can see from the minutes. It progressed to a disciplinary hearing. They submitted their written submissions and effectively they were denying anything. The meeting was rescheduled to allow Mr Wrigley to attend. They were still expected to attend. They were not however going to continue to engage, and the Respondent had lost confidence. How was the Respondent ever going to move forward? It needed to be resolved. It wouldn't be acceptable to say forget all about it. The Respondent wanted to meet and discuss the position but was not able to do so. They were effectively treating themselves as if they were not employed. It was within the band of reasonable responses to make the decision to dismiss. There was no way to move forward any further.

212. On the procedure, the Respondent engaged external consultants. Mr Rudston couldn't recall if he was shown the written statements but those were no more than denials. Moreover, any procedural defect can be rectified on appeal. Mr Patel said that he had taken it all into account and still upheld decision to dismiss.

213. The Respondent denies failing to take into account material matters of which they were aware. Any procedural defects were rectified at appeal. It was the cumulative effect of the First and Second Claimants' conduct that led them to make the findings that there was gross misconduct and they had to be dismissed because of the sequence of events. The Respondent appreciates that Mr Rudston thought every single act was gross misconduct and that was his recommendation, however, was up to the Respondent to choose and they gave evidence.

214. On the question of the TUPE claim, the contract clause did not give carte blanche to the Claimants to bring anybody to attend. It had to be reasonable in the circumstances and the refusal to allow Mr Wrigley to attend was not to do with TUPE.

215. In relation to the Third Claimant's constructive unfair dismissal claim, the Respondent referred to Kaur v Leeds Teaching hospital. The alleged breaches are the formal meeting but that was reasonable as they had not provided their CPD records, and the Respondent wanted a meeting. The Respondent made the same submissions about Mr Wrigley not being able to attend. The Respondent

appreciated that the claim is set out as a final straw claim, but there was a proper disciplinary process and that cannot amount to a breach or contribute to a breach.

216. The second matter was supposed to be Mr Wrigley's attendance and the third matter was issuing the Claimant with a written warning. The Respondent argued there was no written warning. The Respondent did not interpret the Croner report as a written warning. A disciplinary process could not form part of a series of facts which was a repudiatory breach.

217. The Claimant was provided with a contract. She had time to read it before she signed it and the Respondent thought she was happy with the contents. It was not necessary to go through every alleged detriment in terms of the differences between the latest contract and the previous contract, as these had been reviewed with the witness in evidence.

218. The third Claimant emailed the Respondent with her request to postpone the implementation of the new contract on 31 March. The Respondent believed the contract came into effect on 1 April, which was the date when it got her email. It was a reasonable reply that the contract was already in effect and that is why. The Third Claimant could have spoken to Mrs Patel. Had she done so, any errors could have been rectified. The events did not come anywhere near the threshold of repudiatory breach. The test is conduct calculated or likely to seriously damage trust and confidence in the employment relationship. The Respondent's behaviour was not calculated to do that and not likely to do that. It needed a conversation. People make typos all the time and the Respondent was not given an opportunity to rectify it.

219. In terms of the Kaur test, the most recent act was the provision of the contract and the handbook. The questions involved are has the Claimant affirmed the contract. If not, was the act itself a repudiatory breach? If not, was it part of a course of conduct or set of several acts viewed cumulatively as a breach of the Malik term of trust and confidence? The Respondent submitted it was not, particularly if you disregarded any parts of the disciplinary process.

220. As regards the reference to regulation seven of TUPE, the Respondent did not deliberately conceal the changes. The holiday reduction was less than one day. It was not sufficient to be repudiatory breach. The Respondent was entitled to change the way they did payroll. A lot of companies do change over to a payroll system that suits them. The Respondent had to alter the contract as it had enrolled the Claimants in the pension scheme and that was not a repudiatory breach.

The Law

221. Section 98 of the Employment Rights Act 1996 provides:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(b) relates to the conduct of the employee,

Cases on Unfair Dismissal

222**.** Kuzel v Roche Products Limited [2008] EWCA Civ 380) is authority which confirms that the burden of proof is on the employer when it comes to determining the reason for a dismissal.

223. The case of Abernethy v Mott, Hay and Anderson [1974] ICR 323 provides: *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."*

224. In Royal Mail Limited v Jhuti [2019] UKSC 55, the Supreme Court stated:

> *"if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason."*

225. In Toal and anor v GB Oils Ltd 2013 IRLR 696, EAT, the EAT held that the suggestion in the previous ACAS Code that an employer could veto a worker's choice of companion was not permissible.

Cases on Constructive Dismissal

226. In Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA, the Court of Appeal held that in order to succeed in a claim for constructive dismissal an employee must establish three matters. These are:

> That there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment
>
> That the employer's breach caused the employee to resign
>
> That the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal?

227. Malik v Bank of Credit and Commerce International SA [1998] AC 20) is authority for the proposition that the term of trust and confidence is an essential term and an employer who acts in a manner calculated to or likely to destroy or seriously damage the trust and confidence between employer and employee is in breach of a fundamental term of the contract.

228. In Hunter v Timber Components (UK) Limited [2009] UK EAT 0025, the Honourable Lady Smith addressing the effect of Malik, and confirmed it could apply where the treatment was directed at another employee saying:

> *"Put shortly, it is, thus clear that whereas breaches of the implied term of trust and confidence will most commonly occur because of conduct by an employer directed at the claimant employee, if other conduct, not so directed, can when viewed objectively be shown to be calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, the employer will be in breach. So, an employer could breach the implied term of trust and confidence owed towards employee A by means of conduct directed at employee B. Whether, viewed objectively, his conduct has that effect will be a matter of an assessment of the whole facts and circumstances of the individual case".*

229. It is settled law that the operation of a disciplinary procedure in the normal course cannot be a breach of contract. However, not all disciplinary procedures fall outside the range of breach of contract. Failing to allow a companion to attend can be a breach of contract. Stevens v University of Birmingham 2015 IRLR 899, QBD where the High Court held that the University's refusal to allow S, a medical consultant, to be accompanied at a disciplinary investigation by a member of the Medical Protection Society (MPS) breached the implied term of trust and confidence. This was despite the fact that the University's ordinances expressly provided for accompaniment during disciplinary proceedings by a colleague or trade union representative only. The High Court took into account the fact that the disciplinary allegations were serious and, if proved, would potentially have serious ramifications for the employee. He had given an explanation as to why there was no suitable colleague available to accompany him, and he was not a member of a trade union. Applying the University's restrictions on the choice of companion, the employee would be compelled to attend the meeting unaccompanied. Even where there were express terms in the contract restricting the choice of companion, the obligation of trust and confidence qualified the express terms.

231. In the case of Toal v GB Oils Ltd [2013] WL 3450708 EAT it was held that there is no requirement under the Employee Relations Act 1999 s (10) (1)(b) that the choice of companion should be reasonable.

232. In Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA, the Court of Appeal clarified that an employee who claims unfair constructive dismissal based on a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act — the last straw — forms part of the series. The effect of the final act is to revive the employee's right to terminate his or her employment based on the totality of the employer's conduct. Where an employee claimed to have been constructively dismissed, it was sufficient for a tribunal to ask itself:

1 What was the most recent act that the employee said had caused their resignation?

2 Had the employee since affirmed the contract?

3 If not, was the act by itself a repudiatory breach of contract?

4 If not, was it nevertheless part of a course of conduct which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

5 Did the employee resign in response to that breach?

Conclusions

What was the reason for the dismissal?

233. The Respondent says that it dismissed the Second Claimant for conduct, and lists a series of conduct related reasons. The reasons given are those found by Mr Rudston on which he recommended the First and Second Claimants be dismissed. I have considered what Mr Rudston knew when he recommended dismissal and then what Mrs Patel knew when she acted in that recommendation

Rudston- Unreasonable failure to attend a meeting on 4 December

234. The first of those reasons is the Second Claimant's unreasonable failure to attend a meeting with the Respondent on 4 December 2018. Despite the list of issues, the Respondent did not dismiss the First Claimant for this reason as Mr Rudston found that she had attended.

235. Was the admitted failure unreasonable? I note that Mr Rudston should have been aware that the Second Claimant attended with Ms Vidgen earlier than the time for her meeting, but left as she was told Mr Wrigley would not be allowed to attend with her. It is not clear that any attempt was made to hold the later meeting planned to take place with Ms Hudson. There are no notes suggesting that it did. Mr Rudston found that the Respondent refused to allow the Second Claimant to bring her "friend" with her as a representative, despite it being her contractual right. It is not clear how Mr Rudston could have concluded that the failure to attend, knowing that the Respondent would only conduct that meeting without her chosen friend as her companion and thus in breach of her contractual rights, was unreasonable. Mr Rudston merely says that Mr Wrigley acting in the role of "Friend" should have been acceptable to the Respondent and as such the meeting should have continued as scheduled. Clearly the reason it did not continue was due to the Respondent's failure. His recommendation is inexplicable.

Rudston- The First and Second the Claimants refusal to obey the Respondent's reasonable instruction by failing to provide evidence of the CPD they had completed to the Respondent

236. The next reason relied upon by the Respondent was Mr Rudston's finding that both the First and Second the Claimants refused to obey the Respondent's reasonable instruction by failing to provide evidence of the CPD they had completed to the Respondent. There is no doubt that the First and Second Claimants refused to obey the Respondent's instruction which was to produce evidence of the historical CPD they had completed. The CPD required by that

instruction was CPD completed prior to the Respondent company becoming her employer by reason of their acquisition of the dental practice. The question is therefore why Mr Rudston could have thought that instruction was reasonable. Mr Rudston's explanation for this conclusion were muddled and his analogy to the forklift driver was simply incorrect. That comparison would be whether they were certified as dental professionals entitled to practice as such by the GDC at the relevant time. That could be established by a simple search of the dental register, which is online. The request for historical CPD records was an entirely different matter.

Rudston - breach of the General Dental Council ("GDC") rules relating to CPD

237. The third reason given for Mr Rudston's recommendation was the Claimant's breach of the General Dental Council ("GDC") rules relating to CPD. As regards the Respondent's submission that the Claimants had breached the General Dental Council rules relating to CPD, the Respondent submitted that the breach was not holding the older CPD records personally. I reject that. Mr Rudston did not make that finding. His report states it was entirely reasonable for Mrs Patel to request copies of the CPD and the wilful withholding of such documentation would represent a breach of GDC guidelines. In reaching this conclusion in relation to Ms Vidgen, he recited GDC standards and guidance, standard 6.2, relating to members of the team who do not have to register for GDC, which is simply not applicable and does not substantiate that finding. In relation to Ms Hudson, Mr Rudston recited GDC standard 7.3 about taking part in activities that maintain update or develop your skills and deduced from this that it was reasonable for Mrs Patel to request copies of the CPD from Ms Hudson. He then took a giant leap and concluded that the withholding of such documentation would represent a breach of GDC guidelines. There were no GDC guidelines recited by Mr Rudston which, on the facts known to him, had been breached. The Respondent's submissions about letting Mr Wrigley holding the records were not the basis for the recommendation of dismissal according to Mr Rudston.

Rudston – by their failure to provide evidence of their CPD to the Respondent, the potential to bring the Respondent into disrepute should it had been made known that the Respondent was operating outside of GDC compliance

238. The fourth reason relied upon by the Respondent which Mr Rudston recommended as a reason for dismissal was, by the failure of the Claimants to provide evidence of their CPD to the Respondent, the potential to bring the Respondent into disrepute should it had been made known that the Respondent was operating outside of GDC compliance. Since Mr Rudston had not identified any GDC requirement for either of the first two Claimants to provide evidence of their CPD to the Respondent, and no failure as regards GDC compliance, it is difficult to understand how he could have concluded there was any potential to bring the Respondent into disrepute by virtue of these circumstances.

Rudston - on 4 December 2018, Ms Hudson left her workplace at the Respondent without permission and as a result that was an unauthorised absence

239. There was an additional reason relied upon by the Respondent in relation to the second Claimant, Ms Hudson. The Respondent says that it dismissed the

Second Claimant for conduct, namely the same as for the First Claimant and additionally because on 4 December 2018, Ms Hudson left her workplace at the Respondent without permission and, as a result, that was an unauthorised absence;

240. Mr Rudston did no more than identify the fact that Ms Hudson did leave the premises on that date and he concludes presumably from the investigation notes in which she admitted that she did not have permission, that her absence was unauthorised. He gave no consideration to her reasons for that absence.

Mrs Patel's reasons

241. Mr Rudston did not actually decide to dismiss the First or Second Claimants. Mrs Patel made that decision. The case of Jhuti is authority for the proposition that if a decision maker reaches a decision which, on the facts known to them is fair, but a person senior to the dismissed employee has created an invented reason, the reason for dismissal is "tainted". The Respondent cannot hide behind the innocent employee. It is relevant to the extent that Mrs Patel cannot rely on Mr Rudston's assessment, given she had additional knowledge. In this case Mrs Patel actually took the decision to dismiss and she was well aware of facts that Mr Rudston did not always know or had chosen to overlook. Taking the allegations in turn, I have to consider what Mrs Patel knew about them.

Patel – the Second Claimant's refusal to attend the meeting on 4 December

242. As I have noted the First Claimant attended the meeting according to Mr Rudston and he did not find that allegation upheld. This allegation only relates to the Second Claimant. Mrs Patel knew that both the First and Second Claimants attend the meeting on 4 December at 1p.m. but refused to stay because Mr Wrigley was not allowed to attend. By the time of their dismissal, she knew that there was a contractual entitlement for Mr Wrigley to attend as a friend. There remained a suggestion that Mr Wrigley was not an appropriate person (although case law shows that is not a valid argument). Mrs Patel does not explain her own thoughts about this matter in her witness statement, merely stating that she adopted the consultant's findings.

Patel – the First and Second Claimants refusal to obey a reasonable instruction to provide evidence of the CPD they had completed to the Respondent

243. As regards the assertion that the First and Second Claimants were in breach by reason of their refusal to obey a reasonable instruction to provide evidence of the CPD they had completed to the Respondent, the question arises as to what Mrs Patel believed to be a reasonable instruction. In considering that it is necessary to consider both the reasons given by Mrs Patel for the instruction and what she knew about it more generally. It is also important to remember that the CPD had been recorded with the GDC and the Respondent could check that easily itself. The request was for historical records which had been generated by the training providers.

244. Several reasons had been given by Mrs Patel for this instruction. The first explanation for the request was that Mrs Patel required it in order to carry out a

gap analysis, which I understand was a review of the amount of training and the areas of training previously undertaken. While this might have been useful, it was not necessary. There were other ways by which Mrs Patel could have reached a decision as to what training she wished to cover. There was, for example, a presentation made by a consultant about my ways in which they could improve the practice, which gave suggestions for the training. Reviewing training which had taken place over a period of time between one and six years previously was not necessary.

245. Thereafter it was suggested that the Respondent had some regulatory duty to investigate the prior training. This was not correct. There was clear evidence of communications with the GDU in which they stated unequivocally to Mrs Patel that there is no need for a new employer to investigate prior CPD training.

246. Another suggestion was that the requirement related to the Care Quality Commission's requirements in relation to the practice and to Mrs Patel's effort to become acknowledged as practice manager. While I can see that understanding that your staff were trained and having a plan to keep that training up to date was a CQC expectation, it was neither an expectation of the CQC, nor necessary to review prior training records in order to achieve that.

247. A third reason given was that it related to the insurance. This had not been pursued with any effort in these proceedings. Mr Rudston was not shown the policy and thus was unable to verify it and so did not accept this assertion.

248. Importantly, the GDC had expressly stated in email communications with Mrs Patel that they did not require the Respondent to review the training for a prior period when they were not the employer. There was no reason to analyse the detailed records. The Respondent had access to the GDC register which showed the necessary amount of CPD had been registered for this period. Mr Wrigley had written on behalf of the Claimants asking what the reason was for this request. He had never been given a proper answer. It is suggested that the answer had been given to the Claimants, but I cannot locate any point at which a proper explanation was given which would render this a reasonable request. I note that shortly prior to 4 December, in communication with Mr Wrigley, Mrs Patel referred to the demand for the historic CPD records as a polite request.

Patel - the Claimants' breach of the General Dental Council (GDC) rules relating to CPD

249. Mrs Patel had been in communication with the Council and had raised all of the issues between herself and the Claimants with the GDC. The GDC knew that the former employer held their historic CPD records, but they had shown no concern about this. She had complained that she was concerned they may have falsified their training records and had sent the email that she relied upon from Mr Wrigley to his staff. Again, the GDC had shown no interest. She had referred to the possibility that the staff might be lacking in some training but had declined to provide any details when these were asked. In short Mrs Patel was well aware that there was no breach of the GDC rules.

Patel - the failure of the Claimants to provide evidence of their CPD to the Respondent had the potential to bring the Respondent into disrepute should it have been made known at the Respondent was operating outside of GDC compliance

250. Mrs Patel, knew that the Claimants had not breached any GDC rules in the light of the correspondence she had had with the GDC and in all the circumstances she was well aware there was no potential to bring the Respondent into disrepute.

Patel - the Second Claimant's leaving the Respondent's premises without authorisation on 4 December

251. While Mrs Patel was aware that the Second Claimant, Ms Hudson, had left the dental premises on the morning of 4 December without having permission, she also knew that she was distressed at the time. Ms Hudson was tearful, and no dental practice would have wished a client to be attended to by a dental nurse showing obvious signs of crying. Mrs Patel was present when Ms Hudson returned at 1:00 p.m. with Mr Wrigley and Ms Vidgen and she was aware that she had left when Mr Wrigley was denied permission to remain with the two Claimants during the disciplinary hearings. Mrs Patel had received the email sent by Ms Hudson which offered to return in the afternoon.

Were these the reasons?

252. The Respondent's position is that Mrs Patel largely relied on Mr Rudston's recommendations. However, as I noted, Mrs Patel cannot have relied on Mr Rudston as she had more information than he did and was readily able to identify the fact that his conclusions were erroneous. In her witness statement she differentiates her views somewhat from Mr Rudston. My conclusion is that Mrs Patel's real reasons for dismissing Ms Vidgen and Ms Hudson were about control over her staff. Mrs Patel wanted obedience from the staff. This is clear from the manner in which Mrs Patel in her witness statement differentiates the position of the First and Second Claimants from the third Claimant, Ms Payne whom she describes as having attended the formal meeting, understood her mistakes, completed the core training, organised professional indemnity insurance and started to move forward to take responsibility for her career.

253. There is evidence that there was a longstanding desire on the part of Mr and Mrs Patel to dismiss Ms Hudson. I have noted that Ms Hudson explained she was felt that they were trying to push her out. Mr and Mrs Patel held an impromptu meeting with Ms Hudson on 5 November at which stark choices were given to her, essentially pushing her to resign. The initial requests for old CPD records was only pursued in relation to Ms Hudson. As the reasons identified by Mr Rudston mainly post-dated the initial pressure for Ms Hudson to leave, they facts indicate that those were not the real reasons in her case.

If so, was the dismissal fair pursuant to section 98(2)(b) of the ERA 96?

In particular, did the Respondent have a genuine belief based upon reasonable grounds after carrying out as much investigation as was reasonable in the circumstances, that the Claimants had committed the misconduct.

254. In considering a dismissal where the potentially fair reason relied upon is conduct, the classic test is set out in the case of British Home Stores v Burchell and is did the Respondent:

(a) Have a genuine belief in the Claimant's guilt – i.e. that the Claimant had committed the misconduct as alleged?

(b) Was that belief based on reasonable grounds?

(c) Was that belief reached after carrying out as much investigation as was reasonable in the circumstances?

256. In this case, given the discrepancies between the facts known to Mrs Patel and the assertions raised against the Claimants, she could not have had a genuine belief in the guilt of the First and Second Claimants. If Mrs Patel had a genuine belief in the guilt of the First or Second Claimants, it was not based on reasonable grounds. I have set out at length how Mrs Patel knew from her own enquiries of the GDC that there was no basis upon which she could possibly assert that the Claimants might be in breach so that there was a possibility of ending their dental nursing for some other substantial reason, leaving them only as receptionists. She was also aware that Mr Wrigley was determined to demonstrate that, and she was aware by the date of dismissal that the Claimants were entitled to have Mr Wrigley present at any disciplinary hearing as a friend. In all those circumstances, for the reasons I have recited extensively above, there was simply no basis for her decision.

257. In addition to the Burchell test, it is also possible for a dismissal to be unfair where there are procedural failings which are of a sufficiently serious nature as to render the process unfair. There were a number of points at which the process followed was unfair. The occasions when Mr Wrigley was declined the ability to assist the Claimants as a friend, despite their contractual entitlement, was a breach of contract and unfair. Pursuing an assertion that the Claimants were guilty of misconduct when they did not remain at a disciplinary hearing because Mr Wrigley had been denied the right to attend with them as their chosen companion was a serious procedural error.

258. During the hearing, I referred the parties to the case of Toal v GB Oils Ltd [2013] WL 3450708 EAT in which it was held that there is no requirement under the Employee Relations Act 1999 s (10) (1)(b) that the choice of companion should be reasonable. However, I note that this is not a situation where the Claimants were was seeking to exercise their rights under section 10 of the Employment Relations Act 1999. Rather, they were endeavouring to exercise a contractual right. The parties both accepted that the intention of that clause and its effect was that it should apply to both disciplinary and grievance procedures. I understand that the Respondent's submission was to the effect that this clause could not override the statutory provisions and the code of conduct, but I do not accept that. The clause enhanced the employees' rights. The ACAS code of conduct and the statutory provisions were not diminished by the additional option to have a friend attend as companion. In those circumstances the employee had a contractual right. I am reinforced in that view by the cases I have cited. Another argument raised by the Respondent was that Mr Wrigley was disruptive or somehow

aggressive and that it was appropriate to refuse to allow him to attend. I have found that it is simply not consistent with the facts to suggest he was aggressive as he had previously made it quite clear he was sympathetic to the fact that the meeting was taking place in the Practice premises. The notes made by Mrs Patel do not reflect an aggression or intimidation. Moreover, following the Stevens case, by refusing the Claimants the opportunity to have Mr Wrigley attend as their companion, the Claimants would have been denied the essential benefit embodied in the legislation of a companion. There was only one other trainee dental nurse who could possibly have attended as a companion on the day, and she was needed in the surgery. Moreover, she had no experience and would not have been able to behave as more than a note taker. The Respondent had refused the option for the Claimants to attend together, suggesting there was some risk of conflict. In the circumstances, I cannot see there was any risk of conflict. They both had the same accusations, bar 1, and they both had exactly the same reasons for challenging the allegations. There was no conflict in allowing them to attend together. My conclusion is that the Respondent's refusal to allow Mr Wrigley to attend as the Claimant's friend at a disciplinary procedure was a clear breach of contract.

259. Ms Wood's insistence on investigating the CPD records when the Claimants had received assurances from Mrs Patel that the investigation would be limited to the matters in the invitation letter was another flaw.

260. Mr Rudston did not refer to the Claimants' statements explaining their defence to the allegations. He did not address them in his assessment of the position. He simply did not take into account that important information. The fact that the Claimants did not attend was no reason not to consider their explanations and this was the very serious flaw.

261. There is no evidence that the Mr Rudston or Mrs Patel considered the mitigating circumstances which were the Claimants' long service and unblemished disciplinary history.

262. Taken together, these matters were sufficiently serious as to render the procedure unfair.

Correction by the Appeal

263. The Respondent argued that mistakes could be corrected by the appeal and that there was an appeal in which the matter was reviewed, and Mr Patel took the decision to uphold the dismissal. I have found that the dismissal was substantively unfair, but I nevertheless think it important to address the relevance of the appeal. I reject that a correction of the procedural flaws occurred in this case. One of the flaws previously was the failure to allow Mr Wrigley to attend with the Claimants until the last stage of the disciplinary process. When it came to the appeal, Mrs Patel insisted that it took place at a time when she knew Mr Wrigley could not attend with the Claimants. Even when one of the Claimants volunteered to waive any right to payment for the extra time it would take while the appeal was delayed to allow him to attend, the request to hold it when Mr Wrigley was available was refused. The behaviour of the Respondent and refusing to allow that delay so that

Mr Wrigley could attend was indicative of their approach. This was not a rehearing of the nature likely to correct any previous flaws in the disciplinary outcome.

Was dismissal within the range of reasonable responses?

263. An essential element of considering section 98(4) of the Employment Rights Act 1996 is the question of whether dismissal was within the range of reasonable responses. The only allegation which was in any way substantiated was that Ms Hudson left her workplace on 4 December without authorisation. I have therefore considered whether dismissal for that matter was within the range of reasonable responses. Mrs Hudson acknowledges that on 4 December, she left the Respondent's workplace. In her evidence there was a suggestion that she may have had some sort of permission from Mr Patel. Mr Wrigley did not put that to Mr Patel and the evidence was not in the witness statement so that it was not explored and I disregard it. What was clear was that Mrs Hudson was distressed at the time and felt she was not capable of carrying out her dental nursing duties. I have no doubt reason to doubt that Ms Hudson returned a while later and tried to go back to work but Mrs Patel was unavailable to tell her what to do and all workstations were properly occupied. I take that from her later account of the day sent to the Respondent. She knew she was due to attend a formal meeting that day which might lead to her dismissal. She accompanied her colleague, Ms Vidgen, and Mr Wrigley when they attended for Ms Vidgen's meeting as they had asked to attend together, but Mrs Vidgen left with Mr Wrigley when he was refused permission to act as her companion. Mrs Hudson left with them as it was clear that Mr Wrigley would not be allowed to attend the meeting with her which was scheduled later. Mrs Hudson then emailed offering to return at 3:00 p.m., but got no response.

264. A bout of serious distress which causes crying, such that an employee feels incapable of carrying out their work is akin to a short bout of sickness. They both have the same impact if the employee cannot carry out their duties. In these circumstances, Ms Hudson was effectively experiencing short term emotional distress which made her incapable of carrying out her duties. As such, it should have been treated in the same manner as sickness. It was not an unreasonable refusal to work, but rather temporary incapacity. I recognise that Mrs Patel understood that Mrs Hudson had gone to the coffee bar to meet her colleagues. There was, however, no suggestion that she walked out simply to have a coffee. The evidence clearly shows that she left in circumstances of some distress and in the investigation hearing she explained that she had telephoned her husband and returned some 20 minutes later when she had calmed down. While this may have been technically an unauthorised absence in that there is no evidence that she had prior permission to leave, it was not an unreasonable absence. Moreover, the fact that this employee offered to return and asked whether she should do so indicates that this was not an employee who was disregarding her obligations to her employer. It was a first offence and there was no suggestion that Ms Hudson had a history of warnings or any other behaviour which rendered this a basis for summary dismissal.

265. Overall, the substance of the allegations was either completely erroneous or, to the limited extent there was a possible argument, as I have noted in relation to Ms Hudson's leaving the premises on 4 December without permission, dismissal

for gross misconduct was well beyond any reasonable response. No reasonable employer would have dismissed in these circumstances.

First and Second Claimant's claim for unfair dismissal under Regulation 7 of the Transfer of Undertakings Regulations 2006

(a) Was the sole or principal reason for the Claimants dismissal because of the transfer of undertakings from Alastair and Parinaz Wrigley, trading as The Wrigley Dental Practice to the Respondent in July 2017? or;

(b) Was the sole or principal reason connected with the transfer, which was not an economic, technical or organisational reason?

(c) The sole or principal reason for the dismissal which the First and Second Claimant rely on is that the dismissal was because they were not afforded the contractual pre-transfer right to be accompanied to a disciplinary hearing on 4th December 2018 by their chosen companion and this caused the proceeding events which were relied upon by the Respondent when dismissing the First and Second Claimants.

266. While I note the assertion that the reason for the dismissal was a failure to acknowledge the Claimants' contractual right to have a friend present at the disciplinary hearing, I have already found that their dismissals were unfair. Regulation 7 of the TUPE regulations 2006 provides that the dismissal of an employee is to be treated as unfair if the sole or principal reason for the dismissal is the transfer. There is a defence to this where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of the transferor or transferee before or after a relevant transfer.

267. It is not my view that the reason for the dismissal was the transfer. The Claimants continued to be employed for over a year before the disciplinary procedure began. It is clear that the reason the disciplinary procedure was invoked was that Mrs Patel was unable to gain what she felt to be full control over the employees and that she objected to Mr Wrigley's involvement and the apparent way in which the employees reverted to Mr Wrigley and took his advice and guidance, rather than obeying her. In all the circumstances this was not to do directly with the transfer but purely with the relationships between the staff and their approach to the new management. In those circumstances regulation 7 is inapplicable.

Third Claimant's claim for constructive unfair dismissal

Was the Third Claimant unfairly dismissed pursuant to section 95(1)(c) of the ERA 96?

268. The parties agree this is a claim about a course of conduct over a period and that the last straw doctrine is applicable.

269. The third Claimant, Laura Payne, faces a different situation from the First and Second Claimants. Mrs Payne attended the disciplinary hearing on 4 December. She did so because she could not cope with the pressure of a continued dispute

and wished to get it over with. Thereafter, she continued to operate for the Respondent as normally as possible until she resigned following the insistence by Mrs Patel of relying on a new contract of employment which Mrs Payne had signed.

270. The Third Claimant, Ms Payne, relies on the following alleged breaches:

(a) In December 2018, subjecting the Third Claimant to a formal meeting for the inability to provide the Respondent with her CPD records;
(b) The Respondent failing to allow the Third Claimant's chosen companion to attend with her to the formal meeting with the Respondent on 4th December 2018;
(c) The Respondent issuing the Third Respondent with a written warning;
(d) In March 2019, the Respondent imposing on the Third Claimant a new contract of employment and employment handbook to take effect on 1st April 2019, which contained terms which were to the Third Claimant's significant detriment, as particularised at pages 98-104 of the joint hearing bundle;
(e) The Respondent denying the Third Claimant's request to delay when the new contract of employment and employment handbook came into effect in order for the Third Claimant to seek legal advice regarding its contents.

271. Taking these in turn, there is no doubt that the Respondent did insist that there be a disciplinary hearing in relation to the failure to provide the CPD records. Since the Respondent had been told unequivocally by the GDC that it did not require employers to audit their employees or keep a record of employee CPD, it was clear by that stage, if not before, that the statement in the letter of 20 November convening the formal meeting on 28 November, later postponed to 4 December, which was the basis for the meeting, was simply wrong. All the employees were aware that there was no obligation on them to provide those records to the Respondent and the Respondent knew that too.

273. The Respondent did refuse to allow Mrs Payne to have Mr Wrigley attend with her on 4 December at that formal meeting. While she did agree to go ahead the comment was clear that her initial intention had been that Mr Wrigley should attend with her and the respondent was in breach of contract in refusing to allow that.

274. There is some doubt as to whether the Respondent issued Mrs Payne with a written warning. When she was asked about it in evidence, she did not recall receiving a written warning. However, it was clear that the Respondent did provide a copy of the Croner report to Ms Payne and that report did contain a statement to the effect that if Ms Payne did not comply with the requirements made for her to do a certain amount of training within two weeks, she would be dismissed. Supplying her with a statement explaining what conduct would have followed, would amount to a written warning were it framed in the usual formal manner of a separate letter. However, I discount it since Ms Payne clearly did not take account of it.

275. In March 2019 the Respondent did produce for Mrs Payne a new contract of employment and a handbook which it wanted to take effect on 1 April 2019, and which contained a number of different terms. The question is whether those terms were all to have significant detriment is a fairly detailed and lengthy one and I do not intend to go through each and every term. Some of those terms clearly were significantly to her detriment such as the removal of the right to be accompanied disciplinary grievance hearings by a friend. Some terms she believed to be to her detriment, not necessarily understanding that in a legal dispute, a tribunal would look at actual dates of commencement, regardless of the contract. Arguably the Respondent might have relied on the dates shown in the contract in its dealings with Ms Payne and the need to go to a tribunal to get her rightful entitlement, was in itself a detriment. The requirement to work for half an hour after normal business ended in order to get paid overtime as opposed to the previous 15 minutes was also a detriment. There is no doubt that Mrs Payne, having initially agreed to sign the contract, then became extremely concerned about the contract and handbook, when she realised what they contained.

276. Finally, the Respondent did refuse to agree to defer the coming into effect of the new contract and Handbook, in order to allow time for Mrs Payne to take advice.

If the Tribunal establishes that these acts occurred, the question arises, did they amount to a repudiatory breach of an express term(s) and/or the implied term of trust and confidence? In that, did the Respondent a) have reasonable and proper cause for its conduct; and b) if not, was the conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?

277. The letter of resignation submitted by Mrs Payne indicates that the insistence on the new contract and handbook was the last straw and effectively shows that there was a course of conduct as Mrs Payne says she had been thinking about the position for some months. It is clear that Mrs Payne took into account prior actions by the Respondent when deciding that she could no longer work for the Respondent. The question is whether there were together circumstances which amounted to a breach of either express terms or the implied term of trust and confidence. In other words, applying the Malik case, did the Respondent have reasonable proper cause for its conduct and if not, was that conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and Ms Payne.

278. The initial insistence by the Respondent that the Claimants, including Mrs Payne, should attend a disciplinary hearing because of their failure to provide the CPD records was an unreasonable demand. That initial demand was framed in terms where the Respondent made it clear that there could be a dismissal if the records were not produced. Since the Respondent had no right to demand the records, that was unreasonable conduct. When it was coupled with a refusal to allow the Claimant to be accompanied by Mr Wrigley as a friend, as permitted by the contract, that was a serious breach and most certainly conduct which was likely to destroy or seriously damage the implied term of trust and confidence.

279. Initially Mrs Payne attended the disciplinary hearing on her own without Mr Wrigley and thereafter accepted the instruction to carry out additional CPD and to

institute her own insurance. She continued working with the Respondent. However, the situation was papered over. The cracks below remained in place. Mrs Payne was faced with a new employment contract as well as a handbook, and was told that there were no fundamental changes. Although some of the changes was not hugely significant, some of them were material and those were not drawn to Mrs Payne's attention. Mrs Payne clearly had an opportunity to read the contract and might have been able to identify the changes for herself, but it seems that the time allowed for this was in practice only a matter of days and she did, as she had done before, rely on Mrs Patel's assurance that there was nothing that she need be concerned about. In consequence, she did not check for the differences, and it was only when she was told by, presumably Mr Wrigley, that she realised that there were a significant number of differences. Perhaps one of the most significant differences was the fact that the right to be accompanied by a friend had been removed. Mrs Payne endeavoured to contact Mrs Patel before the contract came into place. Mrs Patel says she was asleep and not available. Whether she was or was not, is not material because she was made aware that Mrs Payne regarded the contract with concern. Under the previous contract, Mrs Payne had the right to a minimum of three months' notice before any changes took effect. This had been removed from the new contract and while the parties could have waived that notice period, clearly Mrs Payne was unaware that she had the right to three months' notice of the changes and need not rush her signing the contract. When she was told that the contract would take effect, even though she was offered the opportunity to discuss it, her belief was that if she worked under it, she would be bound by it.

280. Mrs Patel's suggestion that the new contract could not be deferred or delayed because other people were involved is simply not credible. The only two people involved in the Respondent were Mrs Patel and her husband. Mrs Patel generally had the right to administer the Practice on behalf of both of them and if she had needed to talk to her husband, she could have contacted him easily and quickly. There is no suggestion that he particularly objected or demanded the contract remained in place. The clear fact is that Mrs Patel chose not to agree to defer it pending a discussion, but rather insisted it remained in place with the possibility of a discussion to see if it might be amended. Given the history between the Claimant and the Respondent, that was indeed a last straw and Mrs Payne was entitled to resign as she did.

If so, did the Claimant;

(a) Resign in response to those breaches or for some other reason; and/or;
(b) Affirm any breach through her actions or by delay?

281. It is clear that Ms Payne resigned in response to the breaches rather than for some other reason. I am also satisfied that Ms Payne did not affirm any breach through her actions or by delay but rather responded to a last straw situation. I have given some consideration to the fact that Ms Payne also referred to her concern about the treatment of her former colleagues and I have no doubt that played on her mind. It was, however, not relied on as the breach of contract in this case even though there is some case law which demonstrates the treatment of colleagues can give rise to a breach of trust and confidence. I therefore carefully

considered whether the circumstances which led to Ms Payne's resignation, excluding the treatment of her colleagues, amounted to a breach of the term of the trust and confidence and I am satisfied that they do.

Pursuant to section 98(4) of the ERA 96, if the Third Claimant is found to have been dismissed, was this dismissal reasonable in all the circumstances of the case, including the size and administrative resources of the Respondent and the substantial merits of the case?

282. It is rare for a constructive dismissal to be fair, but it is necessary to review whether that could be the case. My conclusion is that it was not a fair dismissal. The dismissal was not reasonable. There is no procedure. There was no basis for a proper dismissal at the time. Even though the Respondent is a small entity, and taking into account its size and limited resources, the dismissal was not reasonable in all the circumstances.

283. I have also reviewed this matter following the sequence of questions identified in the Kaur case. The first of these questions is what was the most recent act that the employee said had caused their resignation. In this case it was the denial of the request for a delay on the new contract coming into force. In relation to the question, had the employee affirmed the contract since then - Ms Payne had not affirmed the contract since then. In relation to the question of whether that act was a repudiatory breach, I consider that act was not by itself a repudiatory breach. It was, however, part of a course of conduct which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence. In relation to the question, did the employee resign in response to that breach - Ms Payne did resign in response to that breach. Therefore, this situation meets that test. It was a constructive dismissal.

<u>Third Claimant's claim for unfair dismissal under Regulation 7 of the Transfer of Undertakings Regulations 2006</u>

Was the sole or principal reason for the Third Claimant's assertion that she considered herself constructively dismissed for the alleged repudiatory breaches by the Respondent set out in paragraphs 8(a-e) above and the two further alleged breaches below because of the transfer of undertakings from Alastair and Parinaz Wrigley, trading as The Wrigley Dental Practice to the Respondent in July 2017?

284. I do not consider that the Third Claimant's claim lies under Regulation 7 of the Transfer of Undertakings Regulations 2006. Those regulations apply, as I have pointed out previously, if the sole or principal reason for dismissal is the transfer. That was not the case in this situation.

Was the sole or principal reason connected with the transfer, and a reason which was not an economic, technical or organisational reason? The Third Claimant relies on paragraphs 8 (a-e) above and the additional breaches of:

(a) Changing the Third Claimant's contract of employment in April 2018, which reduced her annual leave entitled by one day;

(b) The Respondent deliberately concealing the contractual change to annual leave entitlement in or around April 2018.

285. As I have explained, I do not consider the Third Claimant has any claim under the Transfer of Undertakings Regulations 2006.

Third Claimant's claim for unfair dismissal under Regulation 4(9) of the Transfer of Undertakings Regulations 2006

Did the transfer in 2017 as outlined above, involve a substantial change in the Third Claimant's working conditions to her material detriment, such that the Third Claimant is entitled to treat her contract of employment as having been terminated and as having been dismissed by the Respondent? The Third Claimant relies on paragraphs 8 (a-e) above and the additional material detriments of:

(a) Changing the Third Claimant's contract of employment in April 2018, which reduced her annual leave entitled by one day;

(b) The Respondent deliberately concealing the contractual change to annual leave entitlement in or around April 2018;

286. Regulation 4(9) of TUPE provides that where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is, or would be, transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purposes having been dismissed by the employer.

287. The scenario envisaged by regulation 4(9) simply does not apply in this situation. The transfer took effect and did not involve any changes in working conditions for some months. The first change took place when Mrs Patel amended contracts and erroneously reduced the holiday time. I have no doubt that she did so by mistake and that the Claimants would have been entitled to enforce their original rights to holiday in any event. Other than that, there were no work-related changes. Subsequently, the new contract produced in March 20 19, was a different situation and it did not arise by virtue of the transfer but simply because Mrs Patel elected to update the contract in ways which were wide ranging and favoured the employer. Those changes were not in consideration at the time of the transfer and the TUPE regulations only applied them to the extent that Regulation 4(4) precludes any purported variation of contract of employment if the sole or principal reason is the transfer. This case law makes clear there has to be a new operative reason for the change. In the circumstances this is not applicable.

288. In summary, I have found that all three dismissals were unfair, and it will be necessary to consider remedy.

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Employment Judge N Walker
Date: 25 June 2021