EMPLOYMENT TRIBUNALS

Claimant: Ms T Winterbourne

Respondent: The Barrowford Surgery

HELD AT: Manchester Employment Tribunal **ON:** 1 & 2 November 2021
BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr B Williams, counsel
Respondent: Mr N Grundy, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for constructive unfair dismissal is not well-founded and is dismissed.

2. The claimant's claim for wrongful dismissal (notice pay) is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form received on 28 April 2021 the claimant, who was employed as a practice manager, brings a claim of constructive unfair dismissal and wrongful dismissal. Her employment commenced on the 1 October 199 and the claimant resigned with immediate effect on the 3 December 2020. The claimant alleged the respondent was in fundamental breach of the implied term of trust and confidence as set out in the agreed list of issues.

2. The respondent denies the claimant's claims maintaining it was not in breach of contract and the claimant would have been dismissed for gross misconduct and/or ill health capability.

Evidence

3. The Tribunal heard evidence from the claimant on her own behalf, and on behalf of the respondent from the practice nurse Catherine Ali, and practice manager, Christine James.

4. The bundle consists of 252 pages together with a number of additional documents produced during the hearing by way of contemporaneous emails. The contemporaneous documents reflect some of the communications between the parties, but not all as there were a number of without prejudice communications that were not included in the bundle.

5. The conflicts in the evidence were largely resolved by reference to the bundle and contemporaneous documents, and I have dealt with them in my findings of facts below.

Agreed issues

6. The agreed issues in the case are as follows –

Constructive Dismissal (section 95(1)(c) Employment Rights Act 1996)

1. C relies on the following acts (as repudiatory breaches):

    a. Seeking to terminate C's employment without having followed any form of fair process (the meeting on 04 November 2019); Is C entitled to rely on the meeting of 4.11.19 as evidence of breach of contract .

    b. Consistently and deliberately ignoring her grievances

        i. The first grievance ignored was submitted on 12 December 2019 [77]

        ii. The second grievance was dated 13 January 2020 [83]

        iii. The final grievance was sent on 30 September 2020 [131] (*the final straw*)

    c. Failing to investigate any of her grievances fairly or at all

    d. Failing to have any form of welfare meeting or contact during C's absence following the meeting on 04 November 2019 and prior to May 2020

    e. Unreasonably seeking to hold an ill-health review meeting to consider termination of C's employment at short notice

2. Did any such act or omission (alone or cumulatively) of R amount to a repudiatory breach of the Trust and Confidence Term?

3. If so, did C resign in response to all or some of those breaches?

4. Did C delay too long and so affirmed the contract?

5. If C was constructively dismissed, was that dismissal unfair, having regard to section 98(4) ERA 1996? What was the reason for dismissal and did R act reasonably or unreasonably in the circumstances [para 31 od ET3 at p 47]

6. Was C guilty of contributory fault [para 32 of ET3 at p 47/48]?

Remedy

1. What compensatory award, if any, is C entitled to?

2. Should there be an increase or reduction in any award on the basis of any failure to comply with the ACAS Code of Practice on Discipline and Grievance Procedures?

3. Is there a cut-off point on the basis that C would have been dismissed fairly in any event [para 33 of ET3 at p 48]

7. I heard evidence on the claimant's own behalf, and on behalf of the respondent Dr Ian Ashworth, the principal, practice nurse Catherine Ali and Christine James, practice manager. There were conflicts in the evidence which have bene resolved as set out below. In short, I did not find the claimant to be an entirely credible witness, had reservations concerning Dr Ian Ashworth's responses on cross-examination and took the view practice nurse Catherine Ali and Christine James gave honest, straightforward credible evidence to the best of their ability.

8. Having considered the oral and written evidence, the agreed bundle, the claimant's skeleton argument and oral submissions made on behalf of the parties (which I have not repeated in full but attempted to incorporate within the body of this Judgment with Reasons) I have has made the following findings of the relevant facts resolved such conflicts on the evidence as there were.

Findings of Facts

9. The respondent is a small GP practice which consists of Dr Ian Ashworth, the principal, together with approximately 10 employees including practice nurse Catherine Ali and Christine James, administrative assistant, who covered the claimant role when she was absent before taking it on full-time following her resignation. Dr Ashworth was the only doctor who ran the business and he was the claimant's line manager.

10. The claimant's employment commenced on the 1 October 1999 as a secretary, and she was practice manager with a substantial increase in her salary, for 7-years before her resignation without notice on 3 December 2020. The contract signed by the claimant on 1 March 2001 provided for 1 months full pay and one-month half pay during the 4th year of service. The claimant had 20 years of service and the contract did not cover the sick pay for any service beyond year 4. Both

parties were entitled to receive 12-weeks' notice of termination of employment from the other, and as practice manager, which was an important position, the claimant could only raise a grievance with Dr Ashworth.

11. The claimant signed her contract of employment as a practice manager on 16 October 2002 and was provided with a Job Description under which she was responsible for staff appraisals, finance and profitability, health and safety and a range of other responsibilities essentially aimed at running the practice.

12. The respondent provided a Grievance Procedure that set down various stages. Employees were required to raise an informal grievance, followed by a written grievance under stages 1, 2 and 3 if it was not resolved, with the provision of a grievance hearing which should be heard within 10 working days by the GP (Dr Ashworth or authorised deputy) who would give his or her decision 7-days after the grievance hearing was heard. The claimant has criticised Dr Ashworth for failing to comply with the Grievance Procedure; however the claimant was either unable to or refused to attend any meeting with him throughout the relevant period.

13. The respondent also provided a Disciplinary Policy that included an investigation stage during which an interview was "essential" and a formal disciplinary hearing that could result in various disciplinary action including downgrading and dismissal. Acts of gross misconduct included "gross negligence" that could result in dismissal, and under "general misconduct "failure to comply with performance requirements of the post" that could result in dismissal if "recurrent…normally following the full disciplinary procedure."

14. The respondent also had a procedure for managing poor performance that included action plans, review meetings and monitoring.

15. The claimant was aware of the all the procedures in her capacity as practice manager.

<u>History leading to the claimant's ill-health absence</u>

16. In oral evidence the claimant suggested she had raised a complaint on some unknown date in 2018 with the assistance of the union, and in support of this disclosed an undated note. In oral evidence the claimant could not be sure whether the note had been provided to Dr Ashworth who denied receiving it, and I find the note was not provided. The claimant alleged a number of times she had waited 3-years for her grievance to be dealt with, and it had not. I did not accept this was the case, and preferred Dr Ashworth's evidence to the claimant who made no mention of this allegation in a Grounds of Complaint. I took the view the claimant is not relying on events prior to 4 November 2019 as a breach of the implied term of trust and confidence there is no requirement for me to consider earlier grievances, if any, that are irrelevant to the issues.

17. There was an issue between the claimant and Catherine Ali concerning plumbing work carried out by the claimant's partner in early 2019 which resulted in litigation that had no connection with the respondent as it was a personal matter and Dr Ashworth had made this clear to both, refusing to get involved and he did not favour one party over the other, expecting both to act professionally in the business as required of a nurse and practice manager. The relationship between the claimant

and Catherine Ali suffered as a result of the dispute, and it is not relevant to the issues before me whether Catherine Ali liked the claimant or not, or whether she believed the claimant was absent with genuine mental health issues or not, as Catherine Ali was not involved in the management of the claimant's absence and the meeting held on 4 November 2019 referred to below.

18. On the balance of probabilities I preferred Christine James' evidence that soon after the claimant's sickness absence she had to step in when asked to go through the emails accessible only to the claimant by Dr Ashworth, which she did. It became apparent the claimant had not actioned 4220 emails, 40 percent of which had not been opened. A number were communications were from the NHS, as one would expect in a doctors surgery. I did not accept Mr William's submission that the respondent should have investigated the position and produced more information, for example, titles and dates of the emails, in anticipation of a disciplinary hearing that never took place as the claimant refused to have anything to do with Dr Ashworth, or have any face-to-face meetings with him after the "protected discussion" through to her effective date of termination by resignation.

19. The emails disclosed give a flavour of the emails that had not been actioned, and I have recorded as an example, the more important exchanges relating to the claimant's failure to action indemnity insurance renewal and payment of 2019 flu jabs, below. The claimant had been employed as a practice manager for a number of years, and the evidence points to emails not being actioned, which caused Dr Ashworth concern when they were brought to his attention for the very first time, and this was not by the claimant despite the fact that with her experience she must have been aware of the importance and the fact, for example, that without professional indemnity insurance the practice could not treat patients and would close down as a business.

20. Following the claimant's sickness absence Christine James dealt with a number of matters last minute as follows, which she discussed with Dr Ashworth:

13.1 Unopened email dated 8 August 2019 requesting payment of an overdue account out of time with the agreed credit terms which required payment in order that the respondent could purchase flu jabs for the winter 2019. The invoices had been outstanding since 2018. John James (husband of Christine James) who helped with the accounts, emailed Dr Ashworth on 1 October 2019 informing him the account was overdue by 7-months, the emails were unopened, he was never been sent a copy and "this could have placed the practice in a very humiliating position if Seqirus had not chosen to honour our order for FLUAD…until these long overdue invoices had been paid…" I accepted Dr Ashworth's evidence that the claimant's failure in this regard could have put senior patients at risk if no flu vaccine had not been supplied as a result of the debt.

13.2 Email from a health & safety officer dated 12 September 2019 regarding a Health & safety Assessment undertaken in July checking whether the risk assessments had been documented. The claimant responded on 16 September 2019 stating she had been "off sick" but would endeavour to "have it done by the 17th Oct." Under cross-examination the claimant gave a less than credible explanation of the sickness which prevented her from providing the information, when the documentation, she acknowledged, was due in July 2019. The

claimant explained she left work upset, had a "full day off work" and yet, it was not until the 18 September 2019 the claimant went off to see her GP and was signed off work thereafter.

13.3 In an email sent on 18 July 2019 to the claimant from the NHS a general medical services contract was attached for signature and return by 31 July 2019, followed by a chasing letter on 10 September 2019 and picked up by Christine James on 14 October 2019 who requested the documentation be re-sent as it could not be found. The claimant's less than credible evidence that she could not reply to the correspondence until Dr Ashworth had signed the contract, and when it was put to her that she could have written and explained that, the claimant's response was "maybe I did" criticising Dr Ashworth for regular delays. There was no contemporaneous document in bundle evidencing the claimant did reply, I find she did not and her evidence was less than credible. Dr Ashworth was not cross-examined on this, and I find as a fact on the balance of probabilities the claimant was fully aware of the importance of the contract and ensuring it was signed and returned in order that the respondent was not entitled to payment, and she failed to do so. This was yet another serious omission on the claimant's part.

13.4 The claimant was responsible for ensuring the respondent's public liability insurance was valid. In an email set on 14 September 2019 from the NHS marked "information required – urgent" the claimant was informed the public liability insurance information held for the respondent had expired, and "you are contractually obliged to provide this information, could you please send the policy schedule by return…" The claimant emailed Christine James "I can see employer's liability on the wall, do we have public liability?" Christine James responded on 15 September 2019 "Not a clue but would have thought it was something you would have had to produce for CQC. Do you not have anything in your files?" The claimant did not action the NHS email and the practice's indemnity insurance was sorted by Christine James last minute after the claimant's sickness absence when the omission first came to light. This was a serious issue for the respondent, who was not put on notice by the claimant that the indemnity insurance was outstanding.

13.5 On the 5 August 2019 a new employee was recruited and the claimant, who was responsible for ensuring DBS checks were completed, failed to do so and the employee commence working in the practice without a DBS check. This matter came to light, in addition to a failure to carry out 20 appraisals which were also the claimant's responsibility, when the personnel files were checked when it became apparent the claimant could be on long term sick leave as recorded below.

21. On the 18 September 2019 the claimant informed Dr Ashworth she had a rash and was going to see her own GP Dr Ashworth, who worked in a different practice and was not connected or related to Dr Iain Ashworth and the respondent. There was no reference at that point to work related stress or any allegations that gave rise the grievance submitted much later on in the chronology.

22. The claimant provided a fit note confirming she was unfit for work due to "stress at work" and this remained the case through to the claimant's resignation following approximately fifteen months absence from work with no indication of a

prognosis or return in the foreseeable future. During this period the claimant received full sick pay.

23. By an email sent on the 20 September 2019 the claimant wrote "Hi Dr Ashworth" asking him not to discuss her sick note with Catherine Ali or Christine James "as Cath is already asking me to check I'm contacting you, this is part of the problem I'm having…I'm too stressed and down to be in work and maybe in a week or so I would like to see you as things can't continue as they [have] for me to do my job efficiently. But now I don't feel well enough to talk about it…hence my skin getting like it is…" The claimant made no mention of bullying or any grievance, and the correspondence was friendly.

24. Dr Ashworth responded by return email sent on 21 September 2019 "…if part of the problem is work please feel free to talk to me about it, when you are ready, of course. You mentioned that you have been unable to perform your job efficiently, and it is something we can talk about, once you are feeling better and more disposed to talking about such."

25. Dr Ashworth emailed the claimant again enquiring how she was feeing on 25 September 2019, referencing a return to work meeting which he wanted to arrange for 1 October 2019 at a time to suit the claimant whose sick note was to run out that day.

26. In an email sent on 26 September 2019 the claimant confirmed she was taking antihistamine for hives, still felt anxious about work and "I don't think I'm ready to talk about if just yet…"

27. There was a further exchange of unremarkable party-to-party emails reflecting a good relationship between the claimant and Dr Ashworth, which included the claimant being concerned about the build up of emails which she offered to work on from home. The claimant had been signed off until Dr Ashworth's return from holiday "so I can return to work with your support which both myself and my family feel I need so I can carry out my duties [as] expected without it affecting my health again. I am also very anxious about my workload building up…" The claimant had a substantial number of emails outstanding, including matters such as indemnity insurance and the NHS contract on which she remained silent despite the seriousness of such matters, which the claimant, as practice manager would have been aware of.

28. As indicated above, following the intervention of Christine James, Dr Ashworth became aware over time the claimant had failed to carry out her role as practice manager.

29. Dr Ashworth responded on the 4 October to the effect that as the claimant has been signed off sick unable to work it would not be advisable for her to work from home. Dr Ashworth wrote: "I have put the time aside for a meeting on 21 October 2019…I agree with your synopsis. Things are very difficult and need a lot of thought. The future is very uncertain, in lots of ways, and need careful discussions."

30. The claimant requested a meeting longer than the hour proposed by Dr Ashworth away from work, and confirmed she was not ready to come back to work. Through this exchange there was no reference to any allegations of bullying and

victimisation; and it appears on the face of the communications the parties were discussing the claimant's work.

31. By October 2019 the claimant was receiving legal advice about her employment position. Mr Grundy in submissions pointed to the claimant's statement to the effect that legal advice had been obtained following the 4 November 2019 meeting. The claimant in her statement confirmed "as a result of the above [a reference to the meeting] I felt worried and wished to understand what had been said to me; and what the implications were for me and my employment…I instructed solicitors…" The claimant's witness statement was contradicted by her oral evidence, and I concluded the claimant would have taken advice from her solicitors before and after the 1 November 2019 email about her employment position, which makes it all the more remarkable that the grievance was not raised until much later.

32. By an email sent on 1 November 2019 Dr Ashworth wrote "Can we have an informal meeting at 11.30 on Monday? There are some important issues to sort out. It is an informal meeting without prejudice. Hope this is ok. You can chose a venue." Dr Ashworth sent a chasing email the next day reiterating that it was a "without prejudice meeting."

33. It is notable the claimant at paragraph 11 of her written statement made reference to being "suddenly asked to attend a meeting on 4 November with himself" by text sent on 1 November 2019. It is clear Dr Ashworth had been trying to arrange a meeting with the claimant soon after she went off sick, and the claimant had at first indicated she was not well enough, and then agreed, seeking a longer meeting. There was nothing "sudden" about the meeting. The contemporaneous communications reflect Dr Ashworth treating the claimant with care and dignity, and there was no hint he did not believe or accept the claimant was unwell with work related stress. Dr Ashworth believed the claimant was unwell with work related stress and was attempting to assist her until it became apparent to him that she was not carrying out her duties, and this had been the case for some time. Dr Ashworth took the view the claimant should be disciplined.

34. The claimant agreed to attend the informal meeting at a location of her choice. She was aware that it was to be "without prejudice" and had the facility to take legal advice from her solicitors beforehand.

<u>The "protected meeting".</u>

35. A conversation potentially protected by section 111A of the Employment Rights Act 1996 as amended ("the ERA") took place on the 4 November 2019. This was a watershed moment in the employment relationship. as the claimant was told in no uncertain terms what had been unearthed since her sickness absence, that all trust and confidence had been lost in her, she would face disciplinary proceedings and be dismissed for "gross negligence" and "serious misconduct."

36. In her statement the claimant did not refer to Dr Ashworth agreeing not to pursue substantial damages. In her statement she recorded that the meeting concerned Dr Ashworth stating that there was work she had not done which put the practice at risk, she should not return to work and he would be terminating her employment. There was no reference to any threat that financial damages incurred by the practice would not be claimed if the claimant resigned. It is notable there is no

reference to this threat in the Grounds of Complaint, and the claimant did not give any oral evidence about when the threat was made and the effect on her. The first time it was raised was by Mr Williams was on cross-examination of Dr Ashworth who accepted no damages had been incurred.

37. There are two references to the threat of damages, the first was in the letter dated 19 November 2019 which the claimant's solicitors never received. The claimant confirmed in oral evidence on cross-examination the meeting was confidential, Dr Ashworth had made it clear to her that the problems that were of her making, could have closed down the practice, and she was not on top of her work. In short, the claimant was offered a reference without being taken through a disciplinary hearing if she were to resign as described by the claimant and so I find. The claimant raised no complaint about Catherine Ali bullying and harassing her at the time.

38. By email on the 6 November 2019 the claimant's solicitors wrote to Dr Ashworth. This was the first communication of many. The parties have produced a number of without prejudice emails and letters waiving privilege, however there are a many that had not been disclosed as privilege was not waived. I have been invited to take a practical approach to the fact that not all the correspondence has been disclosed, by both parties. It is unfortunate that I have a limited snapshot of the communications exchanged, taking into account the alleged fundamental breach of contract relied upon that Dr Ashworth "consistently and deliberately" ignored the claimant's grievances and the requirement to consider Dr Ashworth's actions against the factual matrix which includes the exchange of correspondence. As both parties were in agreement about the status of the undisclosed without prejudice correspondence I could not look behind this, and proceeded to take a practical approach as invited, by building up the factual matrix using the contemporaneous documentation in the bundle and additional documents produced by the claimant during the hearing.

39. The email of 6 November 2019 from the claimant's solicitors requested the protected conversation be put in writing as follows; "Our client has requested that you please substantively detail the proposed terms in writing via ourselves for her review and consideration." The first point to note is that as far as the claimant was concerned communications were to take place between Dr Ashworth and her solicitors and this remained the case to resignation, underlining the fact that (a) an employee was unable to deal directly with her employer, and (b) solicitors were directly involved thus increasing the confrontation that goes with litigation, and this proved to be the case throughout through to the claimant's resignation. A chasing email was sent on 11 November 2019.

40. Dr Ashworth responded in a letter dated 19 November 2019 setting out the protected conversation of the 4 November 2019 meeting and the reason was stated the decline in the claimant's work and "since her sick leave commenced on 16 September it has come to light that she has seriously neglected her role as practice manager to such an extent that she has put the company in financial jeopardy and therefore placed the livelihood of my other staff at risk. My professional standing as a highly respected General Practitioner has also been compromised by her lack of professionalism, dereliction of duty and breach of mutual trust."

41. Dr Ashworth alleged the claimant put the practice in financial jeopardy in his letter of 19 November 2019 and offered not to "pursue a claim for damages for the

considerable amount of financial loss that my business has suffered under her management." By the time we come to this hearing and the dust of battle had settled these damages were non-existent, however by the 4 November 2019 the respondent had only recently uncovered the claimant's allegedly negligence. I accepted Dr Ashworth's evidence that he genuinely believed the claimant had neglected her role to such an extent it amounted to gross misconduct and after 7-years in the role of practice manager and the time spent as a receptionist, the negligence was such that he could no longer trust her. This was the impetus behind the protected conversation, with no other reason and so I found.

42. The claimant's solicitors did not receive the 19 November 2019 letter and therefore it played no part in these proceedings.

43. The respondent emailed the claimant's solicitors on 25 November 2019 a letter that was not substantially different to the 19 November 2019 letter in that there was no hint of the alleged financial loss in the main body of the letter, plus an attachment. The attachment was a Mutual Termination Settlement Agreement "that concerns the recent verbal offer…Full salary will be paid…until 31 December 2019, a reference will be provided for future employment" and "no claim…for damages for the financial loss that the business has suffered under Mrs Winterbourne's management."

44. There is a suggestion by the claimant that the respondent's email sent on 19 November was fabricated as it had not been received by her solicitors. The email sent on 25 November 2019 was received, and it made no sense to me why the respondent would fabricate the earlier letter, which it denied, bearing in mind the 25 November letter was largely similar with no important differences taking to attachment into account. In short, I do not accept the earlier letter was fabricated, and in any event, nothing hangs on any of the differences. Both dealt with the protected conversation and the terms offered.

45. The claimant's solicitors responded on 12 December 2019 and for the first time (3-months after the claimant had gone off ill and 2-months after first instructed) raised a grievance "about her treatment by you and your surgery and some of its employees" which had not been hinted at by the claimant in any earlier communications. The "serious allegations" referred to by Dr Ashworth were described to be "both false and malicious" and reference was made to the claimant being entitled to a "fair" capability/disciplinary process rather than the protected discussion, claiming it was "outrageous" to state the claimant had "seriously neglected her role as Practice Manager." The claimant's solicitors wrote this, presumably following instructions from the claimant who would have known of the number of outstanding emails, unopened emails, issues with paying bills, employees who were not DBS checked and indemnity insurance renewal. It is notable the claimant's solicitors, unlike Mr Williams, did not respond and query Dr Ashworth's comment about the business losses at any stage according to the contemporaneous documents before me.

46. The letter of 12 December 2019 continued; it alleged bullying and harassment by Catherine Ali citing her blaming he claimant for not informing her about the deadline for smear tests, made reference to the boiler dispute and legal proceeding shaving been commenced against the claimant's partner in respect of it, maintaining Dr Ashworth had not supported the claimant in that dispute. The claimant adopted

this position despite the fact the boiler dispute had nothing to do with the respondent and Dr Ashworth, and the claimant was aware Dr Ashworth considered it to be a private matter that did not involve him or the practice. There were no issues raised against Christine James, and no reference to the respondent being in breach of the CQC and/patient care.

47. The letter of 12 December 2019 was threatening and confrontational, referencing bullying, harassment and detriment, confirming the legal advice was "in the light of your actions to date…she has an excellent prospect of success of potential Employment Tribunal claims including constructive unfair dismissal and/or unfair dismissal and/or automatic unfair dismissal….we are instructed that at the present time, **our client remains determined to progress her grievance and commence legal proceedings against you**…Having taken our client's instructions…our client may have a number of legal claims against you, your surgery and relevant individuals including but not limited to potential claims of ordinary unfair constructive dismissal, wrongful dismissal, breach of contract, harassment, detriment, victimisation and personal injury claims…**our client is committed to the initiation of ACAS Early Conciliation and the issuing of Employment Tribunal proceedings**. **Our client's intentions was [to] continue working for you for some time**. **Our client considers that despite all reasonable attempts for her to find work**, given the current Brexit economic climate…she may be out of work for some time and considers this likely to be in excess of twelve months…We consider that an Employment Tribunal will be extremely sympathetic to her situation. Our client is currently considering her position and the next steps" [the Tribunal's emphasis]. Reference was made to the protected discussion.

48. The 12 December 2019 letter is a letter before action following which litigation was to follow, the claimant believed she had grounds to claim constructive unfair dismissal and the basis of this was the protected conversation. Dr Ashworth took the view there was nothing in the grievance, and it was an attempt by the claimant's solicitors to negotiate an exit package as per the claimant's instructions. The employment relationship had totally broken down and what followed were attempts by the claimant's solicitor to negotiate a settlement and Dr Ashworth to extricate the respondent from the employment relationship. Dr Ashworth took the decision to wait and see what the next step would be from the claimant and he chose not to deal with the grievance, which he believed was a lever for settlement, in the belief that the claimant would be issuing proceedings.

49. The claimant's solicitors threatened to escalate matters in an email sent on 2 January 2020 as the respondent had not dealt with the grievance, and in a further email sent on 13 January a second grievance was raised "about the unfair and unreasonable way her grievances to date have been handled by you…our client has little confidence her grievances will be handled lawfully by you…our client now considers it prudent to escalate matters and involve the CQC and other third parties she deems appropriate."

50. I find it surprising, bearing in mind the content of the first grievance which largely concerned the boiler dispute and alleged behaviour of Catherine Ali, the claimant through her legal advisors deemed it appropriate to "escalate" an employment matter to the CQC and other third parties. Mr Williams submitted that there was no where else for the claimant to go; I do not agree. The claimant's solicitors had already threatened in their letter before action to bring a claim

constructive unfair dismissal in the Employment Tribunal in addition to a raft of other complaints including detriment, victimisation and personal injuries for which there was absolutely no basis. The only inference that can be made is that the threat of reporting Dr Ashworth to the CQC and other third parties was to put pressure on him to reach an acceptable settlement, a conclusion I reluctantly come to in this case. As at the 2 January 2020 there was no basis for any "escalation" to Dr Ashworth's regulatory bodies, and the claimant as a practice manager receiving legal advice, would have understood the implications of involving the CQC. As I indicated to counsel at the final hearing after closing oral submissions, I was concerned with the correspondence sent to Dr Ashworth taking into account the context of an employee and employer relationship. It underlined the fact that the claimant had no intention of returning to work, and this was a litigation tactic, a view understandably taken by Dr Ashworth at the time, who was concerned by the threats to his professional standing and that of the practice. I did not accept the oral submission made by Mr Williams that Dr Ashworth, who he described as an intelligent and experienced GP, would not be worried as he stated under cross-examination. Dr Ashworth, unlike the claimant was a credible witness on this point and I found he was worried by the correspondence and threats it contained against a background of the claimant being advised she had "excellent prospects of success" in the litigation.

51. On the 10 February 2020 the claimant's solicitors wrote to the GMC as follows: "Our client…has raised a number of grievances about her employer and his surgery and other staff **since being on sick leave** but has had no response at all…The doctor is blatantly ignoring all our correspondence…Is notifying your organisation the correct approach here? Do you then contact the GP concerned?" There is no suggestion the claimant's grievance involved safety of patients, unlike the contents of the third and final grievance as recorded below, and had this genuinely been the case, I would have expected the CQC and other regulatory bodies to have been informed much earlier than 30 September 2020, approximately months later,

52. On the 12 February 2020 the claimant's solicitors wrote an identical letter to the NHS, NHSCC and CQC.

53. On the 11 March 2020, having received no response from Dr Ashworth, the claimant's solicitors emailed reminding him "as an employer you have responsibilities for our client's welfare and are also obliged to deal with employee grievances without any reasonable delay...our client considers you are acting in serious breach of your employer and also professional standards and conduct; our client feels she has no option but to escalate matters and contact the appropriate regulatory bodies so matters can be investigated and she has the appropriate support she feels she now needs. We enclose copy correspondence we are instructed to send on her behalf."

54. The attachments was a draft letter to NHS England/NHS Improvement copied to the GMC, NHS Clinical Commissioners and CQC which largely repeated the complaint set out in the emails of 12 February 2020 save for the reference to there being "limited senior personnel at the practice…she has no option but to escalate matters so as to have matters investigated by a third party…"

55. I am deeply concerned with the 11 March 2020 letter threatening to forward the draft letter to four regulatory bodies when the claimant's instructing solicitor had previously raised a complaint on 12 February 2020, one month earlier, and not

informed Dr Ashworth of this giving the impression that a complaint was yet to be made. It is reasonable to infer the objective was to further pressurise Dr Ashworth by the threats to settle the claim taking into account the tenor of the correspondence that followed from the solicitors.

56. In a letter dated 12 March 2020 the claimant's solicitors wrote to Dr Ashworth "Our client has requested us to contact you given that she has not [had any] contact from you whatsoever during her absence from work on sick leave" requesting confirmation of the "precise salary payment…inclusive of any statutory sick pay…for March month." As indicated above, throughout this period through to resignation, the claimant was paid her salary not limited to statutory sick pay.

57. Dr Ashworth, who was aware he had made contact with the claimant during her sick leave contrary to the 12 March letter, responded "that statement is factually incorrect, but I will leave it between yourselves to work out where the truth lies…the MED 3 covering this period was handed in 13-days late."

58. Christine James followed up in a letter dated 16 March 2020 confirming the claimant would not receive salary to be paid in March due to handing her sick note in late as payroll had already been processed. The claimant was paid in full by the April salary run. Originally, the claimant relied upon the late payment of her salary as a fundamental breach of contract, but this complaint was withdrawn along with the complaint regarding the return of the laptop.

59. The claimant's solicitor wrote to Dr Ashworth requesting a telephone conversation reminding him "we would expect you to actively communicate with all your employees including our client albeit **we further remind you that such communication to our client must be via ourselves as per our client's instructions** so as not to prejudice her health" [my emphasis]…**a sensible resolution of matters would be the appropriate way forward here…if we are unable to have an effective dialogue with you, then we are placing you on notice that we will release the letter to NHS England next week to assist our client and afford her some additional support**" [my emphasis]. I reiterate the observation that the claimant, through her solicitors, had in February raised a complaint with NHS England, and the only assumption that can be made was that the threat was being used as leverage for an "effective dialogue" reaching a "sensible solution" to be reached when the telephone discussion took place. On a literal common-sense interpretation of this correspondence it can only point to settlement negotiations, and that was the view understandably taken by Dr Ashworth against a backdrop of the without prejudice correspondence which was not disclosed and not included in the bundle.

60. In short, the parties were negotiating, Dr Ashworth unable to make contact directly with the claimant in his capacity of employer, and constrained to deal with solicitors who were threatening to report him to regulatory bodies unless he had an "effective dialogue" with them. The correspondence sent by the claimant's solicitors was most unwise, and given they were instructed to act in this way by the claimant, fundamentally undermined the employment relationship to such an extent that all that remained was for the claimant to continue to be paid her salary until either she resigned, or Dr Ashworth reached a satisfactory financial agreement.

61. Dr Ashworth emailed the claimant's solicitor on the 2 April 2020 proposing a "without prejudice chat" in August due to the problems caused by the Covid Pandemic. The claimant's solicitors were unhappy with the prospect of waiting so long, and emailed on the 2 April 2020 to this effect.

62. Dr Ashworth wrote to the claimant's solicitors on the 29 April 2020 "…as stated previously I'm concerned about Tracy. She is obviously still unwell. I think a non-prejudicial, virtual meeting with Tracy and myself, as stated previously, will help clarify future perspectives. It would need to be between Tracy and myself, in order to maintain the "without prejudice criteria" for such. Her capacity to work in the same environment…is what focuses my concern…I am happy to discuss this directly with her in a non-prejudiced way." The claimant in her witness statement made no reference to this communication, and at paragraph 41 described how she "suddenly received a letter…dated 26 May 2020, requesting my attendance at a meeting" despite the fact that Dr Ashworth had made it clear he wanted a meeting with her in the 29 April 2020 communication.

63. Dr Ashworth's letter of 10 May 2020 was sent directly to the claimant. The earlier letter dated 29 April 2020 was referenced, and he wrote; "I am concerned that you have not responded or indeed been able to consider my previous requests to either speak or meet with me. The claimant was invited to attend a welfare meeting on 18 May which could be rescheduled if the claimant wanted, it could take place at an agreed venue and "As I have stated many times previously, if you do not want to attend the meeting in person, I am happy to conduct the meeting by telephone…whilst it is my aim to help and support you if I can towards a return to work…given the length of time you have been absent, it is important that I can review the situation with you and seek appropriate medical advice to determine whether a return to work could be achieved within the foreseeable future or not…no decision will be made on your future employment…my purpose is to gather as much information as I can and allow you to raise any further questions you may have at this time."

64. The claimant did not attend the meeting, and Dr Ashworth wrote on 26 May 2020 that he was disappointed and "the purpose of a meeting is so I can explore how to continue to support you during your absence. We need to discuss your current circumstances and attain a better mutual understanding that would facilitate a return to work…" The meeting was re-scheduled, and this was clearly an opportunity for the claimant to explain her position and whatever grievance she had in addition to her health and any link between the two. The claimant did not take up this opportunity.

65. In an email sent on 1 June 2020 the claimant's solicitors wrote "…our client remains unwell and very stressed. In the circumstances she has asked us to correspond with you on her behalf to notify you at this moment in time she is not in a position to attend the meeting you propose…" In short, Dr Ashworth was in a position where he could not meet or communicate with the claimant directly, and all communications continued to be through her solicitors. I question how Dr Ashworth is expected to deal with the claimant's grievance as set out by her earlier when he had little to go on, save for the personal dispute over the boiler. The allegations set out by the claimant had no detail to them, and all Dr Ashworth could do was speak with Catherine Ali and Christine James, which he did, who confirmed there had been no bullying, harassment and victimisation. In short, Dr Ashworth had an employee in

receipt of salary who had been on long term sickness absence and she was still too unwell and/or refusing to deal with him directly with no indication as to when the position would change, if ever.

66. Dr Ashworth wrote to the claimant on the 15 June 2020 as he was entitled to do, expressing his disappointment and enclosing a medical consent form. The claimant did not reply and on 14 July 2020 Dr Ashworth sent a chase up letter suggesting an occupational health report if the claimant did not want her GP to provide a report.

67. On the 14 July 2020 the claimant was sent a medical consent form which she signed on 23 July 2020. An exchange of correspondence took place regarding the claimant's salary and holiday pay. Dr F Ashworth was instructed to provide a report and it was confirmed the claimant wished to have access to the report before it was supplied to the respondent. The claimant's solicitors raised an objection as the letter to the GP had another employees name on it. The documentation in the bundle did not reflect this, and in any event, nothing hangs on it given the fact the correct name was provided to Dr F Ashworth whose surgery informed the respondent on 17 September 2020 that the "go-ahead" of the claimant had not been given to "whether she consents to us responding …and will get back to us in due course if the report should be completed by one of our GP's."

68. Dr Ashworth understood a report had been prepared but the claimant would not release it. He wrote to the claimant on the 21 September 2020 following a discussion with her GP stating; "you have not allowed the report to be forwarded to us…given the lack of information from you or you[r] GP, and the fact you have been absent from work since 16 September 2019, **I would like to offer you one final opportunity to attend a ill-health review meeting…A decision will then have to be made on your future employment…and a possible outcome is that your employment may be terminated**" [my emphasis]. The claimant was advised of her right to be accompanied and she was invited to send written submissions, send a representative to speak on her behalf or participate by telephone, Dr Ashworth's preference being for her to attend the meeting in person. The claimant was asked to provide her opinion of a likely return to work and if there was anything Dr Ashworth could do to facilitate her return. She was informed a decision would be made in her absence given "the attempts we have made to engage with you…a possible outcome is that your employment may be terminated and it is therefore important you engage with us…"

69. The claimant's response sent through her solicitors in an email sent on 30 September 2020 was to remind Dr Ashworth "It remain[s] the position that all contact to our client must be via ourselves" and the third and final grievance was raised described as "a number of serious grievances during the course of my employment." I do not intend to set out all of the grievances which included Dr Ashworth making serious allegations about the claimant's performance, allegations that he had made "false and malicious allegations" and the protected conversation. Despite the claimant being too unwell to deal directly with Dr Ashworth and attend any meetings, she criticised him for failing to performance manage her and/or proceed down the disciplinary route.

70. The claimant alleged Catherine Ali had bullied and harassed her, and for the first time that she had been "regularly undermined and side-lined." No details of the allegations were provided.

71. Reference was made to Dr Ashworth and the practice being reported to the "appropriate regulatory bodies…for an investigation" and he was criticised for agreeing to speaking to the claimant's solicitors by telephone in August concerning "myself, my grievances and the way forward" after a delay of 5-months. The claimant did not capture the reality of what had been proposed by her solicitors, which was a "without prejudice chat" which is completely different to discussing with the claimant directly (and not her solicitors) her medical condition, the way forward and other matters which Dr Ashworth attempted to do, only to be rejected by the claimant. The 30 September 2020 letter is skewed, and I find that it was yet another letter before action. It is notable for the very first time the claimant made allegations regarding the management of the practice almost 12-months after she went off ill, following two earlier purported grievances. Mr Williams submitted that the concerns justified the complaints to the regulatory authority. I do not agree. It is key that none of these concerns were reported in the communications referred to above sent to the regulatory bodies which were exclusively concerned with a private employment matter and had nothing to do with patient safety. I find Dr Ashworth's belief that the third grievance was an attempt to set up the litigation before the claimant was dismissed for capacity had some weight had a legitimate basis. On the balance of probabilities, taking into account the factual matrix and interpreting the claimant's solicitors letters in the only way possible, the claimant was using everything in her means from reporting Dr Ashworth to regulators, making spurious allegations and threatening to bring Employment Tribunal claims that had not basis, for example, victimisation and automatic unfair dismissal, to push for a satisfactory settlement.

72. The claimant's solicitors wrote under separate cover in an email sent on 30 September 2020 "We fail to understand why you are corresponding with out client as we have previously requested that all communications must go via ourselves…please therefore desist from contacting our client directly." The meeting suggested by Dr Ashworth was refused and described as "wholly unfair and unreasonable at such short notice when you are aware that she is unwell…our client will not be in a position to attend or participate in such a meeting. May we remind you that our client's grievance has now been ignored by you for one year…"

73. On the 12 October 2020 the claimant was signed off for another 2-months unfit for work with work related stress, and no adjustments were suggested.

74. In a letter dated 28 October 2020 the claimant's solicitors chased up the earlier correspondence that Dr Ashworth had not responded to, remined him of his obligations under the ACAS Code and "natural justice" confirming "our client has no option now but to consider her position; which from the instructions we have from her at this stage; will likely involve Employment Tribunal proceedings against you and the GMC, CQC and NHS England."

75. By a letter emailed to the respondent on 3 December 2020 the claimant resigned referencing her 21 years employment, the fact that she had "an exemplary disciplinary record and my performance and conduct has never been questioned" ignoring the fact that it had, and a protected conversation had taken place because of it. The claimant referred to Dr Ashworth having made "no reasonable attempt" to

investigate the grievance which had been ignored for 12-months and the "mutual trust and confidence between myself and you and your company…has been obliterated.

76. The effective date of termination was 3 December 2021.

Relevant Law

Constructive dismissal

77. Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the 1996 Act") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employers conduct.

78. The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: -

a) Was there a fundamental breach on the part of the employer?

b) Did the claimant terminate the contract by resigning?

c) Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation?

d) Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end?

79. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

80. The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be

stuck between an employer's interests in managing his business as he see fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

81. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"

82. In Omilaju v Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

83. Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 311 Court of Appeal confirmed that an employee who claimed constructive unfair dismissal because of a continuing cumulative breach of the implied duty of trust and confidence was 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", formed part of the series. The effect of the final act was to revive their right to terminate their employment based on the totality of conduct. The court set out a series of questions for a tribunal to ask itself in such cases. Where an employee claims to have been constructively dismissed, it is sufficient, in the normal case, for an employment tribunal to ask: (1) what was the most recent act or omission by the employer that the employee maintains is the cause or trigger for their resignation; (2) whether the employee has affirmed the contract of employment since that act or omission; (3) if not, whether that act or omission was by itself a repudiatory breach of contract; (4) if not, whether it was nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence, and, if it was, no separate consideration of a possible previous affirmation is required; and (5) whether the employee resigned wholly, or partly, in response to that breach (post, para 55).

Conclusion

84. There is no dispute on the law between the parties, which has been set out in Mr William's Skeleton Argument for which I am grateful.

85. With reference to the first issue dealing with the alleged repudiatory breaches relied upon by the claimant, namely;

74.1 Seeking to terminate the claimant's employment without having followed any form of fair process at the meeting on 04 November 2019; I find the claimant is not entitled to rely on the meeting of 4 November 2019 as evidence of breach of contract. The 4 November 2019 was a protected discussion under S.111A of the Employment Rights Act 1996 (ERA), inserted by the Enterprise and Regulatory Reform Act 2013 with effect from 29 July 2013. I referred the parties to paragraphs 14.82 onwards of the IDS Pre-termination Negotiations 2021 which I do not intend to repeat..

74.2 Having considered the "without prejudice" discussion that took place on the 4 November 2019 the meeting was aimed at ending the employment relationship on agreed terms as a result of Dr Ashworth losing all trust and confidence in the claimant being capable of carrying out her role of practice manager, and I found on the balance of probabilities that he had good reason for this based on the findings of fact set out above referencing the claimant's serious/gross misconduct and her breach of the implied term of trust and confidence.

74.3 Mr Grundy in oral submissions submitted the respondent was entitled to invite the claimant to a meeting to discuss termination without there being a dispute between the parties. Dr Ashworth had taken a proper course available to the respondent under section 111A because of the claimant's performance failures which she would have known about, and it was clear it was to be "without prejudice" meeting to discuss and sort out important issues. No procedure was necessary, and the claimant had sought legal advice beforehand. I agree the meeting on 4 November 2019 raised issues that should not have taken the claimant by surprise, and her evidence that she was is not credible. From the cross-examination of the claimant she was aware a number of a number of key tasks, vital to the running of the practice, were outstanding, and it is not credible the claimant was blithely ignorant of the thousands of emails in her box which were unopened and/or not actioned. The claimant, when absent from work, approached Dr Ashworth before the 4 November 2019 meeting to carry out work on her email traffic at home. The emails in the bundle, referred to above, provide a snapshot of misconduct on the part of the claimant, and it is notable even when she was off ill knowing the indemnity insurance was outstanding and the NHS contract unsigned, Dr Ashworth was not put on notice by her that urgent action was required.

74.4 Mr Williams submitted Dr Ashworth was guilty of improper behaviour at the meeting on 4 November 2019. The allegation of "improper behaviour" was not put to Dr Ashworth in cross-examination. It is clear from the letter of 19 November 2019 Dr Ashworth put pressure on the claimant to resign, however I am not satisfied on the balance of probabilities that it amounted to undue pressure or improper behaviour taking into account the claimant's lack of response at the time and in this litigation, to the reference by Dr Ashworth to the claimant putting the practice in financial jeopardy and the offer not to "pursue a claim for damages for the considerable amount of financial loss that my business has suffered under her management." I was invited by Mr Williams to read to the correspondence in context, which I have done. Dr Ashworth's proposed "mutual termination settlement agreement" referenced the "good will

gesture" of not pursuing the claimant the claimant for non-existent financial loss when the fall out of the claimant's alleged negligence was unknown. Dr Ashworth believed the claimant's actions could have closed down the practice, evidence I accepted in preference to that given by the claimant, who has continued to maintain the allegations raised against her without a disciplinary or capability procedure were "false" and "malicious" (claimant's solicitor's email 12 December 2019) when as a matter of common sense she would have been aware of the truth as borne out in the documents set out within the bundle referred to above in the fact finding.

75 Paragraphs 14.94 to 14.98 in IDS sets out the law dealing with improper behaviour which may mean that the protection provided for by S.111A does not apply.

76 S.111A(4) provides that S.111A(1) will only apply to anything said or done which in the tribunal's opinion was improper, or connected with improper behaviour, to the extent that the tribunal considers just. The Tribunal is asked to go through two separate stages to decide whether the inadmissibility rule still applies. It must first consider whether there was improper behaviour by either party during the settlement negotiations. In the event that it finds such behaviour, at the second stage, it decides the extent to which confidentiality should be preserved in respect of the settlement negotiations.

77 Para 17 of the ACAS Code contains a non-exhaustive list of what would be considered improper behaviour including intimidation, and under para 18 • putting undue pressure on a party. The non-binding Code explains that this may include an employer saying before any form of disciplinary process has been commenced that the employee will be dismissed if he or she rejects a settlement proposal. The Tribunal is not bound by the Code, and I find that there is no requirement to commence formally a capability and/or disciplinary procedure before S.111A(1) is evoked. Dr Ashworth was aware before the meeting of the claimant's alleged gross misconduct/negligence; he was in possession of the evidence and had the claimant been well enough would have proceeded down the disciplinary route. As matters transpired he did not due to the claimant's continued absence from work to 3 December 2020 with work related stress and her refusal to have any contact with him either by telephone, written or meeting, throughout the period of absence after the 4 November meeting.

78 The possibility of starting a genuine disciplinary process as a likely alternative if an agreement is not reached does not fall within the definition of "improper behaviour." Referencing the claimant to a "considerable amount of financial loss" in the business that turned out to be non-existent, was less straight-forward, but for the reasons stated above, including the lack of any impact on the claimant and her solicitors, coupled with Dr Ashworth's genuine belief that the claimant's actions could have adverse financial consequences endangering the practice, led me to conclude on the balance of probabilities, the 4 November 2019 meeting was protected under section 111A. But for the claimant's alleged negligence; there is no doubt failing to renew the indemnity insurance policy, ensure completion of the NHS contract, pay long outstanding bills for flu jabs that could have a knock on effect for elderly patients, failing to ensure DBS checks before staff starting working with the public, were failures that went to the heart of the claimant's contractual obligations and the duty of care she owed the

respondent in the capacity of practice manager, a key position just below that of Dr Ashworth, the owner and her only line manager.

79 On balance, turning to the second stage of the test, confidentiality in relation to the 4 November 2019 meeting should preserved in respect of the settlement negotiations and it does not form part of a series of incidents that affected trust and confidence in the employment relationship; the first step being the claimant's failure to do her job and meet her key contractual obligations.

80 By the 4 November 2019 Dr Ashworth and the claimant had lost trust in each other, and all that remained was for the claimant's exit to be negotiated. The problem in this case is that Dr Ashworth, once the claimant involved solicitors, and the claimant, through her solicitors, have attempted to put undue pressure on him. For example, the claimant's solicitors misrepresenting reporting Dr Ashworth to his professional regulators and use the threat of a report as a lever for negotiations.

81 The scene was for the unwise correspondence sent on the claimant's behalf, and Dr Ashworth's policy of wait and see under the bombardment of threats issued against him, which he believed, included a spurious grievance that had no basis and being used as a negotiating tactic by the claimant and her solicitors. Dr Ashworth was entitled to take that view given the fact that before solicitors became involved the claimant had raised no grievance and in the reasonably friendly emails exchanged before the 4 November 2019 meeting the only reference to any possible issues made by the claimant was that "Cath is already asking me to check I'm contacting you, this is part of the problem I'm having…" [the claimant's 20 September 2019 email]. Catherine Ali making sure the claimant kept in contact with Dr Ashworth cannot on any stretch amount to bullying and harassment in the terms subsequently described by the claimant's solicitors, and Dr Ashworth was entitled to take the claimant's response to the allegations he raised in the 4 November 2019 and the threats made against him as set out in detail in the solicitors letters against the exchange of unremarkable party-to-party emails reflecting a good relationship between him and the claimant exchanged before the protected meeting and solicitors became involved.

82 With reference to the second issue, consistently and deliberately ignoring the claimant's grievances submitted on 12 December 2019, 13 January 2020 and the 30 September 2020 relied upon as the "final straw" Dr Ashworth spoke with staff and satisfied himself there was nothing in the first grievance, information he failed to provide to the claimant at the time. The first grievance was limited to Catherine Ali, and unlike the third grievance, there was no suggestion the claimant had raised issues concerning patient safety.

83 Dr Ashworth took the decision in light of the breakdown of trust and confidence that was apparent from both parties and in the knowledge that the claimant "remains determined to progress her grievance and commence legal proceedings against you" to wait and see what the claimant would do, against a backdrop of being unable to talk and meet with the claimant directly, save through her solicitors, who were aggressively pushing for a larger financial settlement having advised the claimant "she has an excellent prospect of success of potential Employment Tribunal claims including constructive unfair

dismissal and/or unfair dismissal and/or automatic unfair dismissal…ordinary unfair constructive dismissal, wrongful dismissal, breach of contract, harassment, detriment, victimisation and personal injury claims." As at the 12 December 2019 there was no prospect the claimant had any claims that gave rise to complaints under section 26 of the Equality Act 2010 , detriment claims or personal injury claims arising out of discrimination. The claimant strengthened her negotiating position by reference to non-existent Employment Tribunal claims.

84 As at the 4 November 2019 there was no prospect of the claimant ever returning to work, whatever Dr Ashworth did and this is borne out by the factual matrix in which she consistently refused to meet up with Dr Ashworth, she refused to speak to him on the telephone, she refused to have a direct dealings with him and she refused to provide a medical report when capability proceedings were in process. Both parties were treading water, the claimant in the hope that she would receive a satisfactory pay out and Dr Ashworth in the hope that the claimant would resign on the terms offered in the without prejudice correspondence I have not seen.

85 The claimant was aware by 12 December 2019 at the latest she had a constructive unfair dismissal claim arising out of the 4 November 2019 meeting. Dr Ashworth was aware the claimant was going to commenced Employment Tribunal proceedings. Her solicitors had confirmed in the 12 December 2019 letter "our client is committed to the initiation of ACAS Early Conciliation and the issuing of Employment Tribunal proceedings. Our client's intentions was [to] continue working for you for some time. Our client considers that despite all reasonable attempts for her to find work, given the current Brexit economic climate…she may be out of work for some time and considers this likely to be in excess of twelve months…We consider that an Employment Tribunal will be extremely sympathetic to her situation. Our client is currently considering her position and the next steps." Litigation was clearly the next step, but instead of resigning the claimant's solicitors continued to negotiate, the claimant accept her contractual pay together with accrued holidays for a period in excess of 12-months and raised 2 additional grievances in an attempt to force a satisfactory settlement.

86 Taking the factual matrix into account, I am satisfied that the "last straw" being the third grievance and Dr Ashworth's failure to deal with it, was yet another attempt to force Dr Ashworth's hand when it became apparent to the claimant she was facing a choice of either returning to work and dealing with Dr Ashworth at a return to work meeting or welfare meeting with the prospect of disciplinary allegations and a hearing dealing with gross misconduct and negligence, or being taken down the capacity route given the fact she had been absent on sick leave with work related stress for fifteen months with no indication of any future prognosis or date when a return to work would take place, the claimant having refused either to provide or release the medical report.

87 Contrary to the claimant's case Dr Ashworth attempted to meet with her face-to-face prior to the meeting held on the 4 November 2019, and when it became apparent the claimant was not resigning, had not commenced proceedings, the negotiations had not borne fruit, she was still refusing to have any contact with him save through solicitors, and his professional bodies had not taken action

against him (which was of concern to Dr Ashworth contrary to the submissions of Mr Williams), further attempts were made to arrange a face-to-face meeting convenient to the claimant. It is notable Dr Ashworth delayed the possibility of meeting the claimant's solicitors, which the claimant has attempted to describe as a meeting to discuss her grievance when it was to be a without prejudice meeting only, with no reference being made to any intention to discuss the grievance. Dr Ashworth was in a difficult position; he was unable to communicate in any way with his employee who refused to deal with him and throughout was faced with threats and ultimatums without any details being offered up as to what the claimant was complaining about and how Catherine Ali had allegedly bullied and harassed her. Dr Ashworth was aware of the problems caused by the claimant's partner and the litigation over plumbing services provided that ensued, and both Catherine Ali and the claimant had been told the issue was a personal one, outside the practice and Dr Ashworth was not getting involved, and he was aware from discussions with Christine James and Catherine Ali as far as they were concerned no bullying or harassment had taken place. Given the claimant's position that she would have nothing to do with Dr Ashworth and the practice, and taking into account the lack of information provided until the expansion of allegations set out in the third grievance, the only way forward for Dr Ashworth was via the claimant's solicitors, and understandably, as a direct result of their threatening and aggressive correspondence, he was not inclined to have dealings with them.

88 Dr Ashworth had good reason to be suspicious of the claimant's solicitors, who had threatened to report him to various professional bodies as leverage, and then on the 10 and 12 February 2020 reported him not as an act of whistleblowing on patient care. The complaint concerned the claimant raising "a number of grievances about her employer and his surgery and other staff **since being on sick leave** but has had no response at all…The doctor is blatantly ignoring all our correspondence" when the first grievance was against Catherine Ali in the 12 December 2019 grievance. Having made the threat and then report Dr Ashworth, the claimant's solicitors then threatened again in the 11 March 2020 communication "our client feels she has no option but to escalate matters and contact the appropriate regulatory bodies so matters can be investigated and she has the appropriate support she feels she now needs. We enclose copy correspondence we are instructed to send on her behalf" when complaints had already been made earlier.

89 With reference to the issue that Dr Ashworth had failed to investigate any of her grievances fairly or at all, I find on the balance of probabilities this was not the case. He had discussed the allegation, limited as it was with no detail of the alleged harassment and victimisation, with Catherine Ali and Christie James, satisfying himself no bullying had taken place. In arriving at this decision Dr Ashworth also took into account the factual matrix as known to him, including the claimant's refusal to have anything to do with him, save through her solicitors, which limited any investigation. The respondent has a grievance procedure referenced above, and it is common industrial practice for an employee when raising a grievance to set out its grounds and have a meeting with his or her employer to explain and discuss how the grievance is put. This was not an option for Dr Ashworth, who took the view in any event that the claimant was litigating and her grievances a negotiating tool.

90 With reference to the issues failing to have any form of welfare meeting or contact during the claimant's absence following the meeting on 04 November 2019 and prior to May 2020, I repeat my observations above. It is instructive to look at what happened when Dr Ashworth made direct contact with the claimant following her solicitors in the letter dated 12 March 2020 complaining the claimant "has not [had any] contact from you whatsoever during her absence from work on sick leave" when Dr Ashworth was aware he had made contact with the claimant during her sick leave, as recorded in the factual matrix above. Mr Williams in submissions described Dr Ashworth's response "that statement is factually incorrect, but I will leave it between yourselves to work out where the truth lies…" as "arrogant" ignoring the fact that by this stage the only contact available to Dr Ashworth was through the claimant's solicitors via communications he found to be threatening, understandably so because they were.

91 When Dr Ashworth wrote to the claimant's solicitors on the 29 April 2020 "…as stated previously I'm concerned about Tracy. She is obviously still unwell. I think a non-prejudicial, virtual meeting with Tracy and myself, as stated previously, will help clarify future perspectives. It would need to be between Tracy and myself" which was not responded to, and again in an email 10 May 2020 sent directly to the claimant. The contents of the second email made no reference to disciplinary proceedings, and Dr Ashworth's concern was "that you have not responded or indeed been able to consider my previous requests to either speak or meet with me." The claimant was invited to attend a welfare meeting on 18 May which could be rescheduled if the claimant wanted, it could take place at an agreed venue and "As I have stated many times previously, if you do not want to attend the meeting in person, I am happy to conduct the meeting by telephone…whilst it is my aim to help and support you if I can towards a return to work…given the length of time you have been absent, it is important that I can review the situation with you and seek appropriate medical advice to determine whether a return to work could be achieved within the foreseeable future or not…no decision will be made on your future employment…my purpose is to gather as much information as I can and allow you to raise any further questions you may have at this time." The third email sent on 26 May 2020 when the claimant failed to attend the meeting, clarified "the purpose of a meeting is so I can explore how to continue to support you during your absence. We need to discuss your current circumstances and attain a better mutual understanding that would facilitate a return to work…" In short, the claimant was being invited to a meeting and at that meeting she could discuss "your current circumstances" and there was nothing to stop the claimant bringing up her alleged grievance with a view to paving the way to a return to work. This did not happen, instead the claimant's solicitors in no uncertain terms rejected the offer, and Dr Ashworth remained unable to speak to communicate directly with the claimant without her solicitors intervention despite Dr Ashworth making it clear to her and the solicitors "I'm concerned about Tracy. She is obviously still unwell. I think a non-prejudicial, virtual meeting with Tracy and myself, as stated previously, will help clarify future perspectives. It would need to be between Tracy and myself."

92 With reference to the next issue, namely, unreasonably seeking to hold an ill-health review meeting to consider termination of the claimant's employment at short notice, I found there was no short notice. The claimant was informed on 21

September that an ill-health meeting would take place on 5 October against a backdrop of the process hearing towards managing the claimant's ill-health absence and capability. The claimant, having refused to meet up with Dr Ashworth, was sent on the 15 June 2020 a medical consent form. The claimant did not reply and on 14 July 2020 Dr Ashworth sent a chase up letter suggesting an occupational health report if the claimant did not want her GP to provide a report. The claimant, who had the benefit of legal advice, would have been aware of the implications, signed the medical consent form on the 23 July 2010 but appeared not to have given her GP consent to the produce a medical report or forward the medical report to the respondent. It is not disputed a medical report dealing with the claimant's absence was never sent to the respondent.

93 Dr Ashworth wrote to the claimant on the 21 September 2020 concerning the discussion he had with her GP and that "you have not allowed the report to be forwarded to us…given the lack of information from you or you[r] GP, and the fact you have been absent from work since 16 September 2019, I would like to offer you one final opportunity to attend a ill-health review meeting…om 5 October…A decision will then have to be made on your future employment…and a possible outcome is that your employment may be terminated." As recorded in the factual matrix, the claimant was advised of her right to be accompanied and if she was unable to physically attend, she was invited to send written submissions, send a representative to speak on her behalf or participate by telephone the preference being for Dr Ashworth her attendance at the meeting in person. The claimant was asked to provide her opinion of a likely return to work and if there was anything Dr Ashworth could do to facilitate her return. The claimant was made aware that her employment could be terminated, and yet she never provided the information sought.

94 It is notable the claimant's solicitors response was to remind Dr Ashworth that all communications should be through them, and bring a third grievance which brought into question the earlier grievances because a number of the allegations were new including one to four that related to patient safety which had not been reported to Dr Ashworth's regulator including the CQC at the same time when the claimant raised complaints about Dr Ashworth failing to deal with her grievance. In contrast to the earlier grievances for which very little detail was provided, the third grievance ran to 3-pages essentially concerned with the employer employee relationship.

95 The claimant's solicitors sent a second email sent on 30 September 2020 "We fail to understand why you are corresponding with our client as we have previously requested that all communications must go via ourselves…please therefore desist from contacting our client directly." The meeting suggested by Dr Ashworth was refused and described as "wholly unfair and unreasonable at such short notice when you are aware that she is unwell…our client will not be in a position to attend or participate in such a meeting. May we remind you that our client's grievance has now been ignored by you for one year…"

96 The meeting with the claimant did not go ahead. Dr Ashworth was in a position where he could not have a face-to-face meeting with the claimant who refused to provide the medical report requested, every indication pointed to the claimant after a fifteen-month absence not being well enough to return to work with no foreseeable return in the future. She was aware that this was the end of the road

and was in danger of being dismissed for ill-health capability, and it can be reasonably inferred against the factual matrix, that the third grievance was an attempt by the claimant to (a) set the clock running for a constructive unfair dismissal and (b) avoid dismissal on the grounds of incapacity as threatened by Dr Ashworth on the 21 September 2020 when the claimant had a number of options put to her, which she did not take up, for example, send in written submissions.

97 With reference to the next issue, namely, did any such act or omission (alone or cumulatively) of respondent amount to a repudiatory breach of the Trust and Confidence Term, I found on the balance of probabilities that it had not.

98 A repudiatory breach is a significant breach going to the root of the contract- Western Excavating cited above. The test is not whether the respondent has behaved unreasonably, and had it been I would have decided it had not in the rare circumstances of this case. Mr Williams submitted that "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach" - Buckland cited above. Objectively assessed and taking into account the whole of the factual matrix I have recorded above; I did not find the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence. The trust and confidence between the respondent and claimant had been seriously damaged as a result of the claimant's actions that had taken place before the protected conversation and as a consequence of it. What transpired after was an attempt to force a settlement and avoid the threatened litigation.

99 Mr Williams referred to Kaur cited above, when the Court of Appeal endorsed the approach of Glidewell LJ in Lewis and Dyson LJ in Omilaju to the 'last straw' doctrine. To avoid any confusion, Underhill LJ proposed that in an ordinary case of constructive dismissal tribunals should ask themselves the following questions:

103.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

103.2 Has he or she affirmed the contract since that act?

103.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

103.4 If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

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

104 Mr Williams submitted that Dr Ashworth refused to acknowledge the grievance of an employee who had 21-years continuous employment, he did not engage with her inquiring about her welfare and objectively speaking, this conduct was likely to destroy of seriously damage the implied term of trust and confidence. Mr Williams did not accept it was reasonable for Dr Ashworth to wait until the

claimant was well enough to be disciplined, there was no evidence of an investigation and he cannot rely on the passage of time for affirmation.

105 Mr Williams relies on "months of not keeping in touch" maintaining it was deliberate on Dr Ashworth's part and this was "one of the clearest cases" of constructive unfair dismissal.

106 Had it not been for the tenor and aggressive quality in the solicitor's correspondence and the insistence that the claimant had no dealings whatsoever with Dr Ashworth with all communications being through solicitors, including those that would ordinarily take part between an employee and employer, for example, welfare meetings which were refused, Mr Williams may have had a stronger argument. I did not agree with Mr Williams that the regulators were the "obvious choice." The CQC, NHS and other regulatory bodies to whom the claimant complained were not "the obvious choice" when it came to a grievance and employment dispute which on the face of the first and second grievance, had no connection with patient safety or any misconduct on the part of Dr Ashworth. In direct contrast, the CQC and NHS would be concerned if for some reason (including default on the part of a practice manager) the professionally indemnity insurance lapsed, employees dealt with the public without a DBS check and the practice was unable to source flu jabs due to a long outstanding unpaid bill as all of these matters go directly to patient care and safety. The regulators were "the obvious choice" if the claimant wished to put pressure on Dr Ashworth to reach a settlement by threatening to report him, which is precisely what happened on a number of occasions. The "obvious choice" was set out in the letter before action sent on 12 December 2019 when Dr Ashworth was informed in no uncertain terms the claimant intended to resign and claim constructive unfair dismissal in addition to a raft of other claims.

107 Mr Williams submitted the deliberate ignorance of grievances is enough for the repudiatory breach. I agree that not dealing with an employee's grievance may result in a repudiatory breach of contract, but not in the claimant's case set against the factual matrix. The Tribunal's function is to look at the respondent's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the claimant cannot be expected to put up with it. I found the "impact of the respondent's conduct on the claimant was such that, viewed objectively, she could not properly conclude Dr Ashworth was repudiating the contract – Buckland cited above, given the litigious nature of the employment relationship in the aftermath of the protected meeting where the entire thrust of the claimant's solicitor's communications was aimed at achieving a financial settlement via intimidation, on the basis that the claimant was never going to return to work after the full extent of her alleged negligent misconduct came to light (without any notice to Dr Ashworth from the claimant) and she was informed that she would be subjected to a disciplinary. Mr Grundy submitted that time was running out for the claimant, which appeared to be the case, and the third grievance dated 30 September 2020 was a tactic.

108 Having found there was no repudiatory breach, there is no requirement for me to deal with the remaining issues. If I am wrong that there was no fundamental breach of the implied term of trust and confidence entitling the claimant to

resign and claim constructive unfair dismissal, in the alternative, I have briefly dealt with the remaining issues.

109 With reference to the issue, namely, did the claimant resign in response to all or some of those breaches, I found she had not. The claimant resigned because she was on route for being dismissed on the grounds of capability with no prospect of any medical report, no prospect of her attending a welfare meeting with Dr Ashworth, no indication of when she could ever return to work and no foreseeable date for when the claimant could communicate with Dr Ashworth directly and return to work.

110 On the issue of affirmation, Mr Williams submitted, on the basis that the fundamental breach was either the protected meeting and/or the three grievances, there was no evidence of affirmation.

111 In the well-known EAT case of W E Cox Toner International V. Crook IRLR 1981 at page 443 it was stated; "The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party (that is to say the employee in this case) must at some stage elect between these two possible courses. If he once affirms the contracts his right to accept the repudiation is at an end."

112 In the words of Lord Denning MR in Western Excavating cited above, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged." The issue of affirmation is essentially one of conduct, not the passage of time. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. As Lord Justice Jacob observed in Bournemouth cited above, resigning from a job is a serious matter with potentially significant consequences for the employee. The more serious the consequences, the longer the employee may take to make such a decision. Where an employee is on sick leave at the relevant time, it is not so easy to infer that he or she had decided not to exercise his or her right to resign.

113 In the claimant's case the delay went on for too long and coupled with the claimant's solicitor's letter dated 12 March 2020 demanding the claimant's salary, accrued holidays in the letter dated 7 April 2020, and providing a form of authority for Dr Ashworth to obtain a medical report from her GP, is strong evidence of an affirmation against a backdrop of the claimant threatening to resign and claim constructive unfair dismissal approximately 8-months before. It was clear the claimant's alleged grievances were not going to be dealt with, and yet after the third grievance dated 30 September 2020 it took the claimant until 3 December 2020 to resign, having threatened to take this course of action on 12 December 2019, 12-months previously.

114 The claimant's delay was prolonged and excessive, during which she continued to claim contractual sick pay not limited to SSP and accrued holidays for a total period of 15 months during which she was signed off with "work

related stress" and refused to discuss her condition with Dr Ashworth, release a medical report and would only communicate through her solicitors in the expectation of pressuring him to settle when the protected conversation had legitimately pulled her up on negligent acts of gross misconduct. Taking all of these events cumulative, I found on the balance of probabilities the claimant had affirmed her contract when she remained on sick leave for 15 months before resigning and claiming constructive dismissal during which time she was capable of instructive her solicitor on a range of matters including party-to-party correspondence, without prejudice negotiations and grievances. For the avoidance of doubt, I did not find the manner in which Dr Ashworth approached the three grievances did not by itself does not amount to a breach of contract— Lewis v Motorworld*,* a Court of Appeal decision and the approach referred to by Lord Justice Underhill in Kaur above. An important point to draw from the Court of Appeal's decision in Kaur is that, where there is a genuine last straw that forms part of a cumulative breach of the implied term of trust and confidence, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign. The problem for the claimant is that the third grievance was not a genuine grievance, but an attempt to force a higher level of settlement and the last straw relied upon was not a genuine last straw against a backdrop of clear performance issues the claimant having decided following the 4 November 2019 meeting fifteen months previously that she was not returning to work, and preferred to use the negotiating tactics of her solicitors whilst in receipt of contractual pay and holiday pay that continued to accrue for duration.

115 With reference to the remedy issues, namely, is there a cut-off point on the basis that the claimant would have been dismissed fairly in any event, I preferred on the evidence before me Mr Grundy's submission that the claimant would have been dismissed for performance issues and ill-health. It was the action taken by the respondent to manage the claimant's ill health absence that spurred the claimant in a resignation as set out above, when her solicitor's threats and negotiating tactics failed to bear fruit. I did not accept Mr Williams' submission on the evidence before me that as Dr Ashworth had not carried put a disciplinary investigation and failed to include all of the 4,200 off emails in the bundle, it could not be established the claimant would have been fairly dismissed at a later date and/or had contributed towards her dismissal. Taking into account the evidence before me, including the contemporaneous documents which supported the oral evidence of Catherine James and Dr Ashworth who discovered the claimant's gross misconduct when she was off ill, there was no need to produce all of the emails to which the claimant had not responded or left unopened.

116 Following the House of Lords decision in Polkey v AE Dayton Services Ltd [1988] ICR 142, HL, Tribunals are required, when assessing the compensatory award payable in respect of the unfair dismissal, to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss. The principle encompasses of S.123(1) ERA in awarding what is just and equitable having regard to the loss sustained by the complainant. In the claimant's case I am satisfied on the balance of probabilities that she was the author of her own misfortune for the reasons already stated, ranging from the negligent acts of gross misconduct

through to her refusal to provide medical evidence or any prognosis of a return to work after fifteen months absence for stress at work. Had the claimant not resigned she would have been dismissed, and in those circumstances, it was not 'just and equitable' within the meaning of S.123(1) ERA to award compensation for loss one month after the effective date of termination making an allowance for the time the respondent would take to re-convene the earlier hearing which the claimant had refused to attend prior to her resignation.

117 Mr Williams criticises Dr Ashworth for failing to invoke the disciplinary process, maintaining "the 'mudslinging' and cheap shots at the claimant are unfair and flawed. The Tribunal would need to know a lot more in order to assess whether the claimant was genuinely at risk of discipline." I did not agree taking into account the factual matrix above. I was satisfied that Dr Ashworth had no intention of dismissing the claimant when she went off ill, as borne out by the contemporaneous emails they exchanged which were friendly and supportive. It was only when her serous breaches of contract became apparent that Dr Ashworth concluded the implied term of trust and confidence had been broken and he no longer had trust in the claimant, despite the number of years she had worked with and for him and the protected conversation followed on the 4 November 2019.

118 Mr Williams submitted in respect of the capability point – at no stage had the respondent sought to obtain or request medical evidence that claimant was somehow unfit to return to work at a point after her resignation. I did not agree. Dr Ashworth had sought to obtain this information and it was not forthcoming from the claimant who either refused to provide him with access to the report or refused to authorise her GP to prepare one; either way there was no medical report and the claimant refused to attend any meeting to discuss her health with Dr Ashworth and/or make written representations in the knowledge that she could be dismissed. Mr Williams described this aspect of the claim is "similarly desperate and unreasonable in the context of someone off for genuine reasons who is seeking to have them resolved by her employer so she may return, only for that employer to deliberately ignore these / refuse to resolve them" ignoring the fact that there was a total embargo on the claimant discussing her employment with her employer, Dr Ashworth who was unable to move matters forward.

119 With reference to the issue if the claimant was constructively dismissed, was that dismissal unfair, having regard to section 98(4) ERA 1996, without substituting my view with that of the respondent, I found on the balance of probabilities, the dismissal to have been a fair one for the reasons explored above, concluding the respondent had acted reasonably in the circumstances.

120 Following the House of Lords decision in Polkey v AE Dayton Services Ltd [1988] ICR 142, HL, Tribunals are required, when assessing the compensatory award payable in respect of the unfair dismissal, to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss. The principle encompasses of S.123(1) ERA in awarding what is just and equitable having regard to the loss sustained by the complainant. In the claimant's case I am satisfied on the balance of probabilities that she was the author of her own misfortune for the

reasons already stated, ranging from the negligent acts of gross misconduct through to her refusal to provide medical evidence or any prognosis of a return to work after fifteen months absence for stress at work. Had the claimant not resigned she would have been dismissed, and in those circumstances, it was not 'just and equitable' within the meaning of S.123(1) ERA to award the claimant full compensation and I find on the balance of probabilities there a 100 percent chance of the claimant being fairly dismissed within one month of the effective date of termination. If determined at a disciplinary/capability hearing the claimant would have been found guilty of gross misconduct and summarily dismissed, and dismissed for ill-health capability (which had it not been for the gross misconduct would have been on 12- weeks-notice).

121 In conclusion, had the claimant returned to work and been taken through a proper procedure, the respondent would have been entitled to dismiss her for gross misconduct on the basis that her conduct had brought Dr Ashworth and the practice into disrepute with a loss of reputation and a breach of trust on Dr Ashworth's part. With reference the final remedy issue as agreed, namely, had the claimant been unfairly constructively dismissed (which for avoidance of doubt, I found she was not) was the claimant guilty of contributory fault, on the balance of probabilities I found that she was for the reasons stated above within the factual matrix. Briefly, the claimant's conduct before her sickness absence was 'blameworthy' or 'culpable' it contributed to the dismissal and therefore justified a reduction in the employee's compensatory award under S.123(6).

122 In the Court of Appeal judgment in Nelson v BBC (No.2) 1980 ICR 110, CA, Lord Justice Brandon explained that it could never be just and equitable to reduce a successful complainant's compensation unless the conduct on his or her part was culpable or blameworthy. Preferring the evidence of Dr Ashworth supported by contemporaneous documentation it could not be said the claimant was blameless. She had clearly caused the dismissal by her negligent actions, which on any reading, could have closed the practice down affecting the employment of others and the patients, in addition to the profitability of Dr Ashworth's business and his reputation as a GP.

123 In the well-known case of Steen v ASP Packaging Ltd 2014 ICR 56, EAT Mr Justice Langstaff (then President of the EAT) stated when a reduction on account of culpable or blameworthy conduct is made to the basic award, the question under S.122(2) is simply whether it is 'just and equitable' to make such a reduction. But when it comes to a reduction of the compensatory award by reason of contributory conduct under S.123(6), an additional consideration obtains — namely, whether the conduct in question caused or contributed to the dismissal to any extent. In connection with the claimant, I am satisfied she has met both tests and there should be a reduction of one hundred percent in the basic and compensatory award underlining the seriousness of her contributory conduct.

124 Finally, as the respondent has proved on the balance of probabilities the claimant has failed in her constructive unfair dismissal claim and she had committed an act of gross misconduct I conclude that the respondent was entitled to dismiss without notice and the claimant's claim for wrongful

dismissal is not well-founded and is dismissed.

125 In conclusion, the judgment of the Tribunal is that the claimant's claim for constructive unfair dismissal is not well-founded and is dismissed.

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18.11.21 Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON

30 November 2021

FOR THE TRIBUNAL OFFICE