



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Ms LC Sayles

AND

Newcastle upon Tyne Hospitals
NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 13, 15 & 16 February 2017

Before: Employment Judge Johnson

Appearances

For the Claimant: Ms R Eeley of Counsel

For the Respondent: Ms A Carver, Solicitor

JUDGMENT

- 1 The claimant's complaint of constructive unfair dismissal is well-founded and succeeds.
- 2 A remedies hearing with a time estimate of half a day will take a place on **Tuesday, 14 March 2017 at North Shields Hearing Centre, 2nd Floor, Kings Court, Earl Grey Way, Royal Quays, North Shields, Tyne and Wear, NE29 6AR** to commence at **1:30pm**. The parties shall attend by **1:00pm**. The Tribunal may transfer the hearing at short notice to be heard at another hearing centre within the region.

ORDERS

- 1 By not later than **28 February 2017** the respondent shall serve upon the claimant copies of the statements of any witnesses whom the respondent intends to call to give evidence at the remedies hearing. There shall be attached to any such

witness statements, copies of any documents to which reference is to be made at that remedies hearing.

- 2 By not later than **7 March 2017** the claimant shall serve upon the respondent copies of the statements of any witnesses (including the claimant) whom the claimant intends to call to give evidence at the remedies hearing. There shall be attached to any such statements, copies of any documents to which reference is to be made at the remedies hearing.

REASONS

- 1 The claimant was represented by Ms Eeley of counsel, who called the claimant to give evidence. The respondent was represented by Ms Carver, solicitor, who called to give evidence Professor Mark Walker, Dr Steve Parry, Dr Nicola Leech and Dr Michael Wright. The respondent tendered a witness statement from Mr John Davison, who was unfortunately unable to attend the hearing to give evidence. It was agreed that there would only be attached to Mr Davison's statement, such weight as was appropriate, taking into account the fact that he was unable to attend to give evidence under oath, be cross-examined and to answer questions from the Tribunal.
- 2 There was an agreed bundle of documents marked R1, comprising a single A4 ring binder containing 188 pages of documents. The claimant and all of the respondent's witnesses had prepared formal, typed and signed witness statements. Those were taken "as read" by the Employment Tribunal, subject to questions in cross-examination and questions from the Tribunal Judge. A chronology had been prepared which was marked R2 and an agreed list of issues marked R3. The respondent's skeleton argument prepared by Ms Carver was marked R4.
- 3 By claim form presented on 25 August 2016, the claimant brought a complaint of constructive unfair dismissal. The respondent defended that claim. The claimant alleges that on 11 January 2016, her senior colleague Professor Mark Walker entered her consulting room on two occasions and acted in a rude, unpleasant and aggressive manner towards her. After the claimant complained about that to the respondent's HR Department, Professor Walker on 18 January offered what the claimant described as a "perfunctory apology." The claimant then raised a formal complaint in writing on 20 January 2016, which the claimant alleges was not thereafter dealt with in a reasonable manner. The claimant alleges that Professor Walker's behaviour towards her and the respondent's failure to properly deal with her complaint amounted to a breach of the implied term of trust and confidence and thus a fundamental breach of contract. The claimant resigned by letter dated 14 March 2016 and left the respondent's employment on 30 May 2016. The respondent denies that Professor Walker's behaviour towards the claimant and/or the alleged failure to deal with the complaint amount to a fundamental breach of contract. The respondent denies that the claimant resigned in response to that alleged breach and says that, by delaying her resignation, she effectively affirmed her contract of employment.

- 4 Having heard the evidence of the claimant and the witnesses for the respondent, having examined the documents to which it was referred and having carefully considered the closing submissions of Ms Eeley and Ms Carver, the Tribunal made the following findings of fact on a balance of probability:-
- 4.1 The claimant is a qualified medical practitioner who works within her own practice as a GP. Between February 2001 and May 2016 the claimant worked as a speciality diabetes doctor for the respondent Trust, working every Monday afternoon under the terms of a Speciality Doctor's Contract, a copy of which appears at 44N in the trial bundle. The claimant's immediate line manager was Professor Mark Walker, who spends half his time working at Newcastle University and the other half working for the respondent Trust as a consultant in diabetes.
- 4.2 The claimant began work for the respondent on 12 February 2001. The claimant had a clean disciplinary record throughout that period and had satisfactory annual appraisals and assessments until she resigned in May 2016. Each Monday afternoon the claimant conducted a diabetes clinic along with Professor Walker and other colleagues. Patients were dealt with on a "first come-first served" basis. The clinics were usually extremely busy due to the number of patients who attended. In 2015, Professor Walker became concerned that the claimant was not seeing as many patients as the other doctors during the Monday afternoon clinic. Professor Walker was also concerned that there had been negative feedback from the registrars who attended the Monday afternoon clinic, to the effect that they were not being provided with adequate support by the claimant. Professor Walker believed that these matters had impacted upon his own personal appraisals from the respondent. Enquiries made by Professor Walker showed that the claimant was on average seeing 4.9 patients at each clinic whilst the other doctors were seeing far more patients. This information was shared by Professor Walker with Dr Leech, head of the diabetes clinic, but not shared with the claimant herself. At page 62 is a copy of an e-mail dated 16 December 2015 in which Professor Walker informs Dr Leech that the claimant saw an average of 4.9 patients in an afternoon, whereas the other doctors in the same clinics saw an average of 9.9 patients per clinic. Professor Walker states in that e-mail, "I have not discussed these data with LS (the claimant) in relation to her performance as I do not do her PDR, nor am I asked to feed into the process."
- 4.3 The claimant was contractually obliged to undertake an annual appraisal. At page 58 in the bundle is an exchange of e-mails between the claimant and Mr John Davison (consultant geriatrician) relating to the timing of the claimant's annual appraisal for 2016. The claimant and Mr Davison agreed by e-mail dated 16 November 2015, that the claimant's annual appraisal would take place at the Freeman Hospital in Newcastle upon Tyne at 3:00pm on Monday, 11 January 2016. On 16 November, the claimant informed the senior medical secretary that her annual appraisal would take place on 11 January 2016 and that she would need to leave the Monday afternoon clinic at 2:30pm in order to attend the appraisal in

time. The senior medical secretary replied stating, "Thanks Lisa, I'll mark you down as you leaving clinic at this time."

- 4.4 The respondent accepted throughout these proceedings that the claimant had properly organised her annual appraisal, that she was entitled to do so during the afternoon when she ordinarily worked for the respondent, that the appraisal would last two hours and that this would mean that the claimant would be unable to return to her clinic once the appraisal was finished.
- 4.5 On 11 January 2016 both Professor Walker and the claimant were seeing patients at the Monday afternoon diabetes clinic. It was a particularly busy clinic. At that time, Professor Walker's wife was seriously ill. Professor Walker learnt that the claimant was due to leave that afternoon's clinic at 2:30pm to attend her annual appraisal. Although the claimant had properly ensured that details of the appraisal were included in the appropriate diaries, Professor Walker was apparently unaware that the claimant would be leaving the clinic at 2:30pm. This undoubtedly compounded what was already a stressful time for Professor Walker in a particularly busy clinic.
- 4.6 When Professor Walker was informed that the claimant was due to leave the clinic at 2:30pm to attend her annual appraisal, he approached the claimant in her consulting room at the start of the clinic. Professor Walker's version of this meeting is set out in paragraph 9 of his witness statement. He states:-

"I approached the claimant at the start of the clinic in her consulting room and said to her that I was aware that her appraisal was at 2:30pm but that we had a very busy clinic that day so would it be possible for her to come back after her appraisal to help finish the clinic. The claimant told me it was not possible for her to return post clinic as she was leaving my clinic at 2:30pm and following her appraisal she would be going home. I then mentioned the SPR criticism of the clinic and she told me that was my problem and nothing to do with her. I did not mention to the claimant the number of patients that she saw but I did confirm to her that this clinic was very busy and that we all needed to pull together. I did state that I was aware that the clinic that I had inherited her from was relatively quiet."

- 4.7 The claimant's version of this meeting appears at paragraphs 9-19 in her statement. The relevant extracts are:-

"At approximately 1:30pm Professor Mark Walker entered my room. He was clearly agitated. He took me by surprise. I cannot recall the exact words that Professor Walker used, but in summary he said that he felt that it was outrageous that I was going to leave the clinic to attend my appraisal and he instructed me to come back as soon as it had been done. He indicated that he had been told by

the centre manager that it would take no more than half an hour with Steve Parry. Professor Walker appeared very angry. I explained that whilst Steve Parry was responsible for my job plan review which took place annually (and usually did take half an hour) the appointment I had that afternoon was with Dr John Davison for my appraisal which would take significantly longer than a job plan meeting. I explained to Professor Walker that the appraisal had been booked some time ago with the appraisal meeting itself expected to take two hours. It was certainly not my fault that the clinic was busy. I had given the appropriate amount of notice to go to my mandatory appraisal which was clearly marked on the top of the clinic sheet for that day. Professor Walker told me he thought it was ridiculous that a GP like me should need to have a separate appraisal for diabetes. I advised him that it was Trust policy. Professor Walker indicated to me that other GPs who worked at the diabetes centre had their appraisals in GP time at their own surgeries. Professor Walker then indicated that he wanted to remind me about the previous conversation that he had had with me about his own poor feedback from the diabetes registrars and he suggested that his "*neck was on the line*" if the clinic was too busy and he would then get more complaints from the registrars. This seemed to be his main concern. Professor Walker advised me that he was going to speak to Dr Nicky Leech as he said I should not be having all of this time from the clinic. I rang my appraiser, Dr John Davison, and discussed it with him. He did agree to alter the start time of the appraisal to 4:00pm as a result of my request, which I only made because of Professor Walker's overtly aggressive behaviour towards me. I felt that I had been effectively bullied by Professor Walker into moving the time of the appraisal. Professor Walker then came back into my room. I advised him that I had put the appraisal back. I could see that Professor Walker was still very angry. I advised him that I had been really upset by the earlier conversation. I told him that I was having my appraisal because it was mandatory not because I wanted it. Professor Walker became angry again and told me that he did not want to have the conversation with me right now and that he "*had inherited me into his clinic and there were other clinics I could move to on other days that might be quieter.*" Professor Walker then went on to say that it was about workload and he was of the view that I only ever saw five patients in the clinic. I was shocked by this assertion and asked to see the figures upon which his comments were based. I was aware that I saw more than I was being accused of. Professor Walker then said that the situation might have changed and that he was under a lot of pressure to improve the clinic. He said that he had been ridiculed in front of his peers about poor clinic feedback. He said he was going to speak to Nicky Leech about it and that I should not be doing my mandatory training in clinic time because I only worked one session a week."

- 4.8 The claimant's evidence to the Tribunal was that she had been "extremely upset" by her conversation with Professor Walker. After the second time when Professor Walker had come into her room, one of the claimant's staff brought her a cup of tea, when she realised how upset the claimant was. The claimant went on to state, "I eventually left the clinic in a state of complete shock at 3:20pm to go for my appraisal, during which I took the opportunity to discuss the events that had occurred with Dr Davison. I eventually left the Freeman Hospital following my appraisal at 5:50pm."
- 4.9 On the evening of Monday, 11 January, the claimant typed out a record of the day's events, a copy of which appears at pages 74-76 in the bundle. The Tribunal found this to be an accurate record of what had happened that afternoon and in particular of what had been said by Professor Walker. The Tribunal found this to be a contemporaneous record of what had happened and which had been prepared as soon as possible after the incidents themselves. The Tribunal accepted the claimant's evidence that Professor Walker had been "overtly aggressive" and that the claimant had been "effectively bullied" by Professor Walker. The Tribunal accepted the claimant's evidence that Professor Walker had been "really quite angry" and had said that he "had inherited the claimant into his clinic and that there were other clinics which she could move to on other days that might be quieter". The Tribunal accepted the claimant's evidence that this was an implication from Professor Walker that he was not pleased that he had inherited the claimant and that he no longer wished her to work with him in his clinic. The Tribunal accepted that Professor Walker had said that the claimant "only ever saw five patients in the clinic". There was no way the claimant could have known about this from any other source. She had not been told by Professor Walker or anybody else about the statistics which had been obtained by Professor Walker at the end of 2015. The Tribunal accepted the claimant's evidence that after speaking to Professor Walker the claimant "sat in her room feeling completely devastated and extremely upset".
- 4.10 It is clear from Dr Leech's subsequent interview with Dr Wright on 22 March 2016, that Professor Walker had contacted her on the afternoon of 11 January. Dr Leech says in the notes of that interview at page 149, "MW contacted me straight away. MW felt it didn't happen quite the way it was reported. MW was worried about it."
- 4.11 On Wednesday, 13 January the claimant sent an e-mail to Ms T Mitchell (HR officer) and to Dr Steve Parry (clinical director for medicine) to which she attached a copy of her account of what had happened on Monday, 11 January. The claimant telephoned and spoke to Ms Mitchell on the morning of Wednesday, 13 January and was told that she would speak to Dr Parry. Ms Mitchell assured the claimant that she would contact her again on either Thursday, 14 January or Friday, 15 January. However, no such contact was made.
- 4.12 On Monday 18 January 2016, the claimant again attempted to contact Ms Mitchell but was unable to do so. The claimant sent e-mails to both Ms

Mitchell and Dr Parry and finally managed to speak to Dr Parry at 11:00am on Monday the 18th. Dr Parry admitted that he had received the claimant's e-mail, but had not opened and read the attachment, which was the claimant's written account of what had happened on 11 January. Dr Parry informed the claimant that he had already spoken to Professor Walker and that Professor Walker "was keen to apologise" in the clinic later that day. Dr Parry indicated to the claimant that Professor Walker had been under a lot of strain because of his wife's illness and that this had resulted in behaviour "that was not like him." At paragraph 28 in her statement, the claimant states that she informed Dr Parry, "I also indicated that my issue was the fact that Professor Walker had made a very personal and derogatory statement to me regarding his having *"just inherited me from another consultant"*. I indicated that this implied that Professor Walker did not want me in his clinic." The claimant goes on to state, "During the telephone conversation on 18 January 2016 I advised Dr Parry that I felt it would be difficult for me to go to the clinic and work because of the tension and unhappiness. Dr Parry told me that unless there was some extreme reason why I was unable to come to work that day then I would be expected to attend the clinic. He referred to the Trust policy regarding cancelling patients with less than six weeks notice." The claimant then says at paragraph 31:-

"I restated how upset I was and how disappointed I had been by his response to my complaint. I told him how difficult it would be for me to return to work with Professor Walker after what he had said to me. He told me that Professor Walker and I would just have to be professional and carry on as normal. He acknowledged that his response was not ideal but that he would try and sort things out."

- 4.13 The claimant then attended the Monday afternoon clinic on 18 January. At approximately 1:30pm Professor Walker entered the claimant's consulting room together with Ms Vicky Westgate (the diabetes centre manager). Professor Walker did not say why he had brought Ms Westgate with him. Professor Walker remained standing throughout this brief meeting and told the claimant that he had received a call from Dr Parry, concerning the fact that the claimant had raised a complaint with HR. Professor Walker said that he "should not have raised issues about my (the claimant's) clinical performance in the clinic setting". Professor Walker said that he was apologising for that. Nothing else was said about the events of 11 January 2016. The claimant described this meeting by saying, "I was both surprised and bemused by his attempt at apologising to me in what was a perfunctory manner and without empathy."
- 4.14 Professor Walker says at paragraphs 11 and 12 of his statement that he had received a telephone call from Steve Parry on 13 January, during which Dr Parry told him that the claimant had made a complaint about Professor Walker "shouting at her." Professor Walker had not shouted at the claimant and accepted that it would have been highly inappropriate to do so. Professor Walker accepted that he should not have raised performance issues in the clinical setting and confirmed to Dr Parry that

he would apologise to the claimant for this. Professor Walker said that he asked Ms Westgate to accompany him when he went to see the claimant to issue his apology as, "I felt it important to have a witness to this apology, given the accusation that I had shouted at the claimant the previous week, something which I continue to deny. I confirmed to the claimant that it was inappropriate for me to raise her performance in a clinical setting and that her decision not to come back from her appraisal put the clinic and me in a very difficult position."

4.15 The Tribunal accepted the claimant's version of this incident. Professor Walker did not apologise for the manner in which he had spoken to the claimant, nor did he apologise for his allegation that the claimant only saw five patients each clinic, nor that he had "inherited" the claimant from another clinic. The Tribunal found Professor Walker's explanation for asking Ms Westgate to attend, to be unpersuasive. The Tribunal found that this was an indication that Professor Walker did not trust the claimant or her account of what was said at this meeting. In fact, the claimant had never alleged that Professor Walker had shouted at her. Dr Parry had in some way indicated to Professor Walker that this was part of the claimant's complaint, which in fact it never had been. Professor Walker says at paragraph 14 of his statement, "To me, the claimant accusing me of shouting at her was a critical element of the accusation against me." The Tribunal accepted the claimant's evidence that Professor Walker's apology in these circumstances was "perfunctory and lacking in empathy". The Tribunal found that it was reasonable for the claimant to come to that conclusion. The claimant did not regard the apology as genuine, particularly because it did not refer to the comment that Professor Walker had "inherited" the claimant and that she could move to another clinic. Professor Walker has never apologised for those comments, nor for alleging that the claimant only saw five patients in each clinic.

4.16 On 20 January 2016, the claimant raised a formal complaint in writing, a copy of which appears at page 83 in the bundle. Her e-mail to Tracy Mitchell of HR states:-

"Having initially raised my complaint informally, I now wish to make a formal complaint about the events in the diabetes clinic on Monday, 11 January. I enclose this as an attachment. I would appreciate your acknowledging receipt of this complaint and I await your response."

4.17 By e-mail dated 21 January, Ms Mitchell replied stating:-

"I am sorry matters weren't resolved to your satisfaction – from the conversation I had with Dr Parry following the various conversations he had had with Dr Walker, Dr Leech and yourself, Steve and I were of the view that the matter had been resolved informally and that there were plans in place to address the issues going forward. I flagged your complaint with the medical director

Mr Welsh and he has asked Dr Michael Wright, one of his associate medical directors, to look into this.”

4.18 Dr Michael Wright gave evidence to the Tribunal about his investigation into the claimant's complaint. His evidence was that the claimant had not raised a formal grievance (which would ordinarily have been dealt with under the respondent's grievance procedure), but had made a complaint which the respondent was dealing with under its Dignity at Work policy. Dr Wright accepted that the claimant had never been told that her complaint was not being treated as a grievance but was being treated under the Dignity at Work policy. The chronological sequence of events with regard to Dr Wright's investigation was as follows:-

- (a) investigation meeting between Dr Wright and the claimant – 1 February 2016;
- (b) investigation meeting between Professor Walker and Dr Wright – 8 February 2016;
- (c) Dr Wright's meeting with Victoria Westgate – 17 March 2016;
- (d) meeting between Dr Wright and Dr Leech – 22 March 2016;
- (e) meeting between Dr Wright and the claimant – 9 May 2016;
- (f) Dr Wright's report of his investigation into the claimant's complaint – 7 July 2016;
- (g) Dr Wright's complaint outcome letter – 2 August 2016.

4.19 It was put to Dr Wright during his evidence to the Tribunal that his investigation into the claimant's complaint had taken an inordinate length of time. The two incidents on 11 January took place in the presence only of the claimant and Professor Walker. Each one lasted only a few minutes. Similarly the incident on 18 January took place in the presence of the same two people and Ms Westgate and again lasted only a matter of minutes. The claimant had provided a detailed written account before being interviewed by Dr Wright. No explanation was given as to why Professor Walker and Ms Westgate had not been asked to provide their own written account immediately thereafter. Dr Wright's explanation was that all of the clinicians involved are extremely busy people and that patient care must at all times take priority. Dr Wright explained how difficult it had been to arrange for the relevant people to organise their diaries so that they could meet to discuss the claimant's complaint. The Tribunal found Dr Wright's explanation to be wholly unsatisfactory. It was wholly unreasonable in all the circumstances of this case for it to take over six months for the investigation to be concluded and an outcome to be provided. These were serious allegations brought by a professional clinician who alleged that her professional integrity had been challenged and undermined by her line manager. All of the relevant persons were in

attendance at work throughout the relevant period – there was no evidence that any of them could not be interviewed because they were absent from work for any reason.

- 4.20 The Tribunal particularly notes that in the immediate aftermath of the claimant's complaint, Drs Wright, Leech, Parry and Professor Walker exchanged e-mails relating to collection of data relating to the number of patients seen by the claimant in her clinics. No explanation was given to the Tribunal as to why such an investigation was necessary when the complaint itself related to Professor Walker's personal behaviour towards the claimant and in particular the manner in which he spoke to the claimant, rather than about the accuracy of anything which had been said. No explanation was given as to why the question of the claimant's performance was given more priority than her complaint.
- 4.21 Upon examination of the documents in the bundle and the comments made by those involved, the Tribunal found that those involved were seeking to protect Professor Walker, and whilst perhaps not to justify his behaviour, certainly to explain it because of the stress he was under due to his workload and his wife's illness. Nowhere is any similar sympathy expressed towards the claimant. An example is at page 148, which is a note of the meeting between Dr Wright and Dr Leech on 22 March. That note recites how Professor Walker had raised concerns about the number of patients seen by the claimant and that the claimant "had not contributed much with primary care links". It records how Professor Walker had looked at the claimant's patient numbers and that she "doesn't see as many patients as others". Dr Wright asked how the claimant's figures compared to the other GPs and was told that she was seeing "a lot less" and that "Professor Walker was carrying the burden." Nowhere in this meeting is there any discussion about exactly what had been said to the claimant, or the impact it may have had upon her. The only discussion about the claimant relates to whether or not she could be placed in an alternative clinic.
- 4.22 The same thread continues in the actual report prepared by Dr Wright, which appears at pages 172-182 in the bundle. Dr Wright notes that the claimant's primary concerns were:-
- (a) Professor Walker told me that he had just inherited me from another consultant and that I could go and work in another clinic – this is an offensive comment;
 - (b) professional issues – off the cuff comment about how many patients I see in the clinic was not based on accurate data and I feel that it was inappropriate to discuss this issue at this time when he was visibly angry about my leaving to have my appraisal."

At page 175 Dr Wright records that Professor Walker claimed that his wife had been extremely unwell and that he had felt under a great deal of pressure. He accepted that he had raised some concerns about the

number of patients that the claimant was seeing in her clinic and that he had been under the impression that the claimant was to return to the clinic after her appraisal on 11 January. Professor Walker acknowledges that he was agitated, but denies shouting at the claimant. Professor accepted that he had used the term “inherited”, and that this might have been perceived negatively by the claimant, whereas that had not been his intention. Professor Walker felt it was appropriate for him to apologise on 18 January but because he had not shouted at the claimant on the first occasion, he felt it necessary to have a witness with him when he went to apologise. Professor Walker did not feel that the apology was perfunctory, but was genuine and an attempt to improve future working relationships. Dr Wright recorded that Professor Walker had not explained to Ms Westgate as to why he required her to be present, nor had he explained it to the claimant.

- 4.23 Dr Wright’s report ends with his “conclusions” at pages 180-181. Nowhere in those conclusions does Dr Wright make any specific finding as to what had been said by Professor Walker to the claimant on any of these three occasions. His conclusions record that Professor Walker accepted “he became angry” and that he told the claimant that he had “inherited her from another consultant”. Dr Wright records that Professor Walker did not intend to cause offence, but does not record whether it did cause offence to the claimant. He does not state whether he finds Professor Walker’s apology to have been perfunctory or inadequate. Professor Wright goes on to make three recommendations. The first is that “There does not appear to be a case for further action against MW”. The second is that “It does not appear that there is a patient safety concern” and the third is that “The department should clarify the arrangements and requirements for GPs and any other medical staff for whom the Trust are not the primary employer around mandatory training and appraisals.”
- 4.24 Nowhere is there a finding as to whether or not the claimant’s complaints are upheld or rejected. Nowhere is there any finding as to the extent of any hurt and upset suffered by the claimant. Nowhere is there any finding as to whether or not it would be reasonable for the claimant to continue working with Professor Walker and if not what other arrangements could be made.
- 4.25 The claimant had in fact tendered her resignation by letter dated 14 March 2016, addressed to Dr Leech. The letter appears at page 135 in the bundle and states:-

“It is with regret that I write to inform you of my intention to resign from my post as speciality doctor with immediate effect, having worked for 12 years in the diabetes centre. My decision to resign is a direct result of Professor Mark Walker’s unprofessional behaviour towards me on 11 January 2016. I had previously met and discussed this with Dr Wright (associate medical director) on 1 February, but sadly I have had no response some six weeks later. I

would be grateful if you can confirm what my notice period is please.”

- 4.26 That letter was written some two months after the incidents which formed the subject matter of the claimant’s complaint. By the time of her letter, Dr Wright had conducted meetings with the claimant and Professor Walker in the first week in February. Within three days of receiving that letter, Dr Wright met Ms Westgate, followed by Dr Leech a week later and again with the claimant on 9 May. The Tribunal found it more likely than not that the claimant’s resignation was what triggered those latter meetings. Even then, it took a further two months to prepare the report and over three weeks thereafter to produce the inconclusive outcome letter.
- 4.27 After submitting her letter of resignation on 14 March, the claimant enquired of the respondent as to whether she would be required to work her period of notice and if so for how long. She was told by HR that the standard notice period was three months but that “shorter or longer notice periods may apply where agreed between both parties.” The claimant’s reply on 15 March (page 138) was that:-

“Dr Parry in the immediate period following my problems in Professor Walker’s clinic made it clear to me that I had no choice but to continue to attend Professor Walker’s clinic because clinics could not be reduced without six weeks notice. He made it very clear to me that it was my professional obligation to fulfil my clinical duties in spite of the events that had occurred. So the only alternative to continuing to work was to go off on stress related sick leave, which is not appropriate. To interpret my continuing attendance at Professor Walker’s clinic as a sign that I was happy with events is a total misinterpretation – I essentially had no choice. I have continued to work with Professor Walker due to a professional obligation but I feel that I cannot continue to work with him in the long term.”

- 4.28 The respondent’s reply from HR (page 141) was:-

“As you have now advised us that you cannot continue to work with Professor Walker regardless of the outcome of the current investigation into your complaint, Dr Wright will ask that interim arrangements are put in place to move your clinic. This is not a long term option due to wider operational issues but we will try to accommodate it for the duration of your notice period.”

- 4.29 Eventually, the respondent agreed to release the claimant at the end of May 2016. The Tribunal accepted the claimant’s evidence that she considered it to be her professional duty and obligation to continue to see patients in her clinic until such time as arrangements could be made either to transfer her elsewhere or to release her from her contract. The Tribunal found that the claimant had no wish to continue working in the same clinic as Professor Walker and only did so because she considered it to be her

professional duty and obligation. The Tribunal found that the claimant would have left the respondent's employment as soon as possible, had she been able to do so without being in breach of that professional duty and obligation.

The law

- 5 The relevant statutory provisions engaged by the claimant's complaint of unfair constructive dismissal are set out in sections 94 and 95 of the Employment Rights Act 1996.

Employment Rights Act 1996

94 The right

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

95 Circumstances in which an employee is dismissed

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)--
- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
 - [(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
- (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if--
- (a) the employer gives notice to the employee to terminate his contract of employment, and
 - (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

6 It is the claimant's case that she was unfairly constructively dismissed in that she terminated her contract with notice in circumstances in which she was entitled to terminate without notice by reason of her employer's conduct (section 98(1)(c)).

7 The basic principles involved in the complaint of unfair constructive dismissal were simply set out by Langstaff P in **Wright v North Ayrshire Council UKEAT/S0017/3**:-

(1) A breach of contract by the employer.

(2) The breach is fundamental, or is, as it has been put recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract.

(3) The employee has resigned in response to the breach; and

(4) Before doing so has not acted so as to affirm the contract notwithstanding the breach.

8 In **Woods v WM Car Sales (Peterborough) Limited [1981] ICR 670**, Browne-Wilkinson J said:-

"It is clearly established that there is implied in a contract of employment a term that the employers will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The tribunals 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. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed."

9 That test was approved in **Lewis v Motor World Garage Limited [1986] ICR** when Lord Justice Glydewell said:-

"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, though 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? This is the last straw situation".

10 The Court of Appeal said in **London Borough of Waltham Forrest v Omilaju [2005] IRLR 35** with regard to the last straw:-

"Its essential quality is that when taken in conjunction with the earlier acts on which the employer relies, it amounts to a breach of the implied term of

trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective."

11 In **Malik v BCCI [1997] ICR 610** the Court of Appeal said:-

"Conduct must of course impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. Proof of a subjective loss of confidence in the employer is not an essential element of the breach."

12 Resignation must be in response to the breach. The correct position with regard to causation was set out in the judgment of Keane LJ in **Meikle v Nottinghamshire County Council [2005] ICR page 1:-**

"There are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other. The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigns in response, at least in part, to fundamental breaches of contract by the employer."

13 Again, coming back to **Wright v North Ayrshire Council**, the issue is whether the breach played a part in the resignation. It is not necessary to show that a particular breach was the effective cause of the resignation.

14 Once it is established that the employer has committed a fundamental breach of contract, the employee can choose either to affirm the contract or accept the repudiation. If the employee affirms the contract, he will lose the right to accept the repudiation and thus will lose the right to claim that he has been unfairly constructively dismissed. A lengthy passage from the judgment of Browne-Wilkinson J in **WE Cox Toner International Limited v Crook [1981] IRLR page 443** remains widely cited:-

"The general principles of contract law applicable to repudiation of contract are that if one party commits a repudiatory breach of the 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 must at some stage elect between those two possible causes. If he affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. The delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty for further performance of the contract, since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. Nevertheless, if the innocent party further performs the contract to a limited extent but reserving his rights to accept the repudiation, or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation. The Court of Appeal's decision in **Marriott v Oxford Cooperative Society [1071] QB196** establishes that, provided the employee makes clear his objection to what has been done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purposes is only to enable him to find another job. As was also said in **Bournemouth University v Buckland**, "When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays, there is a risk they will be taken to have affirmed. Ideally, a wronged employee who stays on for a bit whilst he or she considers their position would say so expressly. But even that would be difficult and it is not realistic to suppose that it will happen very often. For that reason the law looks very carefully at the facts before deciding whether there has really been an affirmation."

- 15 The Tribunal found that Professor Walker's comments made to the claimant on 11 January 2016 were inappropriate and hurtful and said in a manner which caused the claimant considerable distress and upset. Professor Walker accepts that he was angry and frustrated. He was at the time being subjected to considerable stress, both at work and at home. Professor Walker was armed with statistical information which he believed showed that the claimant was effectively not "pulling her weight", something which had never been disclosed to the claimant or discussed with her. The Tribunal found that it was reasonable for the claimant to interpret Professor Walker's words about having "inherited" the claimant from a less busy clinic as meaning that Professor Walker did not really want to have the claimant working in his clinic. The Tribunal found that these comments were likely to seriously undermine the claimant's position and amounted to a direct challenge to her professional integrity from her immediate line manager. The Tribunal found that Professor Walker's purported apology was, as was described by the claimant, no more than "perfunctory". Professor Walker's decision to take a witness with him whilst he apologised for a small part of what he had done, is further evidence that he did not really trust the claimant and was only apologising for those parts of his conduct which he accepted were

inappropriate. The Tribunal found that when viewed objectively, Professor Walker's apology was neither sincere nor genuine.

- 16 In **W A Goold (Pearmak) Limited v McConnell [1995] IRLR 516** it was held that there was an implied term in the contract of employment that the employer will provide a suitable procedure for resolving a grievance reasonably and expeditiously. The respondent in this case has attempted to justify its delay by saying that it was dealing with the claimant's complaint under its dignity at work policy rather than its grievance policy and that as a result the complaint did not need to be dealt with as speedily. The Tribunal rejected this argument. The complaints raised by the claimant were simple and straightforward. They should have taken very little investigation. The investigation which was carried out was unreasonable both in the length of time taken and inappropriate focus on the claimant's performance rather than on the impact upon her of what had been said by Professor Walker.
- 17 The Tribunal must look at the employer's conduct and, applying an objective test, consider whether it so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. In the present case, the Tribunal found that Professor Walker's conduct towards the claimant and the respondent's unreasonable approach to her complaint did amount to conduct likely to destroy or seriously harm the mutual relationship of trust and confidence. It is trite law that any breach of the relationship of trust and confidence will amount to a fundamental breach of the contract of employment. The Tribunal found that Professor Walker's behaviour and the respondent's unreasonable conduct of its complaints procedure did amount to a fundamental breach of contract.
- 18 The Tribunal found that the claimant resigned in response to that fundamental breach of contract and for no other reason. Dr Wright in his evidence to the Tribunal accepted that it was Professor Walker's behaviour which was the main reason for the claimant's resignation, but he also accepted that the delay in dealing with the claimant's complaint was a factor in her resignation.
- 19 The respondent has alleged that by continuing to work until 30 May, the claimant had effectively affirmed her contract of employment. The initial breach took place on 11 January, the claimant worked until submitting a letter of resignation on 14 March and then continued to work until 30 May. Ms Carver for the respondent referred to the fact that the claimant had worked for 20 weeks from the date of the first incident. She did however accept that this amounted only to 20 afternoons, which is equivalent to 10 full days. Ms Carver pointed out that the claimant in so doing, continued to work in the same clinic as Professor Walker. There was an element of regular contact between them for clinical reasons throughout that period. Ms Eeley's position on behalf of the claimant was that the claimant was professionally bound for reasons of patient care and patient safety, to work her notice or at least until such time as the respondent was in a position to release her. The claimant did no more than that. She made it clear to the respondent that she was only working because she felt professionally obliged to do so and wished to be released from her contract as soon as possible. Applying the principles set out in **Marriott v Oxford Cooperative Society**, the

Tribunal looked at the facts very, very carefully. The Tribunal found that the claimant had made it clear from the outset that she was genuinely distressed at what she saw as a challenge by her line manager to her professional integrity. She made it clear that she no longer wished to work with Professor Walker and was most unhappy about doing so. The Tribunal accepted the claimant's evidence that she only continued to work after submitting her letter of resignation because she considered it to be her professional duty and obligation as a doctor in all the circumstances. The Tribunal found that by so doing the claimant had not affirmed the contract of employment.

- 20 For those reasons the claimant's complaint of unfair constructive dismissal is well-founded and succeeds.
- 21 After a fairly lengthy discussion with both representatives, the Tribunal accepted that the respondent is entitled to call additional evidence relating to any compensation which may be payable to the claimant. In particular, the respondent may wish to call evidence to the effect that the claimant has failed to mitigate her loss. This is not a case where the claimant is suffering any particular financial hardship as a result of any short delay and I am satisfied that it is in accordance with the overriding objective, to deal with the case justly, to enable the respondent to challenge whether the claimant has indeed mitigated her loss. A remedies hearing will be listed as soon as possible with a time estimate of half a day.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

EMPLOYMENT JUDGE JOHNSON

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
2 March 2017
JUDGMENT SENT TO THE PARTIES ON
6 March 2017
AND ENTERED IN THE REGISTER
G Palmer
FOR THE TRIBUNAL**