THE INDUSTRIAL TRIBUNALS

CASE REF: 12362/18

CLAIMANT: **Nicola McAtarsney**

RESPONDENT: **Dr J Patterson/Dr C Kelly/Dr Quinlan/ Dr Wilson p/a Willowfield Surgery**

DECISION

The unanimous decision of the tribunal is that claimant was not unfairly constructively dismissed by the respondents. For the reasons stated, the claimant's claim is dismissed, upon the merits, without further Order.

Constitution of Tribunal:

Employment Judge: **Mr J V Leonard**

Members: **Mr Atcheson**
Mrs Gilmartin

Appearances:

The claimant was self-represented.

The respondents were represented by Mr R Smith, Barrister-at-Law, instructed by Biggar & Strahan, Solicitors.

Background

1. The respondents are medical practitioners and they were at the material time in medical practice as "Willowfield Surgery", conducting that medical practice from surgery premises located at 5 Castlereagh Parade, Belfast.

2. The claimant commenced employment with the respondents as a medical receptionist (or "clerical officer") on 1 May 2003. This employment, it would appear, was without incident of material concern to this tribunal save to mention that, on account of the duration of the claimant's employment as a medical receptionist with the respondents, the claimant regarded herself as being a "Senior Medical Receptionist"; however, that job title or organisational status was not expressly reflected in any written job description afforded to the claimant for a considerable part of this employment. Certain events then occurred and the claimant has instituted proceedings which now come before this tribunal for determination.

The Procedure, Issue to be Determined and the Sources of Evidence

3.1 The claimant's claim before the tribunal has been subject to case-management and there have been two Case Management hearings which, respectively, took place on 29 November 2018 and 8 March 2019. As a consequence of these hearings detailed directions have been given by an Employment Judge in relation to the interlocutory processes to be followed and also in regard to adoption of the witness statement procedure in this case.

3.2 The witness statement bundle provided to the tribunal contains a witness statement from the claimant and, in respect of the respondents, witness statements are included from the respondents' Practice Manager Ms Gail Bowen and from the respondents' medical practitioners, Dr Catriona Kelly, Dr Jonathan Patterson, Dr Marjorie Quinlan and Dr Neil Wilson. There were two further witnesses providing evidence in the case. Firstly, a witness, Mrs Louise Briggs, appeared before the tribunal on foot of a Witness Attendance Order which had been requested by the claimant. Further to that, upon application by the claimant in the course of the hearing and without objection from the respondents' representative, the claimant's sister, Mrs Karen O'Neill, provided oral evidence to the tribunal. In respect of those witnesses in the case who were subject to the witness statement procedure, each witness gave their evidence-in-chief in the form of a witness statement which had been exchanged in advance of the hearing. Each such witness adopted their witness statement as evidence-in-chief. These persons were then subject to cross-examination and to re-examination, as applicable. The two additional witnesses gave oral evidence-in-chief and were then subject to cross-examination and to re-examination, as applicable. There was also before the tribunal an agreed bundle of documents. That bundle ran to some 435 pages and this was referred to throughout the course of the hearing, as adduction of the evidence proceeded.

3.3 The claimant's claim, as comprised in her claim form dated 26 July 2018, consisted of an allegation of unfair constructive dismissal on the part of the respondents. In the response thereto submitted on behalf of the respondents, it was denied that the claimant had been constructively dismissed. A submission was also comprised in the respondents' response that the claimant's case was out of time and that it should not be entertained by the tribunal for want of proper jurisdiction. At the outset of the hearing of the matter, the tribunal explored with the parties the "time issue", as raised on behalf of the respondents. After some discussion, it was conceded by the respondents' representative that there was no time issue requiring to be determined by the tribunal. The representative confirmed on behalf of the respondents that it was accepted that the tribunal had indeed proper jurisdiction to proceed with a hearing of the claimant's claim of constructive dismissal. Accordingly, the tribunal had to determine the issue of whether or not the claimant had been unfairly constructively dismissed by the respondents. After some further discussion, it was agreed between the parties and with the tribunal that the tribunal's immediate task was to determine the substantive case upon the merits, that is to say whether or not the claimant had been unfairly constructively dismissed. If the case were then determined in favour of the claimant, it was agreed that further directions would be made by the tribunal in order to enable the case to be listed thereafter for a hearing upon the matter of remedy. Thus the case proceeded as a merits hearing only.

The Sources of Evidence and Facts Determined

4. In consequence of the oral and documentary evidence adduced, the tribunal upon balance of probabilities made the following material determinations of fact, pertinent to the issues requiring to be determined.

4.1 The respondents are medical practitioners. At the material time they practiced as "Willowfield Surgery", from premises located at 5 Castlereagh Parade, Belfast. The claimant commenced employment with the respondents in the role of a medical receptionist (otherwise "clerical officer") on 1 May 2003. Nothing of note was brought to the tribunal's attention in evidence save that on account of the duration of the claimant's employment in her role as a medical receptionist with the respondents the claimant regarded herself as a being a "Senior Medical Receptionist". She asserted that the former Practice Manager, by 2012, had come to accept that specific status attaching to the claimant's post and indeed had introduced the claimant to a new Practice Manager, Ms Gail Bowen, as such. There was however no evidence that this was in any way expressly reflected in any written job description afforded to the claimant. In that regard the tribunal inspected the claimant's original statement of main terms and conditions of employment and therein she is described as a "clerical officer". There was then, in March 2012, another contract of employment afforded to the claimant wherein she was described as "Receptionist". The claimant signed acceptance of these latter terms on 28 May 2012. However, the claimant did maintain that this issue of her seniority within the practice was *de facto* recognised, at least up to the time Ms Gail Bowen commenced as Practice Manager. Any such title was however not formalised at that point.

4.2 In January 2012 the then Practice Manager was due to leave and was due to be replaced by Ms Gail Bowen, who had secured that Practice Manager's post after a recruitment exercise that seems to have commenced in the autumn of 2011. The two worked briefly alongside one another until 28 February 2012 when the former Practice Manager retired. At the time this vacancy arose, the claimant appears to have had an ambition to become Practice Manager. A staff appraisal note indicates that the claimant was disappointed that she had not been considered for the Practice Manager's post.

4.3 In the evidence, there were certain references made to a number of the incidents or events, the surrounding circumstances of which shall have been necessarily viewed by the claimant in a subjective manner, whilst others might have taken a different perspective or might have concluded differently. A considerable part of the claimant's evidence consisted of her subjective interpretation of particular facts and circumstances pertaining to these incidents. At times, the claimant's evidence and her interpretation was substantially at variance with others giving evidence to the tribunal. The tribunal's task was to bring to bear an objective assessment of matters in order to establish the reality concerning such incidents and events. The tribunal shall in this decision refer to the pertinent facts concerning a number of events to which the claimant has attached significance in the presentation of her case. The tribunal shall scrutinise these events and circumstances individually and then shall apply an overarching or comprehensive assessment concerning the issue of potential unfair constructive dismissal, as asserted by the claimant.

4.4 A short time after Ms Bowen commenced working in the practice an incident occurred which resulted in a grievance being raised by another employee ("JC"). That person had complained that the claimant had approached JC on 19 January 2012 and that the claimant had spoken to her in a manner which caused JC to become upset. JC had considered the approach by the claimant to be aggressive and indeed tantamount to bullying. JC reported that she was so upset by the claimant's conduct towards her that she had considered leaving her post. Ms Bowen held an individual meeting with JC and thereafter with the claimant, the notes of which meetings were recorded in Staff Discussion Records prepared by Ms Bowen, copies of which were viewed by the tribunal. As part of the process emerging from the meeting with JC, Ms Bowen agreed to clarify with the claimant any Receptionist role in the practice. Ms Bowen also agreed to organise training to help the development of positive communication and dealing with conflict. In further discussions between Ms Bowen and the claimant at the time, Ms Bowen confirmed that the grievance complaint on the part of JC was being dealt with informally.

4.5 Ms Bowen in the course of her meeting with the claimant recorded the claimant's perspective on matters, including that the claimant had apologised to JC at the time. It is clear from the Staff Discussion Record dated 23 January 2012, as viewed by the tribunal, that Ms Bowen was endeavouring to resolve matters upon an amicable and an informal basis. Ms Bowen's recollection was that she was simply attempting to resolve a conflict between two staff members. Ms Bowen also clarified to the claimant in the course of her 23 January 2012 meeting that the practice did not have a Senior Receptionist role and that all receptionists were the same level (other than JC who was new to the team and still learning). It is worthy of mention that the claimant took issue with the Staff Discussion Record pertaining to the foregoing meeting, which has been signed by Ms Bowen but not by her. However, the tribunal accepts the further evidence that such records were placed in a "pigeonhole" or work tray reserved for each member of staff, as applicable. Accordingly, this written record of the 23 January 2012 meeting would have properly come to the claimant's attention. The claimant did not raise any issue regarding the content and accuracy of the record at the time. A short time after, there was a Support Staff Meeting held on 26 January 2012 which was attended by the claimant. The written record of this meeting records that it was discussed that there was no Senior Receptionist role within the practice. However the note proceeds to record that if such a post did become available in the future, it would be the subject of an internal advertisement, with job description and person specification and that anyone interested would be entitled to apply.

4.6 The claimant's perspective concerning the foregoing events was somewhat different to the version recorded in the documentation prepared at the time by Ms Bowen. In her evidence to the tribunal the claimant stated that she regarded herself as having been subjected to unwarranted criticism on account of raising a matter (concerning her interaction with JC on the foregoing occasion) which the claimant stated ought to have been escalated as a significant event. The claimant's perspective also included the view that Ms Bowen's confirmation in the course of the 23 January 2012 meeting that there was no Senior Receptionist role was tantamount to an effective demotion of her role. However, the claimant did not raise any formal or informal grievance at the time and she appeared to continue to work under the practice terms and conditions of employment, including those terms that had been clarified to her regarding her job title and function. If she regarded any part of this as constituting a breach of any express or any implied term of contract, the claimant

took no action whatsoever and she effectively acquiesced in the matter. Indeed, as mentioned, the claimant signed acceptance of substituted contractual terms which had been provided to her in March 2012 wherein she was described as “Receptionist”. The claimant signed acceptance of these terms on 28 May 2012. There is no evidence that at any time did the claimant protest or object to any of these terms. The tribunal’s task was therefore (in the context of the entirety of the claimant's claim) to determine if any breach of contract had occurred in 2012 which might ground or might contribute to a constructive dismissal in the light of the endeavour made by the claimant to add these 2012 events and circumstances to a list of matters which she contended represented a series of significant and material breaches of contract on the part of the respondents.

4.7 There were no events of significant conflict occurring in the immediate aftermath of the foregoing matters in 2012. The claimant was indeed promoted in December 2012 to the post of Senior Receptionist after work had been done to identify such a post and the claimant had been afforded an opportunity to apply. The promotion process appears to have been informal. The claimant's satisfaction at being promoted to Senior Receptionist was, as she saw it, somewhat undermined by the subsequent promotion of JC also to Senior Receptionist. Whilst in her written evidence, the claimant endeavoured to convey the impression that JC had “a mere few months” of experience in the practice at the time JC’s promotion occurred, the promotion of JC occurred in October 2013, some 10 months after the claimant's promotion and indeed JC had already been working in a junior capacity in the practice at the time of the claimant's promotion. The claimant's view was that it was unnecessary for both she and JC to be Senior Receptionists. She seems to have felt that in some way this subsequent promotion undermined her status in the practice as a long-serving employee. That was an entirely subjective view.

4.8 However, Ms Bowen’s evidence was that, in effect, she "championed" the claimant, including in assisting the claimant to secure the promotion to Senior Receptionist and also by arranging for a salary increase. The claimant did not seek directly to challenge this evidence. Far from there being objective and persuasive evidence of a strong antipathy held by Ms Bowen towards the claimant, in any manner demonstrated from the outset of their working relationship in 2012 and continuing thereafter, there is a dearth of any such evidence of any persuasive nature, including any such up to 2016, when, to take one illustration, at that time the claimant felt close enough to Ms Bowen so as to take the latter into her personal confidence regarding a mortgage application that the claimant was making and an invitation to attend a house viewing concerning a property which the claimant was considering purchasing. These were manifestly not the actions of an employee who feels subjected to an oppressive, highly critical and dictatorial managerial style, which the claimant had endeavoured to attach to a depiction of Ms Bowen’s conduct towards her as Practice Manager. Certainly copies of contemporary text messages exchanged at that time between the two do not show anything other than a close and friendly personal relationship between the claimant and Ms Bowen. To take another example, the tribunal viewed copies of text messages between the two showing evidence of the claimant's thanks and sincere appreciation communicated to Ms Bowen concerning a Christmas gift from Ms Bowen to the claimant. The tribunal's assessment from the context is that these sentiments were entirely genuine and demonstrate no difficulty or friction whatsoever between the two.

4.9 The claimant's basic position regarding Ms Bowen's attitude, both to her and also to other members of staff, was that Ms Bowen from the outset of the tenure of her post had endeavoured to assert her authority and, as far as the claimant saw it, to "put her in her place". To assist in conveying this impression of Ms Bowen's attitude, both to the claimant and also to others, the claimant requested a Witness Order in respect of a former employee of the practice, Mrs Louise Briggs. The claimant questioned Mrs Briggs about her experience of working in the practice and indeed how this had come to an end. Mrs Briggs provided evidence that she was quite unhappy about a number of events and circumstances in the practice, both before and also after Ms Bowen had commenced as Practice Manager.

4.10 It was clear to the tribunal that Mrs Briggs was a reluctant witness before the tribunal and that this reluctance stemmed from some difficult personal experiences in the past which she was reluctant to have re-opened, including some matters connected with her work in the practice. In a letter of resignation from the practice dated 6 July 2012, Mrs Briggs, who was apparently then on sick leave due to work-related stress, referred to a significant deterioration in the working environment over an extended period. She stated that a lot of this pre-dated Ms Bowen's time within the surgery. However, whilst Mrs Briggs was, in her oral evidence given to the tribunal, critical of Ms Bowen's interaction with her, it was fully clear that she had experienced issues which stemmed from a time well before Ms Bowen had commenced employment. There also appeared to be issues concerning personal circumstances outside the practice, including pressures associated with Mrs Briggs studying for a university degree. Some of these issues are apparent from the copies of Staff Discussion Records provided to the tribunal, dated 6 March and 9 May 2012, concerning the discussions between Ms Bowen and Mrs Briggs. However, the tribunal also had sight of some staff appraisals concerning Mrs Briggs around the material time which did not appear to demonstrate or expressly allude to any of the issues which were portrayed, otherwise, as significant grievances and issues as articulated in the evidence of Mrs Briggs to the tribunal. In summary, the claimant wished to introduce the evidence of Mrs Briggs in order to afford some manner of corroboration to the suggestion that Ms Bowen and also (it must be presumed) some of the medical practitioners, had a predisposition or an approach to employees of the practice which caused specific difficulties and friction in the workplace, including matters which directly affected the claimant. The tribunal having considered all of this evidence, both oral and documentary, in its overall conclusions considered any weight and any persuasive value flowing from the evidence of Mrs Briggs in that regard, insofar as that might have given assistance or context to the claimant's contentions. The tribunal shall deal with this matter further in its conclusions mentioned below. Further to that, the tribunal also heard evidence from the claimant's sister, Mrs Karen O'Neill, which sought to reinforce the claimant's evidence by the witness agreeing to the claimant's suggestions, including the suggestion that the claimant had considerable difficulties in her working relationship with Ms Bowen, was extremely stressed and also that the claimant's decision to resign from employment was not made lightly and was made after discussions with Mrs O'Neill.

4.11 It is worthy of mention that there was also a suggestion made by the claimant that Ms Bowen had been instrumental in the departure of a Dr Boyd from the practice. However, the tribunal found no persuasive evidence to support that suggestion.

4.12 The claimant's evidence, provided it has to be said in a very candid manner, dealt with specific issues concerning the claimant's problems with sleep and feeling stressed. It seems that the claimant had experienced such sleep deprivation and associated issues and problems over a considerable period of time. The claimant in her evidence connected this sleep deprivation with times when she experienced issues of stress. She specifically alluded to an episode which occurred in early May 2017 when she self-certified as unfit for work. In the claimant's witness statement she did not directly seek, expressly, to link this episode with stress in the workplace. The claimant's specific reference in regard to this episode related to her return to work on Monday, 15 May 2017. The claimant referred to the fact that Ms Bowen had requested that the claimant would work in a first-floor office. In her witness statement evidence the claimant referred to being requested by Ms Bowen to clear out her basket. However, having explored the additional evidence concerning this request, the tribunal notes that the proper context and explanation for this request was that any documents properly for the attention of any individual employee would have built up in that employee's absence from work. Therefore these would require to be attended to upon return to work and nothing more than that. There was no adverse significance to be attached to the claimant being asked to work in the first-floor office. The tribunal accepts Ms Bowen's explanation that this would have afforded a quieter environment upon which the claimant might return to work. This approach had indeed been used in another instance concerning another employee who had been absent from work due to illness. The idea was to afford a quieter environment for return to work, rather than the employee being made to resume very busy and demanding front-line duties, from the outset of the return, in reception. The subjective impression harboured by the claimant, as she expressed it to the tribunal, was that she was being "sidelined", as she put it. However, that subjective impression is not supported by any objective corroboration or assessment concerning the specific situation.

4.13 The claimant's allegation, also at this time, was that Ms Bowen had requested that she compile a list of her duties and she found that request to be "odd", as she put it. Ms Bowen's explanation for this in evidence was that the claimant had made a verbal flexible working request for a reduction in hours as she was trying to get a better work/life balance. Accordingly, Ms Bowen offered to sit down with the claimant and to go through her tasks in consideration of that request. When the claimant then decided not to proceed with that request, she had indicated that she appreciated the time that Ms Bowen had taken in regard to the matter and wished to thank her for that. The claimant did not seek directly to challenge this latter evidence and the explanation thus afforded, which was accepted by the tribunal.

4.14 A further issue raised by the claimant in this case relates to Cognitive Behaviour Therapy ("CBT"). This matter perhaps serves as an illustration of the claimant's perspective on matters which was considerably at variance with perspectives held by others with whom she interacted. It was clear that CBT emerged as a possible treatment which would benefit the claimant. It seems that the claimant had seen her own GP who had suggested CBT, but there was seemingly a waiting list for that treatment. One indication emerging from the evidence was that the waiting list time could have been at least four months. Ms Bowen informed the claimant that the respondents were happy to pay for privately-funded CBT in order to assist. What was, on the face of it, a rather generous offer (indeed the claimant conceded that she was "touched by it") then became entangled in a perceptional difficulty on the claimant's part, for the following reason. A CBT therapist named Linda Skeats, who

was attached to the respondents' practice was (at least as far as the evidence of Ms Bowen was concerned) by agreement between the claimant and Ms Bowen, to be approached purely to ascertain the names of professional colleagues who might assist, rather than Ms Skeats herself being engaged to conduct the CBT. The claimant's perception however was that Ms Skeats was to provide CBT, as it were, "in-house". The claimant felt that that was quite inappropriate. This indeed was also the view taken by Ms Bowen. She indicated that the only reason for endeavouring to approach Ms Skeats was for the purpose of ascertaining from the latter the identity of some other CBT professionals who might provide such privately-funded assistance to the claimant, at the expense of the respondents. For whatever reason, the respondents' offer to pay for CBT was not taken up by the claimant. Worse than that, whilst this objectively-viewed constituted a clearly generous offer, it was perceived by the claimant as constituting in some manner pressure placed upon her to take CBT "in-house", which the claimant felt to be totally inappropriate. This constitutes one of the illustrations or instances that the claimant has sought to add to her list of factors or issues supporting her constructive dismissal case, but the claimant's subjective assessment of this appears to be quite at variance with the objective reality of the situation.

4.15 A further illustration of the claimant's subjective view of matters is her claim that on the morning when she returned to work, 15 May 2017, two of the doctors in the practice, Doctors Kelly and Quinlan, effectively "blanked her" by walking straight past her in the corridor on the first floor and by not acknowledging her presence. In evidence, firstly, Dr Kelly stated that she had no recollection of this matter and she further stated that she did not believe that she would ever have intentionally blanked someone; however, it was a busy practice and sometimes situations meant that people had to interact appropriately in a very busy workplace. Dr Quinlan's recollection was expressed in similar terms to Dr Kelly's and she portrayed a friendly, inclusive, relationship with all members of staff and stated that she was not aware of any such problem in relation to the claimant. The claimant's evidence concerning Doctors Quinlan and Kelly also alluded to the claimant's perception of being "blanked" on more than one occasion in the practice tea room, as the claimant put it, "usually on a Tuesday morning before the surgery started". The claimant asserted that this could not have been accidental due to the small size of the room. Again, both Dr Kelly and Dr Quinlan could not recall any issue of concern regarding this perception being expressed by the claimant. They could not perceive how such a perception could have been engendered by their conduct or on account of any intentional omission to interact with the claimant. The tribunal's conclusion is that there is no objective substance supporting the claimant's subjective impression in that regard.

4.16 Another issue raised by the claimant in these proceedings, relates to endeavours by the claimant to attend a hospital appointment for a potentially significant medical issue. Without going into all the detail of the specific evidence in regard to this matter, the tribunal's assessment of all of the evidence is that Ms Bowen was concerned for the claimant's personal welfare and within the strictures of ensuring proper staffing for the medical practice in order to enable the claimant to attend appointments, she behaved appropriately. Indeed, the claimant was critical of Ms Bowen for not enquiring about her welfare after an appointment had concluded. The other way in which this could be properly perceived is that Ms Bowen did not wish to be unnecessarily intrusive in a potentially delicate matter concerning the claimant's health and that would of course be quite understandable. However, the

claimant's subjective perception, in this matter as well as in a number of other matters, at the time these proceedings are being taken, is that Ms Bowen was obstructive and indeed uncaring. The tribunal sees no persuasive, objective, evidence to support that subjective perception on the claimant's part.

4.17 The claimant also sought to include a reference to another employee's medical information being accessed by Ms Bowen, "clearly without … (that person's) … knowledge or consent". This is an example of the claimant arriving at an adverse conclusion without being fully conversant with facts. As was explained to the tribunal, that other employee had indeed provided proper consent for her medical records to be accessed. At hearing, the claimant was compelled to retract that suggestion. Somewhat in the same vein, the claimant in her evidence raised a very significant allegation which related to Ms Bowen having some specific information regarding a medical incident relating to the claimant's medical history which had taken place some 26 years before. Ms Bowen vehemently denied what would have amounted to quite a serious allegation of her gaining an entirely inappropriate access to the claimant's confidential medical records. Having examined all of the evidence in respect of this allegation, the tribunal does not find any objective evidence to support such a proposition. Indeed, the tribunal notes that the matter was the subject of a complaint to the Office of the Information Commissioner ("ICO"). The ICO found nothing, after what must be presumed to be a full and proper investigation, to support the complaint.

4.18 A further matter raised by the claimant relates to an incident which occurred on 27 November 2017. It seems that a patient had walked out of an appointment with one of the medical practitioners Dr Patterson and that the patient was in a subsequent telephone call to the practice asking to speak to another of the partners, Dr Quinlan. The claimant, seemingly having misunderstood the situation, put a message through for the other partner. When asked to explain why she had done that, the claimant offered to contact the patient to explain her mistake. In her evidence, Dr Quinlan did not remember the particular conversation and Dr Patterson explained that the conversation with the claimant was simply a conversation about how best to deal with a difficult patient. Dr Patterson had believed at the time that the issue had been dealt with and that there was no resultant difficulty in his relationship with the claimant. Again, this matter has been employed by the claimant as another illustration of what she contends to be conduct by the respondents which, taken together with other alleged conduct, goes towards the heart of the contract and the fundamental terms contained within the contract.

4.19 The claimant further referred in her evidence to an incident which occurred on 30 November 2017 when she stated that Dr Kelly had a patient in the treatment room waiting for an ambulance. Again, without going into all the details of this matter, it transpired that this was recorded as a Significant Event within the practice. However, Dr Kelly in evidence indicated that this had occurred actually on 28 November 2017 when she was dealing with an emergency patient who had suffered a heart attack and she had called an ambulance. The claimant had been permitted to leave work and there was a suggestion that the reception was left understaffed. Dr Kelly explained that the purpose of recording a Significant Event was not to apportion blame but to identify how the practice might be improved in the future. The analysis was that in the particular circumstances, a Senior Receptionist ought not to have left, notwithstanding being given permission to leave. Dr Kelly felt that the matter had been however dealt with appropriately and she was not aware of any

lingering animosity or ill-feeling. Notwithstanding that, the claimant's perception is that she felt undermined by the events that had occurred at that time.

4.20 Another incident referred to by the claimant as constituting an illustration of the conduct visited upon her by the respondents relates to an incident when there was a suspected gas leak affecting the premises which seemingly occurred on 1 March 2018. The tribunal endeavoured to separate out the claimant's general criticisms of the manner in which this suspected gas leak was dealt with by the practice from any issue which might have constituted specifically adverse treatment of the claimant. In short, a potential gas leak was detected. The claimant appears to have been critical of the slow response to this on the part of Dr Wilson. However, technical assistance was obtained, carbon monoxide readings were taken and the matter was resolved. The claimant indeed sought to introduce photographic evidence of the alleged effect upon her of this incident. The tribunal found this to be of no probative value concerning the claim pursued by the claimant in these proceedings.

4.21 Associated, to an extent with the foregoing matter, as this occurred on same day, was an interaction by text and telephone call between the claimant and Ms Bowen concerning the claimant wishing to start work 45 minutes early. This occurred on a day when Ms Bowen was off work. She had an understandable reluctance to attend to work tasks unless they were in some way urgent or could not have been otherwise dealt with, upon her day off. It appears that Ms Bowen telephoned the claimant and a telephone call proceeded over approximately 4 minutes. The claimant's perception was that she was not trusted by Ms Bowen to have an earlier start time. However, in the tribunal's assessment this was not a matter of material significance to the issue of the allegations of fundamental breach of an express or implied term of the employment contract.

4.22 The tribunal is reluctant to go into the minutiae of detail concerning certain further illustrations or instances that have been raised by the claimant in these proceedings, in order to support her assertion of a series of contractual breaches. This is so as these matters are, by any objective assessment and if they were indeed found to have occurred in the manner described by the claimant, matters that are entirely trivial and inconsequential. It is perhaps worthwhile providing one such illustration. Such matters include, for instance, the claimant endeavouring to adjust her working hours in order to attend Tai Chi classes, which request had been referred to an external human resources organisation engaged by the practice called Personnel & Training Services ("HR"). The claimant's allegation was that Ms Bowen had made what she subjectively perceived to be hurtful comments to her regarding a recounting of HR laughing out loud and remarking that the next thing would be that staff would require time off to attend to Origami classes. Making this specific remark was denied by Ms Bowen. However, Ms Bowen did state that she had discussions with HR who did raise the issue that other staff might also make similar requests which might have made it difficult for the operational management of the practice. In pursuance of this request Ms Bowen did discuss this with the partners and changes in rotas were consequently made to accommodate the claimant's request. The evidence of this discussion at practice management level is contained within documentation concerning the (partially-redacted) minutes of a partners' meeting held on 23 January 2018, were it is clear that the claimant's request was being properly taken into consideration. Further illustrations of these asserted matters relate, for example, to the claimant's perception at a Christmas event when the topic of her former employment with another medical practice was

discussed and she gained the impression that she was being encouraged to leave and to return to that medical practice. She also gave an illustration of one of the doctors singing in her presence the Beatles song "Get Back" and thereby intentionally making the suggestion that she should leave the respondents' practice and return to her former employment. These interpretations were fully denied by the medical practitioners concerned. The tribunal does not determine upon the weight of the evidence any specific facts arising from these allegations supporting the proposition that these constitute clear illustrations of an endeavour in any manner to force or to persuade the claimant to leave employment with the respondents. These matters also included the suggestion that Ms Bowen engaged in (unspecified) rude and intimidating behaviour towards the claimant and used tactics which were "subtle but effective". One allegation was that if the claimant approached Ms Bowen at a time when the latter did not want to speak she would make a jerking motion with her head and stare at the claimant "with unblinking eyes" and that this had occurred frequently towards the end of the employment. This was denied by Ms Bowen and the tribunal, for want of compelling evidence, did not find in favour of the claimant in terms of these suggestions.

4.23 Another specific matter that might, in assessment, be properly and objectively deemed to fall within the category of trivial or inconsequential but which has been raised by the claimant relates to the date 28 March 2018. On that day the claimant's allegation is that Ms Bowen sighed audibly and showed her annoyance and intolerance of the claimant. The particular significance of this incident is that the claimant depicts this alleged event as constituting the "last straw", beyond which point she could not reasonably have been expected to tolerate the alleged series of breaches of contract that the claimant states were visited upon her. As a consequence, she asserts, she accepted the repudiation of the employment contract and resigned. As the claimant has attached particular significance to this "last straw" event, the tribunal would propose to address specifically the available evidence concerning this matter and any conclusions of fact in that regard. In respect of this allegation, Ms Bowen's evidence was that this particular time marked the end of the practice's financial year. Ms Bowen worked part-time only and she had a day and a half left in that particular working week to complete a substantial amount of paperwork to a tight deadline. Ms Bowen's evidence was that at no point on 28 March 2018 did the claimant mention to Ms Bowen about the claimant being under pressure or needing any assistance with the reception tasks. From the claimant's witness statement evidence, the allegation is made that on that date Ms Bowen did sigh audibly and show her annoyance and intolerance of the claimant when the claimant rang from the front desk for an update on administrative procedures. Having assessed all of the evidence, at its height Ms Bowen might have perhaps displayed a degree of irritation or frustration with the claimant when the claimant interrupted Ms Bowen's work and thought processes. However, when matters are set in the proper context of Ms Bowen working to a tight deadline, that is perhaps understandable especially so if Ms Bowen felt that her pressing work was being interrupted and impeded by an issue which could have been dealt with in a different manner. Ms Bowen's witness statement evidence was that she was, as she put it, "snowed under" at the time. The claimant chose not to cross-examine Ms Bowen further upon this matter in the course of the hearing. In the tribunal's assessment, this would have constituted nothing in any manner out of the ordinary and it would have been an entirely routine and normal experience and verbal interchange between two members of staff occurring in a very busy workplace. The claimant's further evidence was that over the Easter weekend following this incident

she experienced another difficult night's sleep worrying about her work situation. Having considered all of this evidence, it is difficult to perceive or to comprehend how this minor and relatively inconsequential incident, even expressed at its height and through the entirely subjective assessment brought to bear upon the incident by the claimant, could have led to such a degree of worry and anxiety on the claimant's part that she decided to tender her resignation: that this was the "last straw", as the claimant has asserted.

4.24 The claimant wrote a letter, by hand, dated 4 April 2018, addressed to Ms Bowen, which was received by the medical practice on that date. It is worth mentioning the content of that letter, which reads as follows:-

> "*Dear Gail Bowen,*
>
> *Please accept this letter of resignation for my position as Senior Receptionist. My last day with Willowfield will be Wednesday 2 May 2018.*
>
> *Thank you for allowing me to grow professionally in my role. I appreciate the support and guidance I received and the knowledge I gained by working at Willowfield Surgery.*
>
> *If there is anything I can do to make my departure a seamless process, please let me know. I am happy to train a replacement if needed.*
>
> *Best wishes to you and my co-workers.*
>
> *Yours sincerely*
>
> *Nicola McAtarsney*"

4.25 When questioned about the composition and content of this letter in cross-examination and the fact that it did not include any references whatsoever to the issues which the claimant has now sought to bring to the attention of the tribunal, the claimant stated in evidence that she had obtained the text of this letter as a standard letter from YouTube. The tribunal found this evidence rather unconvincing for the reason that it is more probable that any person employed as a senior receptionist would have been inclined, if they were producing a generic letter taken from the Internet, to reproduce that text in electronic or typed format. However, it is notable that the claimant took the opportunity to hand write this letter in very personal terms to Ms Bowen. After doing so, the claimant has chosen not to make any mention whatsoever of any of the issues upon which the claimant now seeks to rely in her claim of unfair constructive dismissal. This is clearly not a "generic" letter intended merely to communicate the fact of a resignation, by any assessment. The claimant also chose to provide notice of leaving amounting to 4 weeks and did not engage in a summary resignation, notwithstanding suggestion that she had experienced "the last straw" in terms of her treatment by the respondents. The claimant did not raise any formal grievance through the applicable processes against Ms Bowen during the course of her employment. Her reason expressed to the tribunal for failing to do so was that this would be a "losing battle", but the tribunal finds that reason to be somewhat unconvincing.

4.26 After the employment had concluded, the claimant did pursue a grievance complaint process in respect of which there were a number of meetings. However, the direct concern of the tribunal relates to the events which occurred prior to or at the immediate time of the termination of contract and which did or which might have had a causative effect upon the contract termination. This is so as the proper scrutiny of the tribunal in any case of alleged unfair constructive dismissal is in respect of contractual issues and the scrutiny is to be directed to any evidence concerning any breach or any series of breaches of the employment contract on the part of the respondents. The tribunal did not need to determine any other material matters of fact for the purposes of reaching a decision in the case.

The Law

Unfair Dismissal and Constructive Dismissal

5. In ***London Borough of Waltham Forest v Folu Omilaju [2005] EWCA Civ. [2005] IRLR 35 CA***, the Court of Appeal (per Lord Justice Dyson) at paragraphs 14-16, helpfully clarified fundamental aspects of the law relating to constructive dismissal in the following extract:-

> "*14. The following basic propositions of law can be derived from the authorities:*
>
> *1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.*
>
> *2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".*
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> *3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).*
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> *4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must "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" (emphasis added).*
>
> *5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents.*

It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

> *"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."*

15. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> *"(3) 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? (See Woods v W. M. Car Services (Peterborough) Ltd. [1981] ICR 666.) This is the "last straw" situation."*

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application."

6. In ***Brown v Merchant Ferries Ltd [1998] IRLR 682***, the Northern Ireland Court of Appeal said that although the correct approach in constructive dismissal cases was to ask whether the employer had been in breach of contract and not to ask whether the employer had simply acted unreasonably; if the employer's conduct is seriously unreasonable, that may provide sufficient evidence that there has been a breach of contract.

<u>*Unfair Dismissal*</u>

7. To ground a successful claim, a constructive dismissal must also be unfair. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides:-

> *"130-(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

(a) the reason (or if more than one, the principal reason) for the dismissal and

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

(2) a reason falls within this paragraph if it –

(b) relates to the conduct of the employee,

(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

The Tribunal's Decision

Constructive Unfair Dismissal

8. In order for the tribunal to conclude that the claimant had been constructively and unfairly dismissed, it is necessary to conclude that the respondents, as employers, had repudiated the contract of employment by a fundamental breach. Further, the tribunal requires to conclude that the claimant resigned because of that breach and not for any other reason and also that the claimant had not affirmed the breach of contract through delay, or otherwise.

9. In ***Malik v Bank of Credit & Commerce International***, the Court of Appeal stated that conduct relied on by a claimant as constituting a fundamental breach of contract must: "…. *impinge on the relationship in a 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".*

10. In ***London Borough of Waltham Forest v Omilaju***, the Court of Appeal (at para. 21) stated: *"If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine*

the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

11. Notwithstanding the claimant endeavouring to portray a series of individual breaches of contract cumulatively going to the heart of the implied term of "trust and confidence", the tribunal had considerable difficulty with the claimant's case in a number of respects. Dealing firstly with the alleged incidents stemming from 2012, these allegations are so remote and so unconnected, in terms of time, with any events which occurred closer to the conclusion of the contract, that even if any of these were to constitute something in the nature of a fundamental breach of contract (and the tribunal does not accept that they do) the claimant has clearly not acted in a timely manner and thus resigned in consequence of any asserted breach; rather she has affirmed the contract by continuing to work for the respondents for a considerable period of time thereafter. At best, any events alleged to have occurred in 2012 can only exist as a matter of context. Even then, they are of little or no probative value and weight. Against this, there is clear evidence in the intervening years of a good and positive personal and working relationship and engagement between Ms Bowen and the claimant. One example of this mentioned above is the illustration of the claimant's invitation to Ms Bowen to attend the house viewing and of the claimant freely discussing the mortgage application. These events would simply not have occurred if there had been a continuing difficult and fractious relationship between the two.

12. Turning then to the alleged events and circumstances pertaining to the phase of employment towards the conclusion of the contract, it is clear that the claimant has endeavoured to construct a case grounded upon a number of otherwise seemingly innocuous or inconsequential work interactions both with Ms Bowen and also with the medical practitioners. The claimant's interpretation of these events and circumstances is entirely subjective; she harbours considerable difficulty in seeing that these interactions might have been in reality inconsequential or innocuous or that there was no intended slight, aggression or antagonism demonstrated towards her. What the tribunal sees, in the true reality of things, is a very busy medical practice being conducted at Willowfield, with personnel, both professional and support staff, working under considerable pressure and stress and with the normal interactive friction and problem-solving which would have occurred in any normally functioning workplace. None of the incidents which the claimant has endeavoured to portray as constituting a series of fundamental breaches of the "trust and confidence" term requiring to be implied into any contract of employment, bear any material weight or significance, when objectively viewed. It occurs that the claimant will have considerable difficulty in accepting that benign assessment on the tribunal's part, no doubt, but that is the tribunal's considered assessment.

13. The claimant sought, in aid, the evidence of Mrs Briggs. The difficulty for the tribunal in attaching any considerable material weight to the evidence of Mrs Briggs is that the main thrust of the claimant's case depends upon the tribunal making an adverse assessment of the attitude, demeanour and interactions on the part of Ms Bowen with staff, including both Mrs Briggs and also the claimant. However, Ms Bowen was only there for a relatively short period towards the conclusion of Mrs Briggs' employment in the practice. Whilst it might be that there were issues affecting Mrs Briggs personally, both work-related and also non-work related, it seems that none of these work-related difficulties, other than minor issues, were recorded in the relevant appraisals relating to Mrs Briggs. If this latter were to be of

assistance to the claimant, the tribunal would need to draw a clear parallel concerning any adverse treatment alleged to have been meted out to Mrs Briggs and any similar treatment alleged to have been accorded to the claimant, for there to be a corroborative value. Whilst the tribunal has no doubt that Mrs Briggs was a reluctant witness before the tribunal and it appears that she did have work and personal difficulties, concluding with her ceasing to be employed by the practice in 2012, the tribunal cannot arrive at any conclusive parallel associations or alignments, which give much assistance to the claimant's case. Accordingly, the tribunal cannot conclude, in any positive manner, that just because Mrs Briggs might have been treated in a certain manner, that is of probative value or of material assistance to the claimant in her case. This is especially so in view of the clear evidence of the claimant's good and positive working and personal relationship with Ms Bowen after 2012 and thus after the departure of Mrs Briggs from the practice.

14. The claimant's case relies not on a single significant repudiation of contract by the employer, as would be so in some cases, but rather the case is grounded upon the cumulative effect of a series of circumstances and instances or examples which, taken together, so the claimant asserts, permits the "last straw" doctrine to be invoked. For this proposition to be successful, something of material significance must have occurred prior to the, perhaps less weighty, "last straw" instance sought to be cited. The tribunal fully accepts the now well-established proposition that the "last straw" requires only to be the final act in what might constitute a series of acts, the cumulative effect of which was to amount to the requisite breach. Accordingly, although the final act may not be blameworthy or unreasonable, it has to contribute in a material manner to the breach, even if it is of itself relatively insignificant. If the final act did not contribute to or add anything to the earlier series of acts, it is not necessary to examine the earlier history (see ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] WCA Civ. 978 [2018] IRLR 833).***

15. In this case the “last straw" relied upon by the claimant arises from a subjective impression that Ms Bowen was in a manner dismissive of her and that she inappropriately "did sigh audibly” in the course of a conversation. Even at its height, the tribunal had considerable difficulty in concluding that this did contribute to or add anything to the series of alleged earlier acts or omissions, in accordance with the principle enunciated in ***Kaur v Leeds Teaching Hospitals NHS Trust.*** The tribunal’s assessment is that this specific matter, as depicted by the claimant and as set in the proper context with the evidence of Ms Bowen’s very demanding work at the material time, is nothing other than an entirely normal and routine interaction in the workplace. As mentioned above, the relevant principle is that although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things. The maxim "*de minimis non curat lex*" is of general application and is thus applicable to this principle. For the claimant to seek to rely upon such an innocuous and inconsequential interaction as this as constituting the "last straw", strains to an extreme the interpretation of that concept and lies at the cusp of *de minimus*. Whilst the tribunal might well, upon this scrutiny and consequent observation, not be obliged to proceed beyond this if it were to determine that this interaction could not constitute, in any manner, the "last straw", in order to reassure the claimant that the incidents preceding that have been fully considered by the tribunal, the tribunal wishes to confirm its categorical conclusion that, taken together and collectively, in this case the tribunal observes a claimant who has endeavoured to construct a case that is, in the reality, grounded upon her entirely subjective assessment of a series of normal and routine working

interactions between individuals in a busy workplace. The perceived slights; the impression that she was "blanked" (she appears to assert routinely) by the medical practitioners; the alleged references to her previous workplace and hints at the prospect of her leaving; the alleged difficulties in the claimant securing a more flexible working regime; the inappropriate dealing with the CBT issue; the events surrounding the carbon monoxide incident; the perceived uncaring approach taken to the claimant's medical appointments; and any other such matters raised by the claimant in this case, when viewed properly through the lens of objectivity, do not constitute anything upon which a constructive case might properly be grounded.

16. The foregoing is so because of the fundamental requirement in law of the necessity for there to be the occurrence of a breach of contract going to the root of the employment relationship. In this case, as presented by the claimant, the matter must upon an objective assessment necessitate the occurrence of acts or omissions in a sequence, fundamentally undermining trust and confidence and thereby entitling the claimant to resign in consequence of that breach - in this case upon the “last straw” principle, for the claimant had not taken that step upon the occurrence of any of the earlier alleged matters. What is the most telling, perhaps, is that none of this has been articulated by the claimant at any time (perhaps by means of a grievance raised whilst currently in this employment or in some other appropriate manner) nor, indeed, in the claimant's letter of resignation. In a personally handwritten letter of resignation given to Ms Bowen by the claimant, any of this now-asserted lengthy list of issues and grievances is conspicuously absent; indeed quite the contrary is the case, emerging from the tone and content of the hand-written letter. From all of this, the tribunal's concluding assessment is that after the claimant had terminated the contract on foot of her letter of resignation, she has endeavoured to construct a case against her former employers by assembling, upon the basis of her subjective recollection, a number of disparate instances and circumstances all pulled together under the head of an unfair constructive dismissal claim. The tribunal cannot however sustain the claimant's case. The tribunal’s determination having heard all of the evidence, having made relevant determinations of fact and having applied the relevant law to the facts, is that the claimant was not unfairly constructively dismissed by the respondents.

17. For these reasons the claimant's claim is dismissed, upon the merits, without further Order.

Employment Judge:

Date and place of hearing: 19–21 March 2019, Belfast

Date decision recorded in register and issued to parties: