EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102650/2016

Held in Glasgow on 13, 15, 16, 17, 20, 21 & 22 March 2017 and 5, 6, 7, 8, 13 & 15 June 2017 (and a Members meeting on 3 August 2017)

Employment Judge: Lucy Wiseman
Members: Elizabeth Farrell
Andie Grant

Mrs May Hendry — **Claimant**
Represented by:
Mr S Miller - Solicitor

Ayrshire and Arran Health Board — **Respondent**
Represented by:
Mr A Hardman - Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is:-

(1) to dismiss the complaints of having suffered detriments and/or dismissal in terms of Sections 47B and 103A of the Employment Rights Act;

(2) to find the claimant was unfairly (constructively) dismissed by the respondent; and

(3) a Remedy Hearing will be arranged should the parties be unable to resolve this issue.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 8 June 2016 alleging she was constructively dismissed and that the dismissal was unfair in terms of Section 98 of the Employment Rights Act and/or automatically unfair in terms of Section 103A Employment Rights Act. The claimant further alleged she had made a number of protected disclosures and that she had, because of this, been subjected to detriment in terms of Section 47 Employment Rights Act.

2. The respondent entered a response setting out their version of events, and denying the claim in its entirety.

3. The claimant's representative provided specification of the protected disclosures said to have been made by the claimant; the detriments to which the claimant was subjected because of having made those disclosures and specification of the breaches relied upon in the constructive dismissal complaint.

4. The Tribunal granted the representatives' application to have the Tribunal determine the issue of liability only at this Hearing.

5. We heard evidence from:-

   (i) the claimant;

   (ii) Ms Anna Alexander (formerly Slaven) who was, at the time of these events, employed by the respondent as Assistant Dental Services Manager;

   (iii) Mr John Cameron, Senior Dental Advisor employed with National Services Scotland, who carried out various investigations into allegations of poor clinical care and mis-claiming by various dentists;

(iv) Mr David Rowland, Head of Service for Health and Community Care, who had previously been employed with the respondent in the position of Head of Primary Care until September 2014;

(v) Mr John Burns, Chief Executive;

(vi) Dr Alison Graham, Medical Director;

(vii) Ms Pamela Milliken, Head of Primary Care and Out of Hours Community Response Services;

(viii) Ms Frances McLinden, General Manager for Oral Health and Lead Officer for Dentistry in Greater Glasgow and Clyde Health Board, who chaired the external Review and

(ix) Dr Grant McHattie, Assistant Medical Director.

6. We were also referred to four volumes of productions (the last of which was produced by the claimant on the first morning of the Hearing, without objection by the respondent).

7. We, based on the evidence before us, made the following material findings of fact.

Findings of fact

8. The claimant qualified as a dentist in July 1982. The claimant is a partner in a dental practice within the respondent's geographical remit, and she works there 2.5 days per week. The claimant is contracted to provide dental services to the respondent.

9. The claimant, in addition to her dental work, took up the post of Dental Practice Adviser with the respondent (2.5 days per week) on 7 August 2001. The claimant's contract of employment for this post was produced at page 145.

10. The Dental Practice Adviser (DPA) role had two main functions: one was clinical governance (ensuring the best for patients of dentists contracted to provide dental services to the respondent) and the other was the provision of support and advice for dental practitioners. The claimant also provided clinical advice to the respondent regarding patient complaints.

11. The claimant, in her role as Dental Practice Adviser, reported to Dr Grant McHattie, Associate Medical Director, who in turn reported to Dr Alison Graham, Medical Director.

12. The claimant, in her role as Dental Practice Adviser, worked closely with Practitioner Services Division (PSD), a branch of National Services Scotland, which is a special Health Board supplying common services to all Health Boards in Scotland. Mr John Cameron is employed as the Senior Dental Adviser with PSD, and he is responsible for clinical governance for the four streams within practitioner services (that is, doctors, dentists, pharmacists and optometrists). Mr Cameron's role is regulatory, fiscal and clinical and he meets regularly with each Health Board to provide a report to them regarding any clinical issues (for example, treatment not in the best interests of the patient) or fiscal concerns (for example, fraudulent claims for payment, one common example of which is where a dentist has used non-precious metal for a dental crown, but makes a claim for the cost of precious metal).

13. The system for payment of dentists is based largely on trust. Every dentist providing services must send an estimate of the work to National Services Scotland in order for it to be paid (or, if the work is in excess of £390 it must be authorised). National Services Scotland makes payment to the dentist once the final forms have been submitted and authenticated. PSD monitor

the claims being made by dentists and can undertake an investigation into claims made by dentists which may appear suspicious. They may also involve Counter Fraud Services, and are responsible for recovery of payments which have been mis-claimed.

14. The claimant, in her role as Dental Practice Adviser, was the clinical lead for weekend emergency dental services; she was responsible for induction training; she chaired the local Quality Improvement Group; she liaised with the Area Dental Professional Committee; she attended Scottish Dental Adviser meetings and attended the Scottish Quality Improvement in Dentistry group meetings and chaired the "*dashboard*" group.

15. The respondent's Primary Care Management Team put in place a new scheme for the investigation and resolution of performance issues in primary care. The "*new model*" was introduced in December 2012 following extensive consultation with the professional groups, and sought to delineate between responsibility for the investigation and decision-making processes associated with concerns about performance in primary care.

16. The *"new model*" (page 124 – 137) established a Primary Care Delivery Group (PCDG) whose remit was to review concerns and complaints concerning the performance of an individual contracted to provide primary care services to the respondent. The PCDG had power to delegate the investigation of concerns to a Performance Assessment and Support Group (PASG) and then to decide upon appropriate action based on the report and recommendations of the PASG. The PCDG had power to implement appropriate action against an individual and this included power to assess and address performance issues in primary care, offer support, censure, and referral to professional and other regulatory bodies as appropriate.

17. The "*new model*" set out the role and membership of the PASG and, for General Dental Services, it was the role of the Dental Practice Adviser to chair the PASG, which also included the Primary Care Manager with responsibility for Dental Services and three other dentists. The "*new model*"

also set out how an investigation would be initiated, conducted and concluded. The role of the Chair of the PASG (the Dental Practice Adviser) was to produce a formal report setting out, amongst other things, the recommendations of the PASG. The report would go to the PCDG, and it was for the PCDG to consider the recommendations and decide whether or not to implement them.

18. In October 2011, Mr John Cameron, Senior Dental Adviser, was contacted by a dentist who had concerns regarding the work carried out by his associate, Mr Michael Morrow, who had recently left the practice. Mr Cameron reported this to the claimant, and it was agreed the claimant and Mr Cameron would meet with Mr Morrow to discuss the concerns and also that Mr Cameron would have patients examined, review treatment plans and prepare a report.

19. The claimant and Mr Cameron met twice with Mr Morrow in early 2012 and through these meetings, they learned that not only were there concerns regarding the standard of his clinical care, but that he was also restricting NHS care. Michael Morrow worked in an area of high social deprivation and received higher payments for this. The restriction of NHS treatment is in breach of regulations, and meant patients would either have to pay for treatment or have an extraction.

20. The claimant made Mr David Rowland, Head of Primary Care, aware of both of the above concerns. (The claimant reported to Mr Rowland because he was responsible for the dental care management team, and he also sat on the PCDG. Mr Rowland and the claimant worked closely regarding the quality of dental health provision and issues of probity).

21. Michael Morrow attended an initial PASG on 26 February 2013 which recommended that he be referred to TRAMS (training, revision, assessment, mentoring and support) because it was acknowledged he had moved to a new practice and should be given an opportunity to improve; and further investigations were also required to consider dental records.

22. A second PASG took place in November 2013 because there were still concerns regarding the quality of Mr Morrow's work, and it had come to light that there were issues regarding infection control (not changing gloves between patients, and using single-use items more than once). The PASG, having heard evidence from John Cameron, recommended Mr Morrow should receive further remedial help; they also, with regard to the restriction of NHS treatment and infection control issues recommended that he should be referred to the General Dental Council (GDC) although they would have preferred to use the NHS Discipline route if that had been available to them.

23. The recommendations of the PASG were endorsed by the PCDG and on 23 January 2014 (page 201) Mr Grant McHattie, Associate Medical Director, referred Mr Morrow to the GDC's Fitness to Practice committee. The letter either did not arrive at the GDC or was misplaced by them upon receipt.

24. The claimant prepared a document called an SBAR which is a contemporaneous record of actions and decisions made in respect of a dentist. The SBAR for Michael Morrow was produced at page 160.

25. Mr Morrow, by letter of 24 November 2014 (page 193), complained to Ms Alison Graham, Medical Director, about the handling of the investigation into issues regarding his performance. Mr Morrow complained about the fact he had been told in January that a referral was to be made to the GDC, but he had heard nothing further from the GDC. He explained that he decided to contact them, and was informed they had not received a referral from the respondent. Mr Morrow also complained about an alleged lack of a paper trail regarding decisions taken in his case.

26. Ms Anna Slaven (now Alexander), Assistant Dental Services Manager, maintained a spreadsheet to track referrals to the GDC. Ms Slaven reviewed the spreadsheet in November and, independently of Mr Morrow's letter, noticed an update had not been received in Mr Morrow's case. Ms Slaven brought this to the claimant's attention on 26 November, and then contacted Ms Rickane Shah at the GDC. Ms Slaven was informed by Ms

Shah that the referral could not be tracked. Ms Slaven informed the senior team of this, and was asked to forward a copy of the referral to the GDC.

27. Ms Alison Graham, Medical Director, asked the claimant to draft a response to Mr Morrow's letter. The claimant sought input from Ms Slaven (page 198) and then drafted a response for Ms Graham to send (page 199).

28. Ms Graham agreed to meet with Mr Morrow and his solicitor, Mr Neil Taylor, in February 2015, and Ms Graham asked the claimant to accompany her to that meeting. The claimant was reluctant to attend the meeting because Mr Taylor has a reputation for being unpleasant and aggressive; however notwithstanding her concerns, she agreed to accompany Ms Graham.

29. Mr Morrow raised three issues at that meeting: (i) the deficiencies leading to the TRAMS process had not been sufficiently detailed, and there was no end in sight to that process; (ii) the claimant had "*doctored*" a letter sent to Mr Morrow in June 2013, and should be reported to the GDC for this and (iii) he questioned whether the referral had in fact been sent to the GDC, and if so, why there had been a failure to follow up the referral to the GDC.

30. The claimant was "*dumbfounded*" at the allegations made against her, and when she tried to challenge what had been said, she felt she did not receive any support from Ms Graham.

31. Mr Morrow wrote a formal letter of complaint to the respondent's Chief Executive, Mr John Burns, on 14 April 2015 (page 220). The letter complained of "*irregular treatment by [the claimant] and the Dental Management Team*" which had impacted on his health. Mr Morrow made three complaints regarding delay in the process; false representations made by the claimant (being a reference to doctoring the letter and failing to make the reference to the GDC) and failure to comply with statutory obligations under the Whistleblowing Policy. Mr Morrow sought an apology, an independent review of the PASG and compensation. The claimant was not made aware of this letter at the time.

32. At the same time as the events regarding Mr Morrow were unfolding, there were also concerns regarding another dentist Mr Donald Morrison. Mr Morrison bought a dental practice in 2011 from Mr Donald McKie, and, when Mr McKie subsequently left the practice in late 2012, Mr Morrison raised concerns regarding the clinical quality of Mr McKie's work. The claimant informed Mr Rowland of these concerns, and also informed him she had a conflict of interest with Mr McKie. Mr Rowland agreed the claimant should have no part to play in the investigation into Mr McKie, and that an external DPA would become involved. Mr Rowland contacted Ms Irene Black, DPA with another Board. The concerns regarding the quality of Mr McKie's clinical care were investigated and, in 2013, a PASG (chaired by Ms Irene Black) made certain recommendations regarding Mr McKie. Ms Black had not chaired a PASG previously and Mr Rowland asked the claimant to attend to advise on process.

33. Mr Morrison also raised concerns regarding one of the associates in the practice who was leaving to join Mr McKie in his new practice. Mr Morrison alleged firstly that he had concerns regarding poor quality clinical work, and subsequently, following an internal audit, he had concerns the associate was claiming for precious metal in crowns, when non precious metal had been used. The claimant reported this to Mr John Cameron, and he, as requested by Mr Rowland and in accordance with the usual practice, commenced an investigation into all dentists in the practice including Donald Morrison. Mr Cameron's preliminary investigations revealed there was wide-spread mis-claiming, and he reported this to the claimant.

34. The claimant reported all of this to Mr David Rowland, who gave authority to widen the scope of the investigation in circumstances where there was an indication that in the region of £300,000 had been mis-claimed and that all dentists in the practice, with one exception, were implicated. A very large and detailed investigation was undertaken by Mr Cameron and PSD during 2014.

35. A meeting took place on 13 January 2015 involving Mr Cameron, Ms Graham, Mr Alan Farrow, Fraud Liaison Officer with the respondent and Mr Scott Fraser, Counter Fraud Services investigation team. Ms Graham expressed concern regarding the length of time it had taken to get to this stage, and the fact none of the dentists had had an opportunity yet to put forward their explanations. Mr Cameron explained this was normal practice in such cases and an opportunity to comment would be given once the investigation was complete.

36. The meeting also discussed the scope for Counter Fraud Services to investigate the case criminally, but Ms Graham confirmed there was to be no criminal investigation of the dentists.

37. Mr Cameron concluded his investigations later in 2015 and sent a report to the GDC. Mr Cameron did not immediately release the report to the respondent because he felt his investigation was being interfered with. He formed that impression because of the actions taken by Ms Graham.

38. Mr Cameron was contacted by Ms Graham by email of 27 March (page 270) where she stated that she was "*keen to speak with the dentists involved to share with them where we are*". Ms Graham asked Mr Cameron to advise who owned the report he was preparing. Mr Cameron spoke to Mr David Knowles, Director of Counter Fraud Services and Ms Marion Brown, Medical Director (and his line manager) because he was concerned that Ms Graham appeared to be favouring Mr Morrison. Mr Cameron responded to Ms Graham's request by email on 2 April (page 238). The email confirmed: "*With regard to ownership, it is my report … Obviously I will share the finished report with the Health Board but before completing it I will be seeking the view of the practitioners on what is their view regarding the recoveries that we at NSS propose recovering. The recovery is NSS's responsibility..*"

39. Ms Graham responded by email of 24 April (page 238) stating; "*I am not sure that I entirely agree with both the points you make and your sentiment. We have yet to agree from whom and what we will try to recover. Secondly, this is not how NHS A&A behave, we want an open and transparent culture to our business. Can you please email me a copy of the report by return so that I can have a conversation with the interested parties on behalf of A&A."*

40. Mr Cameron did not send a copy of the report, and so on 4 May, Ms Graham sent a further email (page 258) stating: "*Further to my email of the 24th April could you please forward me the report so that I can agree how to take it forward on behalf of NHS A&A. I am not in agreement of your writing to the dentists."*

41. Mr Cameron sought advice (including from the Regulator) before sending a very full response to this email on 12 May (page 266). Mr Cameron noted his investigation was ongoing and that he was awaiting responses from the dentists concerned. He confirmed that it might be prejudicial to the investigation to release the report to the dentists, and noted it would be inappropriate for any talks or meetings to take place between the Health Board and the practitioners prior to the completion of the report.

42. Mr Cameron did not receive a response from Ms Graham, although he was aware she sought to challenge his position by speaking to Mr Knowles and Ms Brown regarding ownership of the report.

43. One of the patients involved in the Morrison/McKie situation was the son of Fiona McQueen, who was at that time the respondent's Director of Nursing. Ms McQueen emailed Mr Burns' secretary on 16 March 2015 (page 213) explaining that Donald Morrison would find it helpful to meet Mr Burns and raise his concerns.

44. Mr Donald Morrison thereafter emailed the secretary of Mr John Burns, Chief Executive of the respondent on 20 March 2015 (page 213) asking to meet with the Chief Executive to "*present [my] considerable concerns ….*

primarily regarding the way in which myself, my staff and my practice have been treated by A&A since reporting of neglect by a previous colleague ..". He also noted that the claimant should not be present because she had "declared herself unable to be sufficiently impartial on the main issues I have raised". (This related to the claimant having declared a conflict in issues related to Mr McKie).

45. Mr Burns met with Mr Donald Morrison, his wife who was the practice manager and Mr Simon Morrow (chair of the Area Dental Professional committee) on 20 April 2015. Mr Burns did not, prior to this meeting, seek any briefing or update regarding the investigation into Donald Morrison and his practice and he did not arrange for a note of this meeting to be taken. Mr Morrison set out the history of taking over the practice and the issues which had been encountered. He complained about the length of time the investigations had taken, the impact that had had on him and the lack of communication. Mr Morrison stated he had spoken to other dentists and that there was a concern regarding how the respondent supported dentists.

46. Mr Burns was in possession of Mr Michael Morrow's letter of 14 April 2015, and the meeting with Mr Donald Morrison on 20 April 2015. Mr Burns met with Ms Graham to brief her regarding these matters (although Ms Graham was not provided with a copy of Mr Morrow's letter of complaint dated 14 April 2015). Mr Burns was of the view that a review of the respondent's systems and processes was required because issues had been highlighted (for example, the length of time for an investigation to be done and how the respondent was supporting dentists) which did not, on the face of it, "*feel right*". Mr Burns considered an external review was required because this would provide learning and take into account the views and experience of others. Mr Burns did not consider the complaints concerned whistleblowing.

47. The respondent has a Whistleblowing policy, but it was not used at any time in relation to any of the complaints raised in this case (albeit the policy was referred to on a number of occasions).

48. The respondent also has a policy called "*Can I Help You*" (page 169 of volume 4) which contains guidance for handling and learning from feedback, comments, concerns or complaints about NHS health care services. The respondent did not use this policy to address the complaints regarding the claimant because they either did not consider the allegations to be complaints or they did not consider this to be the appropriate policy to use.

49. Mr Burns met with Ms Graham, Ms Pamela Milliken, the newly appointed Head of Primary Care and Out of Hours Community Response Services (who had replaced Mr Rowland) and Mr Eddie Fraser, on 23 April 2015. Mr Burns wished them to be clear regarding why there was to be a review and its purpose. Mr Burns briefed those present regarding the concerns raised by the dentists, but he did not provide them with a copy of Mr Morrow's letter of 14 April 2015 or any paperwork.

50. Mr Burns did, at this meeting, ask Ms Graham if she had full confidence in the claimant. Ms Graham confirmed she had full confidence in the claimant's integrity.

51. Ms Graham was tasked with commissioning the review and Ms Milliken was tasked with making the arrangements, including drafting the terms of remit for the external review. The focus of the review was to look at the respondent's systems and processes for managing the performance of contractors (that is, the doctors, dentists, pharmacists and optometrists).

52. Mr Burns did not inform the dental care team of the review because he wanted them to hear it from Ms Graham. He did however email Mr Donald Morrison on 29 April 2015 (page 241) to confirm an external review would take place, and informing him that "*at this time we have not spoken to our staff in the Dental Services team and it is important that we handle this properly.*" Mr Burns asked Mr Morrison to treat this in confidence until such time as everything was in place.

53. Mr Morrison responded on 3 May (page 262). Mr Morrison noted his apprehension following his last contact with the claimant and the respondent when he raised his concerns regarding another dentist which had led to a two year investigation. He also referred to the investigation of Mr Cameron and to a letter received which, he said, implied that he had made fraudulent claims which he was now being asked to justify. Mr Morrison complained that this would not encourage people to come forward with concerns, and he asked that the letter be looked at as part of the review.

54. Mr Burns noted the references to the claimant in Mr Morrison's letter, but he did not consider these were complaints about the claimant and he took no action to address or respond to these complaints.

55. Mr Burns responded to Mr Morrison's email on 6 May (page 262). Mr Burns did not clarify that Mr Cameron's investigation was being carried out on behalf of the Board; nor did he clarify the terms of reference for the external review or make it clear to Mr Morrison that any concerns outwith systems and processes would not be considered by the review panel. Mr Burns, in his emailed response, stated "*please be assured that we take the matters discussed seriously and once we have external support agreed we will be taking these matters forward."*

56. Mr McHattie, Associate Medical Director, was surprised and taken aback when he learned there was to be an external review of the process for performance management of dentists. He, together with Mr Rowland, had been involved in proposing the "*new model*" for performance management, which had been subject to consultation with the contractor groups and professional committees. The procedure had been used on a number of occasions to address performance issues with doctors and dentists, and no concerns had previously been raised.

57. Mr McHattie was asked to inform the claimant of the external review, and he did this on 14 May 2015. The claimant was upset when she learned this. The claimant asked to speak to the Chief Executive because Mr Morrison's complaint had followed immediately upon him being investigated for mis-claiming, but Mr McHattie told the claimant that she was not to speak to Mr Burns. He also told her that, on instruction from Ms Graham, the claimant was to distance herself from Mr Cameron.

58. The fact the claimant was not to communicate with John Cameron meant she could not fulfil her role, and it also meant his investigation could not proceed. There was a hiatus in the investigation until 10 July, when Donald Morrison wrote to John Cameron (page 514) noting, amongst other things, how embarrassed he was to have mis-claimed fees.

59. The claimant tried to telephone Ms Graham on 18 May 2015 (volume 4 page 1 was her file note of this), but Ms Graham did not return her call.

60. The claimant happened to meet Ms Graham approximately two weeks later. The claimant took the opportunity to inform Ms Graham about the historical background to Mr Donald Morrison and the investigation. Ms Graham confirmed the review was being set up and that Mr Simon Morrow would be on the panel. The claimant explained this was not appropriate because Mr Simon Morrow had accompanied Donald Morrison to the initial meeting with Mr Burns. Ms Graham agreed to ask Simon Morrow to recuse. Ms Graham re-iterated the review was only about systems and processes, and not individuals, whereupon the claimant questioned why, if that was so, the panel was to comprise four dentists and no managers. Ms Graham agreed to substitute an external manager for one of the dentists.

61. The claimant later emailed Ms Graham on 26 May (page 296) regarding her concerns surrounding the composition of the review panel. The claimant, in that email, also outlined concerns regarding Mr Martin Wishart, who was the Vice Chair of the Area Dental Professional Committee, being

on the review panel because he had been a member of the PASG in respect of the dentist about whom Mr Morrison had complained.

62. The claimant sent an email in similar terms to Ms Milliken on 27 May (page 296).

63. The claimant learned, from Ms Graham on 27 May 2015, that Mr Michael Morrow had also raised concerns and that these were going to be addressed by the review panel. The claimant was not told of the concerns, or shown the letters of complaint.

64. Ms Graham and Ms Milliken decided upon the composition of the review panel and those to be interviewed by the panel. Ms Milliken prepared the terms of reference for the review panel (page 279). The document, entitled Investigation and Review of General Dental Services Quality Assurance and Improvement Processes 21 May 2015, set out the fact the respondent had a revised model for the investigation and resolution of performance issues in primary care. There then followed three paragraphs about the respondent's Whistleblowing Policy.

65. The document set out Concerns and noted that concerns had been raised regarding the operation of the respondent's process for the Investigation and Resolution of Performance Issues in respect of Dentists, and the balance of the role of the respondent between supporting Dentists to improve the quality of care provided and investigation and resolution of performance issues. Ms Milliken based the description of the concerns on what she had been told by Mr Burns: she had not, at this time, been shown the letters of complaint by Michael Morrow and Donald Morrison. Ms Milliken was not aware of the fact that the "*concerns*" raised by Michael Morrow and Donald Morrison went far beyond the respondent's systems and processes.

66. The remit was stated to be "*to review the concerns raised*" and the members of the review panel were provided with a copy of Donald Morrison's letter of complaint (3 May).

67. Ms Milliken prepared a summary of the concerns of Mr Donald Morrison, based on his email of 3 May. The summary (page 443B) identified three areas of concern being:

> "*1. Following DM raising concerns about patient safety related to another dentist – proceeded to bring on over two years of work and a vast amount of worry. Letter received from John Cameron implies fraudulent claims which DM must justify/defend against and threat of recouping money or further investigation unless DM accept the findings. This will not encourage anyone to come forward and do the right thing.*
>
> *2. Embarrassing and frightening to have so much power wielded over you, especially when much of this is based on opinion.*
>
> *3. GMP colleagues use the Quality Outcomes Framework to look constructively at interpretation and procedure review to annually agree their processes without blame or inquisition. As dentists- either all perfectly correct or expect to be punished."*

68. Ms Milliken prepared a summary of the issues raised by Mr Michael Morrow (page 448):-

> *"1. NHS A&A failed to discharge its regulatory functions timeously and effectively. Specifically there has been unwarranted and unreasonable delay in the conclusion of a regulatory process pursued against Michael Morrow in relation to the investigation carried out by NHS A&A and in relation to the referral of the case to the GDC ..*

2. False representations have been made to Michael Morrow by NHS A&A staff regarding the regulatory process pursued:-

- *letter from [the claimant] dated 13 June 2013 states "Mr JC will be in touch with you in due course". Dr AG stated in letter 29 November 2014 that no such sentence appears in the file copy. Michael Morrow requests a review of computerised editorial history – view this as a clumsy attempt to cover up that JC had not reported back to Michael Morrow.*

- *NHS A&A stating GDC had "misplaced" the referral.*

3. NHS A&A failed to comply with its statutory obligations under the Employment Rights Act 1996 and its own Whistleblowing policy .."

69. Ms Milliken prepared these summaries to provide to those being interviewed by the review panel, because they were not to be shown the letters of complaint from Mr Morrow and Mr Morrison. Ms Milliken had not, at the time she prepared these summaries, seen all of the correspondence from the complainers.

70. The claimant was interviewed by the review panel on 12 June. The claimant received the papers for the review panel late on Wednesday 10 June and, with a full surgery the following day, she had little time to prepare. The claimant was very hurt when she read Michael Morrow's summary of concerns and saw that the issue regarding doctoring the letter had been included. The claimant considered this issue had been addressed when it was raised: an explanation had been given to explain there had been a draft letter and a hard copy and that there had been an administrative error.

71. The claimant was very stressed by what was happening: she had been told by Mr McHattie, Ms Milliken and Ms Graham that the complaints were about process and were not personal, yet Michael Morrow's complaint about doctoring a letter had been included. The claimant did not know who else was being interviewed by the review panel and she was surprised the panel did not ask questions about the referral of Michael Morrow to the TRAMS process.

72. The claimant emailed Ms Milliken and Ms Graham on 16 June (page 457) making reference to the fact the paperwork for the review panel included the allegation that she had doctored a letter. The claimant noted she had not been able to provide hard evidence to defend herself, but now that she was back in the office, she had found the email from Ms Slaven with the wrong letter attached and Ms Slaven's comments that the paragraph relating to John Cameron was not in it. The claimant attached the letter and email for Ms Milliken and Ms Graham and asked that they be provided to the review panel.

73. The claimant found the period between 12 June and September, when the review panel Report was produced, to be very stressful. There was stress within the department about what was going on, and the claimant and Ms Taylor felt stifled and afraid of doing anything. The claimant did not want to address performance issues because of this, and her concern that there was an undercurrent of secrecy and half-truths. Furthermore, she had been told not to have contact with John Cameron and this meant patient safety issues could not be addressed. John Cameron had not been told of the Review and was not called as a witness.

74. Mr Donald Morrison wrote to Mr Burns, Chief Executive on 30 June 2015 (page 494) to express his dissatisfaction with the fact that when he met with the review team on the 12 June, the scope of the terms of reference and remit were very narrow. The panel had appeared unaware of his many concerns, and surprised at the scope of the information he had provided. Mr Morrison made reference to the summary of issues prepared by Ms Milliken

and to the fact he had contacted her after receiving same, to complain that the summary did not reflect the full scope of the "*very many serious issues*" discussed at our meeting. Mr Morrison stated Ms Milliken had telephoned him at home to assure him the process was not narrowly limited and for him to be comforted that it would be "*as broad as* [I] *needed it to be*".

75. Mr Morrison continued in his letter to state that "*I wish to reiterate that my main concerns relate to the power of the DPA and her dishonest and unethical behaviour*". Mr Morrison concluded his lengthy letter by stating these concerns, as well as the subsequent behaviour of the DPA, needed to be included in the review.

76. Mr Burns discussed the letter with Ms Graham because he considered Mr Morrison could not make unfounded allegations, and he either had to bring forward the evidence or desist from making the statements. The claimant was not made aware of the allegations made by Mr Morrison in the letter of 30 June. Ms Graham told Mr Burns she had concerns about raising unsubstantiated allegations with the claimant and that she would prefer to first challenge Mr Morrison regarding what evidence he had to substantiate what he had said. Mr Burns and Ms Graham did not seek advice from HR regarding appropriate action to take in respect of this matter.

77. Ms Graham and Ms Milliken met with Mr Morrison on 23 July. Prior to this, however, the claimant reported to Ms Graham that she had been out with friends, one of whom told her she had accompanied her mother to Mr Morrison's practice. The friend told the claimant that Mr Morrison had spoken to her in the hallway to ask if she knew Mr McKie's dentistry was shocking and her mother's mouth would probably be in a bad way. Mr Morrison commented that he knew the friend still went to Mr McKie's practice, and that she should come to his practice so he could try to sort her mouth out. The friend acted on Mr Morrison's comments and made an appointment for both her and her husband. Neither of them had in fact needed any treatment. Mr Morrison had, however, again told her of Mr McKie's poor clinical work and stated there was a senior woman at the

Health Board who would get Mr McKie off and put him (Mr Morrison) under investigation. The friend knew Mr Morrison was talking about the claimant. The claimant had been very upset at hearing this and immediately went home to telephone Ms Graham. The claimant considered she had been defamed. Ms Graham told the claimant there was something she needed to tell her, but before doing so she wanted to speak to the Chief Executive. Ms Graham asked the claimant for the name of her friend so she could contact her to verify the story. The claimant provided this information but also told Ms Graham she was very unhappy with "*all the cloak and dagger stuff*".

78. The claimant emailed Ms Graham on 15 July (page 531) to urgently seek firm assurances that Ms Graham, and NHS Ayrshire and Arran would protect her and her professional reputation in view of the unsolicited comments which had been made by Donald Morrison to a third party. The claimant noted his comments called into question her professional reputation and integrity. The claimant referred to complaints made by Mr Morrison "*and another practitioner*" and stated she believed the actions taken by the respondent were inappropriate and offered no protection to employees. The claimant concluded by stating the way in which the respondent had handled this complaint, permitted Mr Morrison and possibly others, to sully her professional reputation without them having any evidence of wrongdoing. She also stated that she believed his attitude had been supported, by inference, in the way the Health Board had handled the case.

79. Ms Graham responded to say she would speak to the third party and then to Mr Morrison. She also stated that she would come back to the claimant with a formal response about protecting her and her reputation and integrity. Ms Graham then confirmed she would meet with the claimant, Ms Taylor and Ms Milliken on 21July.

80. Ms Graham contacted the claimant's friend to verify what had been said by Mr Morrison. She also contacted Ms Irene Black, DPA, who had chaired the PSAG regarding Mr McKie. Ms Graham told Ms Black that Mr Morrison had

raised concerns regarding the claimant and the Board. Ms Black discussed the audit and the findings regarding Mr McKie, and confirmed there were no concerns regarding the claimant's integrity.

81. Ms Graham also (unbeknown to the claimant) spoke to another dentist, Ms Kirsteen Henderson, who had been mentioned in Mr Morrison's letter of 30 June.

82. Ms Graham and Ms Milliken met with the claimant and Ms Taylor on 21 July. The claimant had prepared a summary of her concerns, which ran to three pages, and ranged from being told bits and pieces over a matter of weeks, rather than being told what was happening in a comprehensive manner; to the complaint/s not being shared with her; to being told she could not speak to the Chief Executive in circumstances where the complainers were allowed to speak to him. The claimant was also critical of the fact the complaints should have been addressed through the formal complaints procedure which would have not only set a timeframe for dealing with the matter, but would also have given her a right of reply to the allegations.

83. The claimant learned at this meeting that Mr Morrison had submitted a written complaint: prior to this the claimant had understood the complaints were verbal. The claimant also learned the review panel had looked at the claimant's role (DPA). The claimant was taken aback to learn this because in all the communications she had received about the review, there had been no mention of the DPA role being looked at. The claimant emailed Ms Graham (page 538) to tell her that the information sent to her did not contain anything about the DPA role being part of the review. The claimant concluded the email by stating that she hoped this would help Ms Graham understand her upset at learning a little more about this every time she speaks to someone who is concerned in the management of the investigation.

84. The meeting on 21 July ended with Ms Graham confirming she would meet with the claimant after she had spoken to Mr Morrison, and also confirming the claimant would see the letter to be sent by Ms Graham to Mr Morrison before it went out.

85. Ms Graham and Ms Milliken met with Mr Morrison on 23 July. The purpose of the meeting was to challenge Mr Morrison regarding his letter of 30 June and the comments made to a patient (the claimant's friend). Mr Morrison was asked to produce any evidence he had to substantiate the allegations. Mr Morrison was also reminded of his professional duties in terms of the GDC.

86. Ms Milliken took a note of the meeting with Mr Morrison. She gave these notes to Ms Graham, who had assured the claimant she would be provided with a copy of these notes. Ms Graham did not ever provide the claimant with a copy of the notes, and when the claimant enquired about them she was told they first had to be agreed with Mr Morrison.

87. Ms Graham met with the claimant after her meeting with Mr Morrison and provided her with a redacted copy of 3 May email and 30 June letter from Mr Morrison. The claimant was devastated when she read the content of the letters because she considered it lies. Integrity is fundamental to the claimant and the respondent had not either allowed her a right of reply to the allegations or investigated them. Ms Graham told the claimant that no-one doubted her integrity. She also confirmed the claimant could now speak to Mr Burns and Mr Cameron.

88. The claimant told Ms Graham that she had to consider her position because she believed Ms Graham, Mr Burns and the Health Board had been inept in their handling of the situation. Ms Graham offered the claimant some time off, and contact with occupational health, but the claimant declined.

89. Ms Graham considered the relationship between her and the claimant broke down at this time.

90. The claimant noted, in the letter of 30 June, that there was a reference to Kirsteen Henderson, and she decided to contact Ms Henderson. The claimant learned, when she contacted Ms Henderson, that Ms Graham had contacted her the previous week to question her about the claimant. The claimant considered this very strange because she had never known Ms Graham to personally make contact with a dentist. Ms Henderson also told the claimant that Mr Morrison was aware of all this because he had been questioning her about it.

91. The claimant contacted John Cameron on 23 July because she was very upset: he was horrified to hear what had happened. Ms Graham had sent Mr Cameron a heavily redacted copy of Mr Morrison's letter of 30 June because allegations had been made about him. Mr Cameron was very annoyed that he had not been given the opportunity to respond and defend himself.

92. Mr Cameron, having read the redacted letter of 30 June, considered it a gross misrepresentation of everything that had occurred, particularly given the fact Donald Morrison had admitted, in the letter of 10 July, that he had been mis-claiming. Mr Cameron could not understand why Ms Graham, who had seen the letter of the 10 July, was even sending Donald Morrison's letter to him.

93. The claimant showed John Cameron a copy of 3 May email from Donald Morrison which he considered was a "load of lies". Mr Cameron was very suspicious about what was going on. He emailed Ms Graham on 24 July (page 546) to express his concern that she had had the letter for three weeks before sending it to him, and that she had not taken any action to investigate the validity of the letter in circumstances where she could access his report and confirm the allegations were untrue. Mr Cameron also

considered it very poor professional respect to send the letter via her secretary rather than in a confidential letter.

94. Mr Cameron instructed a solicitor to write to Donald Morrison to inform him the comments were defamatory and should be withdrawn and not repeated.

95. Ms Graham emailed the claimant the following day (page 549) to "*check that [you] are ok*" and she told the claimant to phone if she wanted to talk. The claimant responded by email on 27 July (page 549) in the following terms: "*Needless to say I am not okay. I consider that my current state is due entirely to the inept, inappropriate handling of this situation by NHS Ayrshire and Arran breaching its duty of care toward me as my employer. .. I note your offer of special leave. I will not be taking up your offer as I have lost confidence in the organisation and feel that I cannot be guaranteed that such a period of leave would not be used against me at some time in the future."*

96. Ms Graham wrote to Mr Morrison on 29 July (page 550). Ms Graham did not show the claimant the content of the letter before it was sent. The letter noted Mr Morrison had (amongst other things) raised some allegations of dishonest behaviour by the DPA and noted Ms Graham had asked Mr Morrison to provide her with the evidence to support these allegations in order for them to be investigated. Ms Graham also noted that she had told Mr Morrison that it had been brought to her attention that he had been speaking to patients and colleagues about the DPA and Mr McKie. Ms Graham referred to the duty to remain professional and adhere to the Codes of Conduct; it being unprofessional to criticise a colleague and against the duties of a dentist as outlined by the GDC.

97. Ms Graham concluded by stating that whilst she believed NHS Ayrshire and Arran should have done more to support Mr Morrison in dealing with these matters, she stated he must not directly criticise a fellow dentist's clinical practice to patients. She asked that any evidence in relation to the

allegations made against the DPA be forwarded to her within the next seven days.

98. Ms Graham did not provide the claimant with a copy of her letter to Mr Morrison. This was not provided to the claimant until October when Ms Lynn Todd, Assistant Director of HR became involved.

99. Ms Graham also wrote to the claimant on 29 July (page 554) informing her that she had written to Mr Morrison to ask him to provide evidence to substantiate his allegations. Ms Graham confirmed that in the event of receiving such evidence, it would be investigated. Ms Graham also advised the claimant that, in relation to the comments made to a third party, Mr Morrison had been reminded this was unprofessional, unacceptable and not in line with GDC guidance. Ms Graham went on to say that she appreciated how difficult and distressing this had been for the claimant, and reiterated the offer of special leave and support. She also restated that she and the Chief Executive had never questioned her integrity.

100. Mr Morrison responded to Ms Graham`s letter on 24 August (page 607). He enclosed what he considered to be the "*proof*" he held, and he asked that his letter and the previous letter of 30 June be shared with the review panel. Ms Graham (and Ms Milliken) did not consider the "*proof"* provided by Mr Morrison supported the allegations he had made, but neither she nor Ms Milliken ever responded to Mr Morrison to tell him this.

101. The claimant attended her GP in mid-August. The GP confirmed she was suffering from work-related stress and prescribed medication, which the claimant continues to take. The claimant continued to work, but felt unsure who to turn to for help.

102. The review panel produced a draft Report on 20 August which was circulated to Ms Graham for comment. The final Report (page 601) was produced on 24 August. The Findings identified by the Review Team included a finding that in relation to Michael Morrow, the sanctions applied

to him were overly punitive and appeared to be inconsistent with other Board judgments in relation to dental issues. The review team also found timelines in relation to communication and monitoring of process were not adhered to and fed back in a timeous manner.

103. The review team found, in relation to the Dental Practice Advisor role that the role was conflicted because it attempted to balance matters of discipline and support. The Board's structure in relation to supporting the role was inadequate and this had led to an over-reliance on PSD for advice and management of Board issues.

104. Ms Milliken was instructed, during a meeting with the Chief Executive to circulate the Report. Mr McHattie was instructed to speak to the claimant about the Report and provide her with a copy of it.

105. Ms Milliken followed this up with an email to the claimant on 7 September (page 620) enclosing a copy of the Report and stating she would be happy to discuss it with her. Ms Milliken also sought to re-assure the claimant the Report did not deal with personal issues, and the focus was on processes. Ms Milliken acknowledged the claimant was agitated and distressed by the allegations made by Mr Morrison. Ms Milliken decided to ask HR to become involved to provide some support to the claimant.

106. The claimant responded to Ms Milliken's email on 7 September, and stated, amongst other things, that her real concern was not to do with the Report, but about "*getting the Board to rebut all the vile and false allegations about me*."

107. The claimant prepared a "*rebuttal document*" setting out her full response to the allegations (page 634). The claimant noted, at the start of the document, that one key point was the fact that the DPA role within the respondent has no decision making powers.

108. The claimant sent this document to Ms Milliken by email of 20 September (page 632). The claimant noted that from what Ms Milliken had said, she believed "*that you are now realising that I am the victim of unfounded allegations"*. The claimant stated she had been "deeply upset" by this and noted she had had to visit her GP for the first time in her life in relation to work related stress, because the incident had "completely broken [me]". The claimant went on to say that it was not only the actual defamation by Mr Morrison which was of concern, but mostly the "completely inept handing of this by my employer. Mr Morrison's allegations were hurtful … but the real source of [her] upset has been the Health Board hiding things from her and its empty promises and its economies of truth.

109. The claimant noted Ms Milliken and Ms Todd were due to meet with Mr Morrison to rebut the allegations, and she asked Ms Milliken to use the rebuttal document, and follow this up in writing.

110. The claimant also noted that she had discovered there were further allegations from Mr Morrison which had been hidden from her, despite her making it clear that she wished to see everything he submitted. The claimant asked to be advised of the content of his submission in order that she could have the opportunity to rebut any further potentially malicious allegations.

111. The claimant concluded by stating her professional reputation, integrity and professional altruism were of the utmost importance to her, and she appealed to Ms Milliken to "*sort out this mess*".

112. The claimant sent a further email to Ms Milliken on 21 September (page 638) asking her to put the rebuttal of the doctoring allegation in writing.

113. Mr McHattie was also provided with a copy of the claimant's rebuttal document, but he was not, at this time, aware of the full nature of the complaints which had been made about the claimant.

114. Ms Milliken and Mr McHattie were tasked with meeting Mr Morrow and Mr Morrison to feedback on the outcome of the review Report. Mr McHattie's knowledge of the concerns raised by Mr Morrow came from the summary of issues which had been prepared by Ms Milliken for the review panel interviews. They met with Mr Morrow in early September. Mr Morrow made it clear at that meeting that the review panel had not addressed some of the specific grounds of his complaint, namely the "false representations" made by the DPA (the claimant). Mr Morrow also wanted the respondent to notify the GDC of the outcome of the review. And, he wanted Ms Milliken to find out if could claim compensation for the stress suffered due to the delay in referring the matter to the GDC.

115. Mr Morrow emailed Ms Milliken after the meeting (page 625) in which he set out the alleged false representations made by the claimant, and stated he wanted the respondent to write to the GDC as follows:-

> "*(i) that having conducted a thorough review the Board has concluded that its own regulatory procedures in respect of my case were not followed properly;*
>
> *(ii) that the sanctions imposed on me (including the referral to the GDC) are now considered to have been "overly punitive" and inconsistent with Board practice and procedures:*
>
> *(iii) that in the whole circumstances as now disclosed to the Board, the Board would not have referred me to the GDC and*
>
> *(iv) that in the whole circumstances as now disclosed to the Board, the Board does not support the current referral"*

116. Ms Milliken responded on 11 September (page 625) to attach a copy of the letter which had been sent by the respondent to the GDC. She also confirmed that she would be requesting the Information Technology department to undertake an analysis of the document history of the letter

which the claimant was said to have doctored. Ms Milliken also confirmed that she was seeking advice in relation to recompense for his stress, anxiety and ill health.

117. Ms Milliken knew, at this time, that the allegation made by Mr Morrow regarding the claimant was groundless: there was no cover up or doctoring of the letter, but rather a simple administrative error. Ms Milliken, notwithstanding this, instructed the IT department to search for the document history of the disputed letter on the claimant's computer, without reference to the claimant (who did not learn about this until November).

118. Mr Grant McHattie sent a letter to the GDC dated 11 September (page 622) regarding Mr Morrow. The letter narrated the fact that based on concerns raised by Mr Morrow and one other, the respondent commissioned an independent review of its process for the investigation and resolution of performance issues of general dental services. Mr McHattie confirmed that in respect of Mr Morrow, the review panel considered the sanctions applied were overly punitive and appeared to be inconsistent with other NHS Ayrshire and Arran judgments in relation to dental issues. Mr McHattie observed that in making their decision to seek review by the GDC, it appeared the PCDG did not strictly adhere to protocol. Further, there was a considerable delay with the referral as documents had been misplaced or lost. All of this had contributed to a period of stress for Mr Morrow.

119. Mr McHattie concluded the letter by stating he would be grateful if the GDC could therefore:-

- *"confirm, given the above circumstances, if the GDC will continue to proceed with this case; and*

- *advise of any timescale that you may have for this case to be reviewed and concluded by the GDC*."

120. Mr McHattie took the reference to not adhering to protocol from Mr Morrow's solicitor, where he asserted that the PCDG had not strictly adhered to protocol in circumstances where the recommendation of the PASG had included their preference to refer Mr Morrow to the NHS Discipline Tribunal if this was available, but the PCDG had changed this to referral to the GDC. In such circumstances, where there is a divergence of views, it would be usual for the chair of the PCDG (Mr McHattie) to discuss the matter with the chair of the PASG (the claimant). Mr McHattie, prior to making reference to this, did not check the precise terms of the recommendation made by the PASG.

121. The GDC sought clarification from Mr McHattie whether there had been discussion between the chair of the PCDG and the chair of the PASG, and Mr McHattie confirmed the claimant had been present at the PCDG when this matter was discussed.

122. The GDC wrote to Mr McHattie on 25 November (page 757) to inform him that the investigating committee would meet on 12 January 2016 to consider the case regarding Mr Morrow's fitness to practice. The letter confirmed Mr Morrow had provided written observations; a copy was enclosed and it was noted that if Mr McHattie wanted to provide comments he could do so by 9 December.

123. Mr Morrow's written observations were contained within a letter from his solicitor dated 23 November (page 758). The letter contained a full page regarding the allegation the claimant had "*doctored*" a letter.

124. Mr McHattie emailed Ms Nicola Taylor, Dental Services Manager, and asked her to draft a response. In his email (page 788) he stated: "*I don't know that we want to comment particularly on the health board bit and John Cameron will no doubt want to comment on the PDS allegations. Happy for advice from [the claimant] and yourself.*

125. Mr McHattie wrote the email in those terms because he felt all information had already been provided to the GDC. He knew Ms Milliken had carried out a document history search of the disputed letter, and he understood Ms Slaven had pulled the wrong letter off the system, and this explained how the error had been made. Further, Mr McHattie did not want any rebuttal to be seen as being overly punitive.

126. Ms Taylor was unable to discuss a response with the claimant prior to it being sent. The response sent by Mr McHattie to the GDC on 10 December (page 798) stated that having given significant consideration to the observations of Mr Morrow, NHS Ayrshire and Arran had no further comments to make.

127. Mr McHattie accepted the GDC could have investigated Michael Morrow's complaint as an allegation of dishonesty by the claimant and this could have led to the claimant being struck off. He also accepted the GDC would only know about the claimant`s rebuttal document and the document search instructed by Ms Milliken and the conclusion that there had been an administrative error rather than any dishonesty if he had told them of this, but he had not done so.

128. John Cameron was subsequently provided with a copy of the solicitor's letter which Michael Morrow had had sent to the GDC. Mr Cameron went through the letter to rebut what had been said, but was astonished that no-one from the Board had contacted him for his comments.

129. John Cameron and the claimant were subsequently contacted by the GDC and asked to provide comments regarding the solicitor's letter. The claimant, at that point, had an opportunity to rebut the allegations regarding doctoring a letter. Mr McHattie accepted that if the Board had taken action to respond when invited to do so, the claimant would not have had to be contacted by the GDC.

130. John Cameron subsequently received a letter dated 29 September 2016, from the GDC, confirming Michael Morrow is to attend a full Hearing to determine his competence to practice.

131. The Chief Executive, Mr Burns, wrote to Mr Morrow on 30 September (page 651) following upon the conclusion of the review and Mr Morrow's meeting with Mr McHattie and Ms Milliken. Mr Burns wrote to unreservedly apologise for the way in which the respondent had managed its communications with him. He assured Mr Morrow the review report findings would be implemented in full.

132. Ms Milliken, Ms Lynn Todd, HR and Mr Grant McHattie met with Mr Donald Morrison on 30 September. Mr McHattie had felt disadvantaged at the meeting with Mr Morrow because he had not been aware of the full nature of the complaints which had been raised. Mr McHattie raised this with Ms Graham, and she provided a verbal briefing regarding the complaints raised by Donald Morrison: this briefing however did not include the fact Mr Morrison had referred to the claimant as being dishonest and corrupt.

133. The purpose of the meeting with Donald Morrison was to feed back on the review Report, and to ascertain whether he was going to withdraw the letters/allegations because they had not been substantiated. Mr Morrison refused to discuss the allegations because he had received a letter from Mr Cameron's solicitor threatening legal action regarding the false allegations.

134. Mr Morrison would not withdraw the allegations. The respondent did not write to Mr Morrison to say the allegations would now be treated as unsubstantiated.

135. The claimant met with Lynn Todd, HR, and learned the meeting with Mr Morrison had taken place and what had happened. Ms Todd told the claimant it was "*a sorry mess*" and that HR should have been involved from the beginning.

136. Ms Todd emailed the claimant on 1 October (page 657) regarding their meeting. Ms Todd noted it was unfortunate to have ended up in this situation, but the Board's intention was to support the claimant but in doing this without her knowledge or involvement, it had left the claimant feeling that there had been a lack of honesty and that she had not been supported in any way.

137. Mr Morrison, in early November, emailed the members of the Area Dental Practice Committee regarding the forthcoming meeting. He attached a copy of the review Report and stated Ms Milliken and Mr McHattie had agreed the Report should be discussed with dentists, regarding its findings and the changes these findings must trigger. He considered it very important that the committee read, review and discuss the report.

138. The claimant emailed both Ms Milliken and Mr McHattie on 9 November (page 754) to enquire if they had asked Mr Morrison to disseminate the report to both committees. The claimant noted that it appeared the Report had already been disseminated widely at national level by Mr Morrison and that it seemed to be a talking point by a lot of people. The claimant commented that none of the people who were part of the team under investigation had been consulted about the report going to "*just about everyone who is anyone in dentistry"*. She stated that it was not fair to a hard working team to have its "*huge failings*" (this was what was being said) discussed at national level. The claimant concluded the email by stating "*surely it is time that some cognisance was given to the morale of our team and its reputation rather than only to practitioners who are under investigation."*

139. Mr McHattie responded to confirm he had not asked Mr Morrison to disseminate the Report, and he felt aggrieved that he had done so. The claimant, in response to this email, stated: *" It's now time that some of the senior people make an attempt to stop this man because he is now even more out of control".*

140. Ms Milliken confirmed she had not asked Mr Morrison to circulate the report. The claimant again responded to say: *"Can the senior people not do something to try to get him to back off?? He is completely out of control and I think he'll just get worse if no one does anything to stop him."*

141. Mr McHattie, in response to the claimant's email, contacted HR. He did not consider the Board had any power to sanction Mr Morrison. Mr McHattie accepted the circulation of the Report may be a reportable issue to the GDC, but this had not occurred to him at the time.

142. The claimant submitted a formal grievance to Mr Burns, Chief Executive on 13 October 215 (page 664). The letter set out a 10 page grievance detailing the history of what had occurred and the way in which the claimant had been treated. The grievance concluded by setting out the action which the claimant wished the Board to take to resolve the grievance. This included a formal written rebuttal, with facts, of Mr Morrison and Mr Morrow's complaints. The claimant included, with her grievance, the rebuttal document she had prepared and the redacted copies of the complaints with which she had been provided.

143. Mr Burns acknowledged the claimant's letter on 29 October (page 718) and enquired whether it would be possible to resolve the grievance informally by way of a mediated discussion with Ms Graham.

144. The claimant responded by letter of 9 November (page 750) to say that what had transpired was not simply personal conflict, and mediation was not appropriate, particularly given the actions which she considered would be required to resolve the grievance. The claimant made reference to the untrue and vexatious complaints which had been made, and to the fact the review Report was being widely disseminated and that this had had a detrimental effect on her role as DPA, and upon her professional reputation. The claimant concluded by stating that if the respondent agreed to carry out the actions requested in her grievance letter, then she would consider

mediation; but if not, then she wished to move to the formal process and a grievance hearing.

145. Ms Graham wrote to the claimant on 9 November (page 794) to explain why she had adopted the approach she had in relation to the complaints by Mr Morrison and Mr Morrow. Ms Graham acknowledged some of the concerns raised were personal to the claimant, and she had met with Mr Morrison to request that any evidence to support the allegations be provided. Ms Graham had hoped to protect the claimant in the absence of the allegations being taken any further. She had also been mindful of the claimant's reputation and was concerned that launching an investigation would have made the allegations more public and would have given them a degree of validity. Ms Graham appreciated with the benefit of hindsight that the claimant would have preferred to have been advised of the allegations at the time and been afforded an opportunity to comment on them prior to any response being issued. Ms Graham apologised for this and stated she had believed at the time that she was acting in the claimant's best interests.

146. Mr Burns wrote to the claimant on 11 December (page 799). He noted Ms Graham had written to the claimant and in light of that letter he wanted to know if she had given further thought to mediation.

147. The claimant responded on 20 December (page 802) noting that it had been nine weeks since she submitted her grievance and no progress had been made to furnish her with a meaningful response regarding the action she desired.

148. Mr Burns responded on 23 December (page 809) to confirm he had requested HR to set up a grievance hearing. The claimant notified Mr Burns on 30 December that she had been signed off sick for a further period of two weeks.

149. The claimant wrote to Mr Burns on 18 January 2016 (page 817) to give notice of her resignation with immediate effect. The claimant reminded Mr Burns of the matters included in her grievance, the manner in which the respondent had dealt with the grievance and the repercussions on her flowing from the respondent's failure to act appropriately to support her. The claimant also referred to a new matter arising from the fact she had received a copy of Mr McHattie's letter of 10 December to the GDC which had been sent in response to the GDC letter enclosing a copy of the letter from Mr Morrow's solicitor. The claimant noted the letter from the GDC informed Mr McHattie that the solicitor's letter was to be presented to an investigation committee of the GDC considering Mr Morrow's fitness to practice. The claimant noted Mr McHattie would have been aware, from reading the solicitor's letter, that it contained defamatory comments regarding the claimant, which he knew to be untrue; and that he would have been aware of the consequences that such unrebutted allegations submitted to the GDC would be likely to have.

150. The claimant referred to Mr McHattie's email to Ms Taylor, and to the fact that she (the claimant) was working for the respondent on the morning of 26 November but no-one made contact with her before Mr McHattie's response was sent.

151. The claimant referred to her disclosures regarding Mr Morrow as being protected disclosures, and asserted the respondent had failed to act appropriately in accordance with its duties under the Employment Rights Act, as well as failing to comply with its own policies.

152. The claimant considered this, together with other matters detailed in the grievance to be so serious as to comprise the last straw giving rise to a repudiatory breach of contract entitling her to resign.

153. Mr Burns acknowledged the claimant's letter on 25 January (page 823).

154. The respondent carried out a grievance review process led by Ms Anne Clark, Assistant Director of Public Health. The grievance was partly upheld insofar as it recognised the claimant ought to have been informed of the complaints, but it accepted Ms Graham and Mr McHattie had acted with the best of intention.

155. The claimant was informed by Ms Nicola Taylor (acting on instruction from Ms Milliken), on 24 September, that the clinical governance budget (which had been being used to assist Practitioner Services clear a backlog of investigations) had now gone and that she was to write to John Cameron to inform him of this. The claimant emailed Mr Cameron on 24 September (page 649). The email was in the following terms: "*As you know, Grant had approved a pilot whereby some of our CG budget would be used to pay additional sessions for your Dental Advisors to investigate some of our outstanding issues. Unfortunately, we will need to cancel that arrangement as the funding is needed elsewhere within NHS Ayrshire and Arran. I am sorry that we are having to pull out of the arrangement.*"

156. The claimant had been a participant on the national Quality Improvement Group, and had been appointed by the Scottish Government to chair a local group/pilot to look at indicators to quickly identify under performance and deal with it in an efficient and supportive way. A national data base was being developed and one domain on that data base related to probity. This was being designed to assist Boards in identifying dentists who moved from one area to another to evade issues.

157. Ms Milliken took the decision to withdraw from the pilot. Ms Milliken considered that as the review Report had identified a "*culture of fear*" amongst dentists, this pilot may contribute to it.

158. The claimant confirmed this in an email of 6 October to others on the pilot (page 658). The claimant believed Mr Morrison (who was a member of the Area Dental Practice Committee) realised that because he had mis-claimed payments, he would show up on the system in red. The claimant in her

email noted there had been vociferous complaints from the Area Dental Practice Committee, which she believed were being led by "*one person*" (that is Donald Morrison). She noted there had been no complaints until such time as he joined the committee.

159. The claimant reported to Mr McHattie and Ms Milliken, by email of 21 October (page 720) that a lot of concern had been voiced about the respondent withdrawing from the database pilot. She confirmed there had also been discussion about the review Report, and that the Chair of the Scottish Dental Practice committee had wanted to discuss the "*huge failings*" identified by the report. The claimant noted this was a very high level group; that she had been humiliated and that this was yet another example of how the completely inept handing of the situation had led to something much worse.

160. Ms Milliken responded to this email to inform the claimant the Report was provided to each of the dentists and the individuals interviewed, and would also be released in any Freedom of Information request.

161. Ms Milliken decided a Press Release should be prepared by the Board in order to protect its reputation should the matter become public.

162. Ms Milliken decided that ongoing work regarding the outstanding concerns in relation to dentists would be taken over by Ms Maura Edwards, the strategic lead for Dentistry and a Consultant in Dental Public Health. These issues fell specifically within the claimant's remit.

163. Ms Milliken and Mr McHattie met with the claimant to discuss the Report and Action Plan to address the issues identified in the Report. One of the issues related to a "*culture of fear*" amongst dentists insofar as they did not wish to come forward to raise issues of concern. It was decided that a questionnaire should be sent out to all dentists. A draft questionnaire was produced (page 685) and one of the questions was "*If you have sought*

advice from the Dental Professional Adviser, has this been helpful?" The claimant was upset that a direct question was being asked about her.

164. The claimant sent an email to Ms Milliken dated 20 October (page 689) regarding the questionnaire, and informing Ms Milliken she felt "*very excluded at present"* and that "*it appears everything which I would have done is done without my consultation or is being directed to Martin and not to me*". The claimant felt that all of this coming after being "*pulled from a role of national chair"* (on the pilot) was upsetting and she felt she was being discarded and slighted in front of peers. The claimant concluded her email by stating she felt people should not be allowed to respond anonymously to the questionnaire, because it they were willing to criticise they should not do so anonymously.

Credibility

165. We found the claimant to be a wholly reliable and credible witness. She had a very clear recollection of events and gave her evidence in an honest, straightforward and candid manner. The same was true of Ms Alexander (formerly Slaven) and Mr Cameron, who was an impressive witness who gave not only his recollection of events, but also an insight to why he considered the actions of the respondent to be unusual and which suggested that "*something was just not right*".

166. Mr David Rowland was also a credible witness who gave his evidence in a very straightforward, fair and balanced manner.

167. Mr Grant McHattie gave his evidence in a straightforward and balanced manner and he acknowledged, with the benefit of hindsight, that he could have provided information to the GDC regarding the investigations which had been carried out in respect of Mr Morrow's allegation regarding the claimant, and the conclusions which had been reached. Mr McHattie was asked in cross examination whether he accepted he could have taken up this issue with the GDC, and we found his response "*yes, but we didn't feel*

it was worth while commenting" to be a startlingly honest and illuminating response given the circumstances of this case.

168. Mr McHattie rejected the suggestion that his letter of 11 September 2015 (page 623) to the GDC, (where he stated he "*would be grateful if you could therefore confirm, given the above circumstances, if the GDC will continue to proceed with this case*") was an attempt to invite the GDC to reconsider taking Mr Morrow through the process, and explained he had merely been inviting the GDC to reflect on the review panel findings and protocol. We considered that given the terms of Mr Morrow's letter to Ms Milliken, following the meeting in September, where he suggested the Board write to the GDC to say they were not supporting a referral, that Mr McHattie's evidence could not be accepted as reliable on this point. The terms of his letter to the GDC were clear and had been prompted by the meeting with Mr Morrow: against that background, and even though he had no remit to ask the GDC to reconsider, the inference to be drawn from the letter was clear and that is, that it was an invitation to reconsider taking action against Mr Morrow.

169. Ms Frances McLinden's evidence was notable for her lack of recall about these events. Ms McLinden's recollection was limited to the terms of the remit and the conclusions of the Review panel. It was clear that many of the questions asked of her in cross examination to test what the Review panel had done and why, had not been thought of or considered at the time of the review.

170. The evidence of Mr Burns, Ms Graham and Ms Milliken was at times perplexing, convoluted and reluctantly given. Mr Burns was very guarded in every response he gave and whilst we acknowledged this may be a product of the environment in which he works, it often left us with the impression that responses were carefully constructed rather than candidly given.

171. Mr Burns was, following receipt of Mr Morrow's letter of 14 April 2015 and his meeting with Donald Morrison on 20 April 2015, in possession of all the information regarding the complaints they wished to raise. He decided to have an external review and whilst that decision was surprising for a number of reasons, we accepted it was within his remit to make this decision. There were, however, two fundamental failures regarding the external review: firstly, Mr Burns did not disclose all of the information in his possession to Ms Graham and Ms Milliken and, Ms Milliken in particular prepared terms of reference for the review panel without knowledge of the full extent of the complaints. Secondly, Mr Burns' decision to have an external review to look at systems and processes only, did not address the other complaints raised by the dentists. This led to a review process where virtually each party involved had a different idea of what was being reviewed: the respondent believed systems and processes were the subject of the review; the dentists believed their complaints (in total) were the subject of the review and the review panel, whilst being clear regarding the terms of reference, strayed into the other areas raised by the dentists.

172. Ms Graham was also guarded in the responses she gave and often would not concede or acknowledge an obvious point until the question had been asked several times. Ms Graham repeatedly told us the Board's role was to support individuals and that an open and transparent culture was one of the Board's values. We had no reason to doubt this evidence, but it only emphasised the closed and opaque way in which the respondent dealt with the claimant. Indeed, Ms Graham accepted, in response to a question asked in cross examination, that she had denied the claimant an opportunity to respond to Donald Morrison's allegations, and that conflicted with an allegedly open and transparent culture.

173. Ms Graham repeatedly told us that the actions she had taken had been done to protect the claimant and that she had acted with the best of intentions. We considered that whilst that may have been true at the start of these events, it was simply not credible to maintain that position as matters unfolded. Ms Graham acknowledged she had been shocked upon reading

Donald Morrison's letter of 30 June at the level of personal attack on the claimant. However, rather than act on that and inform the claimant and involve HR for advice, Ms Graham instead met with Donald Morrison three weeks later, asked him for the evidence he had to support his allegations and, when he provided that (or what he thought was evidence) on 24 August, she never went back to him to say there was no evidence to support the allegations and on that basis the respondent expected the allegations to be withdrawn, or they would be treated as unsubstantiated.

174. Ms Graham rejected the suggestion that she had acted to "*protect*" Donald Morrison and insisted she had merely been fulfilling the duty to support him. We did not find this aspect of Ms Graham's evidence to be entirely reliable because it simply was not supported by the evidence. For example:-

- Ms Graham did not ever disclose to Mr Burns the fact she had previously worked with/for Donald Morrison's father when she started in GP practice; she did not tell Mr Burns that Donald Morrison and his practice were under investigation by John Cameron and that this had been authorised by David Rowland; she was, effectively, told by Mr Burns to tell Donald Morrison to put up or shut up regarding the unsubstantiated allegations, and whilst she asked Donald Morrison for his evidence to support the allegations, she did not ever tell him to withdraw the allegations or confirm the respondent was treating them an unsubstantiated;

- she did not make Mr Burns aware that she had instructed the claimant not to speak to him or John Cameron;

- she attempted to obtain John Cameron's report in order to "*share*" it with the dentists prior to its completion;

- she mistakenly believed it fell within the remit of the Board to decide from whom and how much to recover following mis-claiming;

- she instructed Counter Fraud Services that there was to be no criminal investigation;

- she controlled the witnesses and evidence to be provided to the review panel and

- the review panel was not informed of Donald Morrison's acceptance of the fact he had mis-claimed.

175. We did not doubt the Board has a duty to support individuals, but there appeared to be a lack of judgment and balance in the actions/omissions of Ms Graham, such as to lead to the question "*why*" being asked. This was compounded by an unseemly eagerness by the respondents to dance to the tune of the complaining dentists.

176. Ms Milliken was placed in a very difficult position by the fact that she had only recently started in the post, and was asked by Mr Burns to make arrangements for the external review in circumstances where he told her of some of the concerns raised, but did not provide her with copies of correspondence or full details of Donald Morrison's concerns. This drip-feeding of information continued and disadvantaged Ms Milliken (and Mr McHattie) from effectively undertaking her tasks. That said, however, Ms Milliken's evidence was marked by her mantra of "*systems and processes*" and her reluctance to answer questions without giving careful thought to a carefully constructed answer.

177. Ms Milliken was however prepared to acknowledge actions which should or should not have occurred and this gave her evidence a degree of credibility and reliability.

Claimant's submissions

178. Mr Miller provided a skeleton submission which he expanded upon and presented to the Tribunal. In relation to the complaint of constructive

dismissal, he noted the claimant had to prove five points: (i) the employer's breach of contract must be sufficiently important, judged objectively, to justify the employee resigning, or must be the last in a series of less important incidents (***Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445)***; (ii) the employer's conduct must amount to a material breach of contract (***Western Excavating v Sharp [1978] QB 761)***; (iii) the claimant must leave in response to the breach; (iv) the claimant must act promptly in resigning following the breach and (v) deliberate misconduct or bad faith is not a necessary prerequisite for the obligation of mutual trust and confidence to be destroyed (***Post Office v Roberts [1980] IRLR 347*** at paragraphs 49 and 50).

179. Mr Miller submitted six breaches of contract were relied upon by the claimant and they were: (i) by subjecting the claimant to a series of detriments for making disclosures as part of her job (whether or not these were protected disclosures and whether or not these were made to a prescribed person); (ii) by acting in a manner calculated or likely to place the claimant's GDC registration in jeopardy; (iii) by failing to deal timeously or at all with the claimant's grievance; (iv) by actively misleading the claimant regarding the content and progress of complaints against her, and by acting in a way which favoured the complainers over the claimant; (v) by (consciously or subconsciously) ignoring or at least undervaluing the claimant's interest and rights in an unreasonable and biased desire to mollify the complainers (or some of them) at the expense of her reputation and the credibility of her role and (vi) by producing and allowing to be distributed a flawed report at the BDA Scottish Dental Practice committee. Mr Miller submitted these breaches were cumulative and the claimant resigned in response to the accumulated breaches.

180. Mr Miller addressed each of the breaches in turn, and, in relation to the first alleged breach, he reminded the Tribunal the claimant had a protected disclosure claim and submitted that if that claim was successful, then it was self-evident that the claimant's contract was materially breached.

181. In relation to the second alleged breach of contract, Mr Miller noted each of the professional witnesses had been asked if dishonesty could put the claimant's registration at risk, and had agreed. He submitted the respondent had compromised the claimant's reputation and prejudiced her continuing livelihood by the inadequate response to the GDC to the serious charge made by Mr Morrow that the claimant had deliberately concealed the doctoring of a letter. Mr Miller submitted there was so much more the respondent could have done: for example, Ms Slaven could have been asked for a statement, and details of the investigations undertaken could have been provided.

182. Mr Miller submitted that this breach was compounded by the attempt made on behalf of the Board to influence the outcome of the regulatory process taken by the GDC against Mr Morrow, in his favour. Mr McHattie's letter of 11 September was a plea in mitigation and an invitation to think again. Mr McHattie's denial of this had not been credible.

183. Mr Miller submitted, with regard to the third alleged breach, that the respondent's response to the grievance had been slow, inadequate and inappropriate. The claimant had, by then, put up with a lot and was still in the dark about some matters. The grievance submitted on 13 October had not been substantively addressed by the time of her resignation on 18 January. There was, it was submitted, no attempt by the Chief Executive to follow the grievance procedure. He offered only a mediated discussion with Ms Graham, and he ought to have realised this was completely inappropriate in light of the grievance and his knowledge of the conduct of Ms Graham following the submission of the complaints from the dentists.

184. The claimant should be credited for delaying the submission of her grievance and for offering the respondent an informal opportunity to support her. She sent the rebuttal document to Ms Milliken and despite Ms Milliken promising to deal with the issues, she did not do so. Why not in circumstances where she had the experience and authority to deal with the matter? Mr Miller submitted the complete inability of Ms Milliken and thereby

the respondent, to address the claimant's complaints contrasted markedly with the efforts made to support the complaining dentists.

185. Mr Miller submitted, in relation to the fourth alleged breach, that from the outset of the handling of the complaints, the dentists were favoured. There was an unaccountable and indefensible failure to use one or more of the respondent's applicable policies to protect both the complainers and the members of staff affected. Mr Miller noted that none of the respondent's witnesses could explain why the complaints had not been dealt with under the Can I Help You procedure, and this, he submitted, cast a question mark over the motivation for the review.

186. Ms Milliken had been deliberately kept in the dark, but this did not exonerate her from criticism. Mr Miller submitted it must have been obvious to her that the summary of issues which she drafted went far beyond the terms of reference for the external review. Further, it was highly suspicious that a review into "systems and processes" was deemed necessary at all when the "new model" had barely been used. Mr Miller submitted that in truth, the review was a vehicle for Ms Graham to regain control from PSD of the investigations into the dentists. Mr McHattie had been taken aback when he discovered the process was to be reviewed, yet he failed to act to correct the allegation, which he knew to be untrue, that the claimant as DPA, acted as judge and jury.

187. Mr Burns failed to recognise the element of whistleblowing present in the dentist's complaints.

188. The terms of reference for the review were flawed; and, in the preparation for and conduct of the review, there was a complete absence of objectivity and fairness, and Mr Miller questioned whether the review panel had been encouraged to stray beyond the terms of reference. The claimant, in contrast to the dentists, was denied all rights normally associated with a fair hearing.

189. Mr Miller submitted that it must have been glaringly obvious that the complaints went beyond mere systems and processes: the complaints were highly personalised. The review panel went far beyond looking at systems and processes and Mr Rowland had commented in his evidence that he had been surprised that the review was delving into the specifics of individual dentists.

190. These failures were compounded by the presentation to the panel of incomplete papers and the lack of evidence from all the relevant decision-makers. Mr Miller noted that even the decision makers who had attended the review panel had not been asked to explain their decisions. There was no rigorous examination of the decision making process in Mr Morrow's case and therefore their conclusion that the sanction had been overly punitive had to be questioned.

191. The claimant was denied full notice of the matters being considered by the panel. She was deliberately prevented from talking to Mr Burns and Mr Cameron: this, in contrast to the dentists who enjoyed regular and direct access to Mr Burns. Furthermore, the panel did not seek to interview John Cameron.

192. Mr Miller submitted the review panel appeared biased, and if there had truly been a desire for externality, then it could not have been thought appropriate for Simon Morrow to sit on that panel. The decision to appoint him was only rescinded after intervention from the claimant. Mr Miller submitted the fact it was felt appropriate at all to appoint Simon Morrow revealed a great deal about the motivation of Mr Burns and Ms Graham, and their objective to mollify the complainers at all costs. In addition to this the inclusion of Martin Wishart on the panel was particularly controversial as he was a fellow committee member of Donald Morrison.

193. Mr Miller submitted the respondent had provided no evidence to show that the formation of this review panel matched that of other external panels. Ms Graham, who had previously consulted the relevant medical college when

selecting appropriate members to sit on an external panel, did not even check whether there was an equivalent to the medical colleges in operation for dentistry: had she checked she would have been told of the Faculty of General Dental Practitioners.

194. The claimant was denied a proper opportunity to prepare for the panel interview. She was not provided with adequate support and the respondent failed to recognise that her role and conduct were being demonised. The respondent knew the complaints were lies and they did nothing to stop these dentists from pedalling them. Ms Graham told the panel that the claimant was too close to Mr Cameron and heavily influenced by him. Mr Miller submitted that these statements say far more about the true purpose of the review that any management witness conceded.

195. The document security and data protection was wholly inadequate. There was no redaction of the Report before circulation. The word "*confidential"* was not printed across the report, as it was on some less confidential documentation, and Simon Morrow received the full papers for the review by mistake. Mr Miller submitted there had been a casual disregard of the claimant's rights.

196. Ms Graham and Ms Milliken had decided upon the list of witnesses and although the panel had a right to ask other witnesses to attend, they did not exercise that right. As a result of this, the evidence considered was unrepresentative: the panel was not given the full information about what Mr Morrow had done wrong and had no information about what Mr Morrison had done wrong. The Board failed to show the review panel the 10th July confession of Mr Morrison to his practice of mis-claiming. This was directly relevant and, it was submitted, this restriction of evidence available to the panel contrasted markedly with Ms Milliken's assurance to Mr Morrison that the panel could be as broad as possible.

197. Mr Miller questioned the decision of the Board to provide the panel members with copies of the complaints in circumstances where everyone else was provided with a summary of the issues, and he submitted the inference to be drawn was that the Board deliberately decided to influence the panel in favour of the complainers against the claimant.

198. In relation to the fifth breach of contract, Mr Miller submitted the Board undermined the authority of the claimant by checking the document history many months after the complaint had been made and should have been rebutted. The unfairness of doing so was compounded by the fact the claimant was not informed the checks were taking place and discovered this by accident, thus further diminishing her confidence in the employer. Mr Miller noted that no attempt was made to have Mr Morrow substantiate his allegations. The claimant's authority and status were further undermined by the unreserved apology given to Mr Morrow, and the fact he was given assistance to pursue a claim against the Board for compensation for the stress.

199. The respondent's attempts to control Mr Morrison were weak and there was a failure to send a robust, or indeed any, response to Mr Morrison's letter of 24 August. Instead, a delegation from the Board was sent to meet Mr Morrison on 30 September to ascertain whether the Report's recommendations addressed his concerns, including those raised about the claimant. The respondent was, it was submitted, bending over backwards to help the dentists with their complaints. It did not seem to have occurred to anyone that the complaints from the dentists were being orchestrated by Mr Neil Taylor to serve his clients' best interests.

200. Mr Miler submitted it was extraordinary that Mr McHattie had not been shown the Morrison complaints and had been content to proceed based on the verbal briefing from Ms Graham.

201. The claimant was marginalised, excluded from work (Quality Improvement pilot) and humiliated at a national level. The claimant's hard earned and justified reputation was crudely sacrificed, or at best ignored in the Board's attempts to support two complaining dentists. The Board was uncaring and/or reckless in failing to take obvious steps which were available to it to protect the claimant's reputation being further damaged by wide circulation of the report. The respondent, by their inaction and omissions caused or permitted reputational damage (***Clements v RDF Media Group Ltd [2008] IRLR 208)***.

202. Mr Miller, in conclusion, submitted that no employee should have to tolerate what the claimant had to endure. Further, even if the escalating series of events was not manipulated by the respondent's management so as to destroy or seriously damage the employment contract, it had that effect and that is sufficient to constitute a breach of the mutual term of trust and confidence. The claimant timeously resigned in response to the breaches. Her resignation letter set out a description of events which corresponded to the evidence the Tribunal had heard. Mr Miller invited the Tribunal to uphold the complaint of constructive dismissal.

203. Mr Miller noted the claimant had provided extensive details regarding the disclosures made, and he submitted the content of the disclosures satisfied the test in Section 43B Employment Rights Act. The disclosures had been made either to the claimant's employer or to another responsible person, being John Cameron. (The respondent accepted Mr Cameron was a responsible person in terms of the Act).

204. The claimant had been subjected to a series of detriments in contravention of Section 47B Employment Rights Act. Mr Miller referred to section 48(2) which placed the burden on the employer to show the reason for the act or omission complained of. If the explanation is insufficient, or lacks candour, then it will count against the employer: ***Fecitt v NHS Manchester [2012] ICR 372***. Mr Miller noted the operation of Section 48(2) was similar but not

identical to the reversal of the burden of proof in general discrimination cases.

205. Mr Miller referred the Tribunal to the case of ***Harrow London Borough v Knight [2003] IRLR 140*** where the EAT held the task for the Tribunal is to analyse the mental processes which caused the employer to act as it did. Mr Miller suggested the disclosures regarding deficiencies in some dental practices, was information the respondent did not want to hear and this influenced how they treated the claimant. The question for the Tribunal, if the claimant establishes in fact the detriments of which she complains, is were those acts/omissions committed on the ground that the claimant made a protected disclosure. Mr Miller referred the Tribunal to the case of ***Melia v Magna Kansei Ltd 2006 ICR 410*** for guidance regarding the interplay between constructive dismissal and protected disclosures.

206. We were also referred to ***Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401*** where the approach to be adopted in cases of dismissal on grounds of making a protected disclosure was set out.

207. Mr Miller submitted it was clear that by April 2015 Ms Graham found herself engaged in a turf war with PSD and promoted the external review as a means to take back control. It was Ms Graham's view that the Board owed the dentists being investigated a duty of care. PSD thwarted her efforts to answer that duty. The question then arises: why did she stop her efforts on finding PSD uncooperative? The answer is that she did not: she devised a different approach in the shape of a review, and this, it was submitted, explained all of the unanswered questions.

208. Mr Miller submitted that for there to be an automatically unfair constructive dismissal the claimant has to establish that the reason, or if more than one, the principal reason for dismissal was the making of protected disclosures (Section 103 Employment Rights Act).

209. Mr Miller submitted the claimant, by virtue of her role, was inevitably placed in the position where she would have to make protected disclosures to her employer from time to time. The fact that she did so in furtherance of her contract of employment ought not to diminish the protection conferred on her by law. Where, as here, the employer responds by seeking to cover up, minimise or quash the subject-matter of those disclosures, the claimant is entitled to claim that she has suffered a relevant detriment and that the response to the disclosures was the reason for her constructive dismissal.

210. Mr Miller invited the Tribunal to find the claimant, Ms Slaven and Mr Cameron had been fully candid, honest and reliable in the evidence they gave. This was in contrast to the evidence of most of the respondent's witnesses. Mr Miller considered Mr Rowland had been very fair and balanced in his evidence, as had Mr McHattie with the exception of his attempt to characterise the letter of 11 September as something other than an attempt to persuade the GDC to reconsider the pursuit of the case against Mr Morrow.

211. Ms McLinden had also given honest testimony although she seemed to have almost no recollection of the review in which she had participated. Mr Miller acknowledged Ms Milliken had been denied key pieces of information by Mr Burns and Ms Graham, however, it was submitted that Ms Milliken's evidence was marked by the length of time it took her to assemble her answers in her head and satisfy herself these answers corresponded with the Board's defence.

212. Mr Miller submitted both Mr Burns and Ms Graham had been evasive and cagey in the evidence they gave. They had a habit of sticking slavishly to certain lines long after it had been demonstrated they were not credible. Later witnesses confirmed the extent to which they were manipulated by Mr Burns and Ms Graham and, it was submitted, that for this reason their evidence should be weighed very carefully.

Respondent's submissions

213. Mr Hardman acknowledged the claimant was undeniably angry about what had happened to her in the role as DPA, but the issue for the Tribunal was not to explain or rationalise that anger, but to focus on the legal claims brought by the claimant.

214. Mr Hardman set out a number of proposed findings of fact which he invited the Tribunal to make, and these fell into six broad headings. He then invited the Tribunal to make a number of conclusions based on those findings, and it is helpful to set out those conclusions.

215. In relation to the Michael Morrow issue, Mr Hardman invited the Tribunal to conclude (i) that Ms Graham, and others, refuted to Michael Morrow, from the outset and thereafter on several separate occasions, his claim that a letter had been "*doctored*" by the claimant; (ii) that Ms Graham and others, from the outset and thereafter on several separate occasions, made it clear to the claimant that they did not consider there was any case for the claimant to answer in respect of the letter issue and (iii) that by October 2015 the claimant knew both of these facts.

216. In relation to the Donald Morison issue, Mr Hardman invited the Tribunal to conclude (i) that Mr Morrison's initial allegations primarily concerned the system for dealing with complaints and the claimant's part in that system; (ii) on 30 June 2015, but not before, Mr Morrison alleged dishonest and unethical behaviour by the claimant but provided little or no detail of what that behaviour was; (iii) Ms Graham made preliminary investigations and found nothing to substantiate that allegation; (iv) Ms Graham required Mr Morrison to substantiate or withdraw the allegation, but could not force him to do so and (v) Mr Morrison did not pursue any allegation against the claimant with the respondent Board after 24 August.

217. Mr Hardman invited the Tribunal to conclude, with regard to the external review, that it cannot reasonably be considered either critical of the claimant or supportive of any criticism of her by Mr Morrow or Mr Morrison.

218. Mr Hardman invited the Tribunal to conclude, with regard to the grievance, that the respondent Board did not unduly delay in dealing with the claimant's grievance; the Chief executive sought to resolve the matter by mediation and when it was clear that was rejected, he immediately sought to have a grievance hearing arranged and the claimant was content to remain employed and proceed with a grievance hearing until she considered the response sent by Mr McHattie to the GDC on 10 December 2015.

219. Mr Hardman invited the Tribunal to conclude, with regard to the correspondence between the Board and the GDC that no inference can be drawn from the letter of 10 December to suggest the respondent accepted Mr Morrow's observations to any extent; neither that letter nor the letter of 11 September gives any support to an allegation by Mr Morrow, directly or by inference, that the claimant had acted improperly in connection with the Morrow case and neither Mr McHattie nor any other employee of the respondent sought to suggest to the GDC directly or by inference that the case against Michael Morrow should not proceed. All of the respondent's witnesses had been very firm on this.

220. Mr Hardman further invited the Tribunal to conclude that the evidence did not support that Ms Graham set up the review in order to wrest control back from Mr Cameron/PSD. Further, the last straw was the response sent by Mr McHattie to the GDC on 10 December 2015, and this made no reference to the letter of 11 September.

221. Mr Hardman, against that factual background, noted the claimant maintained that she had made qualifying disclosures and that these had been set out in detail on pages 16 and 17 of the documents. Each purported disclosure was of alleged professional misconduct by dentists contracted by

the respondent. It was submitted that it could not be said that the claimant reasonably believed that the conversations she had with Mr Rowland or Mr Cameron about this alleged misconduct amounted to disclosures in the public interest. Nor could it be said the claimant reasonably believed these conversations tended to show the breaches of the obligations alleged. Mr Hardman submitted the claimant did not believe, or disbelieve, what she reported: she was neutral in the matter because her role was to report these matters and she simply reported them as part of her job.

222. The claimant explained in evidence that when she made these disclosures she did so simply to discuss the processing of complaints which she was passing on about the clinical practice and probity of dentists. She was not, it was submitted, make a "*disclosure*" in the public interest, and she could not reasonably have believed she was doing so.

223. Mr Hardman noted the courts have urged that a purposive construction of the Act was required and he referred to the cases of ***Miklaszewicz v Stolt Offshore Ltd [2002] IRLR 344; Hibbins v Hesters Way Neighbourhood Project [2009] IRLR 198; Woodward v Abbey National plc [2006] IRLR 677*** which were all cases which had been described and adopted in ***BP plc v Elstone [2010] IRLR 558***.

224. It was submitted that the purpose of the legislation was to protect those who "*blow the whistle*" in the public interest, and it was not to provide an unnatural extra protection to an employee whose role happens to include processing of complaints about professional dentists.

225. Mr Hardman further submitted that the evidence did not suggest that any detriment which the claimant maintained was caused to her by the Board or its managers was done on the grounds that she had reported the matters described by her either to Mr Cameron or to any of her managers. Mr Hardman referred the Tribunal to a commentary from Harveys regarding section 47B Employment Rights Act and to the case of ***Fecitt v NHS Manchester [2012] IRLR 64***, and submitted that there was nothing in the

evidence to support a view that the fact of the claimant reporting the matters she did to any of her managers or to Mr Cameron materially influenced any alleged failure to support her.

226. It was submitted that this point was made even more forcefully when, by virtue of Section 103A Employment Rights Act, the claimant asserted that she had been automatically unfairly dismissed (by being forced to resign) because the principal reason for her dismissal was that she had made a protected disclosure. It could not be maintained that any part of the reason for the claimant's resignation, far less the principal reason for it, was that she had made a protected disclosure: ***Eiger Securities LLP v Korshunova [2017] IRLR 115*** paragraphs 55 – 61.

227. Mr Hardman invited the Tribunal, for these reasons, to dismiss the complaint regarding protected disclosures.

228. Mr Hardman next dealt with the claimant's claim of constructive dismissal. He referred to the case of ***Western Excavating v Sharp [1978] IRLR 27*** and submitted that it was not enough for the employee to leave merely because the employer had acted unreasonably. The test was a contractual one, and the employers conduct must be so egregious as to amount to a fundamental breach of the contract of employment. It was further submitted that the test was an objective one and that the focus had to be on what the employer had done, or not done, and not on how the employee had reacted to it.

229. The question for the Tribunal was whether the respondent had, by its conduct, and without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: ***Mahmud v Bank of Credit and Commerce [1997] IRLR 462*** as clarified in ***Baldwin v Brighton and Hove City Council [2017] IRLR 232***. Mr Hardman submitted that taking the whole period up to the claimant's resignation, the respondent's conduct could not be said to pass the rigorous hurdle or a

breach of the implied term of mutual trust and confidence. Mr Hardman acknowledged that with the benefit of hindsight there was little doubt things could have been handled differently. However, by the time the claimant intimated her grievance, it was submitted the Board had sought to recover the situation. They had stepped back from committing a breach of contract and had sought to rectify the claimant's lack of confidence in them. Mediation was offered and an apology was made. No grounds for complaint by either dentist were established which warranted investigation or a disciplinary procedure.

230. Mr Hardman acknowledged this was largely a question of fact for the Tribunal. However, he considered this was a different situation to the one in ***Buckland*** where the breach had occurred and then the employer tried to rectify the situation. In this case, it was submitted, the respondent had not breached the contract and they had pulled back from it before the claimant resigned.

231. Mr Hardman referred the Tribunal to the case of ***Assamoi v Spirit Pub Company UKEAT/0050/11*** which provided an illustration of the difference.

232. Mr Hardman invited the Tribunal to ask why the claimant terminated the contract of employment. He referred to the letter of resignation and the reasons set out by the claimant and in particular to the sentence where the claimant stated: *"I consider that together with the other matters of which you are aware from previous correspondence, etc, (1, 2 and 3 above) the Board's actions in relation to the matters concerning the GDC's approach to it in November 2015, to be so serious that they comprise the last straw giving rise to repudiatory breach of my contract of employment."*

233. Mr Hardman submitted that the claimant clearly anticipated that if she is to obtain payment of compensation for her resignation, she must show a better reason than simply her discovery that the respondent had told the GDC that they had no further comments to make with regard to Mr Morrow solicitor's letter. And so, it was submitted, she described that matter as the last straw.

Mr Hardman submitted that the alleged last straw in this case was not an incident forming part of a course of conduct over a period of time such that it may be considered part of that course of conduct and thus a last straw at all.

234. Mr Hardman referred to Harveys at Division D1, 3.C.6 (at page 480). He submitted that the alleged last straw in the present case was not of the same character as what happened before the claimant's grievance. Mr McHattie's letter was innocent, bland and innocuous. It related solely to Mr Morrow's case before the GDC: it did not relate or refer to any allegations he had made. Those had been refuted and nothing more could have been said. On an objective assessment of the letter, it cannot be said to contribute to a series of acts which, taken together, amount to a breach of the implied term.

235. It was further submitted that the Tribunal must consider whether the claimant affirmed the contract before the alleged last straw. If it can be said that the final conduct complained of by the claimant contributed nothing to the alleged breach of the implied term, or that she had affirmed the contract before that final conduct complained of, then any course of conduct prior to the last act complained of is irrelevant. Mr Hardman submitted the claimant made it clear in her email to Ms Graham on 27 July and again in the covering letter to her grievance on 13 October that she had lost confidence in her employer. And yet, she continued to work in her role for a further 18 weeks before going off with a stress related condition. It was submitted that she had decided to continue to work and she had thus affirmed the contract.

236. Mr Hardman invited the Tribunal to dismiss the claim for the reasons set out above.

Discussion and Decision

237. There are three issues for the Tribunal to determine, and they are:-

- were the disclosures made by the claimant protected disclosures in terms of Section 43A Employment Rights Act;

- if so, was the claimant subjected to detriment on the ground that she made a protected disclosure/s in terms of Section 47B Employment Rights Act and

- was the claimant unfairly constructively dismissed in terms of Section 103A Employment Rights Act or Section 98 Employment Rights Act.

238. We decided to firstly address the issue of whether the claimant made protected disclosures.

Did the claimant make protected disclosures?

239. We firstly had regard to the provisions of Section 43A Employment Rights Act which provide that a *"protected disclosure*" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.

240. Section 43B provides that a "*qualifying disclosure*" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health and safety or any individual has been, is being or is likely to be endangered'

(e) that the environment has been, is being or is likely to be damaged or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

241. Section 43C provides that a qualifying disclosure is made in accordance with the section if the worker makes the disclosure in good faith to his employer or other responsible person.

242. The claimant had provided further particulars of the disclosures alleged to have been made, and it is helpful to set this out.

1. In February 2012 the claimant made a verbal disclosure to David Rowland that Michael Morrow was not providing five routine treatments on the NHS. This disclosure was included in John Cameron's written report (Section 43B(a), (b) and (d)).

2. In February 2013 the claimant made a verbal disclosure to David Rowland when she reported that Donald Morrison, and his associate, had reported to her the poor quality clinical work of Mr McKie. (Section 43B(b) and (d)).

3. In Spring 2013 the claimant made a verbal disclosure to David Rowland when she reported that Donald Morrison had reported concerns to her regarding poor quality clinical work of and associate, Rhona Harrison, and in particular insufficient x-rays. (Section 43B(b) and (d)).

4. In June/July 2013 the claimant made a verbal disclosure to David Rowland when she reported that Ms Fiona McQueen, former Nursing Director with the respondent, complained about her son's dental care with Mr McKie. John Cameron examined her son in June 2013 and produced a report in July 2013. The report was given to Ms McQueen. The claimant verbally disclosed to Ms McQueen, at a meeting to discuss the report, further information related to the care and treatment carried out on her son by two dental practitioners, Mr McKie and Donald Morrison. (Section 43B(b) and (d)).

5. In July 2013 the claimant made a verbal disclosure to David Rowland and John Cameron that Donald Morrison had reported Ms Harrison to her for mis-claiming NHS fees. (Section 43B(a), (b) and (d)).

6. Autumn 2014 the claimant made a verbal disclosure to David Rowland (and made the same disclosure to Ms Graham in December 2014) that Donald Morrison and most of the dentists in his practice were mis-claiming NHS fees (Section 43B(a), (b) and (d)).

7. Between October 2014 and August 2015 the claimant made a verbal disclosure to the PCDG that Michael Morrow was continuing to provide poor quality clinical work as evidenced by ongoing unsatisfactory Dental Reference Officer reports. (Section 43B(b) and (d)).

8. September 2013 onwards the claimant made a verbal disclosure to the PCDG and John Cameron that Michael Morrow was working in a practice with inadequate infection control (Section 43B(a), (b) and (d)).

9. September 2015 to November 2015 the claimant made a verbal disclosure to Mr Grant McHattie, Ms Pamela Milliken and Ms Nicola Taylor when she reported that a PSD investigation had shown that the practice in which Michael Morrow worked had not purchased

enough gloves or matrix bands to change them between each patient. The claimant also made a written disclosure when she included in Mr Morrow's SBAR that Mr Morrow continued to have unsatisfactory Dental Reference reports (Section 43B(b), (d) and (g)).

10. In February 2012 the claimant made a verbal disclosure to Mr David Rowland regarding the fact John Cameron had reported to her that the owner of the practice in which Michael Morrow worked had suggested to him that Michael Morrow was providing treatment without proper skill and attention and was damaging patients and not securing oral health. This disclosure was included in a detailed written report by John Cameron following a detailed investigation by him and the claimant. (Section 43B(b) and (d) Employment Rights Act).

243. The respondent denied the disclosures were protected disclosures on the basis that each disclosure made by the claimant was (put short) of alleged professional misconduct by dentists contracted to provide dental services to the respondent. Mr Hardman submitted that it could not be said that the claimant reasonably believed the conversations she had with Mr Rowland, or Mr Cameron, about this alleged misconduct amounted to disclosures made in the public interest, or that she reasonably believed the conversations tended to show one of the matters set out in section 43B. This, it was submitted, was because the claimant was neutral in the matter and was simply reporting these matters because it was her job to do so. The claimant made these disclosures in the course of discussing how best to process the complaints.

244. Mr Miller acknowledged the claimant may well simply have been doing her job, but that did not prevent the disclosures being protected.

245. We were referred to the case of ***BP plc v Elstone*** (above) where the EAT, endorsing earlier authorities, made it clear (paragraph 16) that all were unanimous in their view that the legislation should if possible be construed

so as to advance the purpose of the legislation, which is seen as to provide protection for those who "*blow the whistle*" in the public interest. … The Act is concerned entirely with protection, and the prevention of victimisation."

246. We also had regard to the case of ***Chesterton Global Ltd v Nurmohamed [2015] ICR 920*** where the EAT held that the question for consideration under Section 43B(1) Employment Rights Act was not whether the disclosure per se was in the public interest but whether the employee had a reasonable belief that it was made in the public interest.

247. We noted the respondent accepted Mr Cameron was a responsible person for the purposes of the claimant making a disclosure. We also noted the respondent did not dispute the claimant disclosed information. The point in dispute in this case related to whether the claimant, in disclosing the information, did so in the public interest.

248. We had regard to the claimant's evidence regarding her role. The claimant described her role as being concerned with clinical governance; and that it had initially been a pastoral role offering advice and support to dentists, but it had evolved to include an investigatory element. The claimant would receive concerns from dentists and also from PSD. The claimant, in cross examination, accepted she was the "*gateway*" for concerns regarding dentists: she would report the information to David Rowland, who was not only the Head of Primary Care but also sat on the PCDG which would refer matters to the PASG if they thought that was appropriate.

249. We reminded ourselves that dentists are one of the contractor groups providing primary care. There required to be a reporting mechanism, or link/ gateway, through which concerns regarding a dentist's standard of clinical care could be brought to the attention of the respondent who operated the performance assessment procedures. That gateway was the DPA role: issues raised directly from dentists, or information from PSD, was channelled through that role to the Board/PCDG to decide what action to take.

250. We were satisfied the claimant provided David Rowland with information because it was her role to do so: it was part of the procedure for processing complaints. We did not think it could be said that the disclosure of information to David Rowland (or John Cameron) was, in the reasonable belief of the claimant, made in the public interest. We reached that conclusion because the disclosure was made in order to pass on information to allow the Board to decide how best to deal with it, and not because the claimant reasonably believed it was in the public interest and tended to show one of the relevant failures. We did not doubt the information regarding the dentists would be of interest to the public; however that is not the question for the Tribunal (***Chesterton Global Ltd*** above).

251. We acknowledged the distinction we have drawn is a fine one, and we equally acknowledged Mr Miller's submission that an employee whose job it is to report concerns should receive no less protection because of it. But it appeared to this Tribunal that to categorise the daily/weekly reporting of information which was done in order to progress performance issues (or financial issues) as protected disclosures would undermine the purpose of the legislation.

252. We concluded, for all of these reasons, that none of the information which the claimant reported to David Rowland and John Cameron was a protected disclosure.

Did the claimant suffer detriment (as set out in the schedule) and if so, did she suffer detriment/s on the ground of having made a protected disclosure?

253. We decided, should we have erred in our above decision and should the disclosures be protected disclosures, to proceed to determine whether the claimant suffered detriment as alleged, and if so, whether she suffered detriment on the ground of having made the protected disclosures set out above.

254. The detriments said to have been suffered by the claimant were set out in the schedule, and it is helpful to list them here.

"The detriments said to have flowed from making the first disclosure were:-

- *Failure to deal with complaints made against the claimant in accordance with the NHS complaints procedure (December 2014 – Ms Graham);*
- *Failure to support the claimant appropriately at a meeting (January/February 2015 – Ms Graham);*
- *Failure to deal with a complaint made in April 2015 in accordance with the NHS complaints procedure (Mr Burns and Ms Graham);*
- *Deliberately misleading the claimant as to the true nature of the Review; treating her in a completely contrary fashion to the complainers and restricting access to Mr Burns (Ms Graham, Mr McHattie and Ms Milliken);*
- *Preventing the claimant from working with John Cameron (Mr Burns, Ms Graham and Mr McHattie);*
- Removal from chairmanship of a national committee.
- The detriments said to flow from the second disclosure were:-
- *Mr Burns failed to rebut the allegation made by Donald Morrison that she had been involved in an investigation in which she had declared a conflict of interest. Mr Burns and Ms Graham knew this to be untrue yet failed to rebut it and failed*

to advise the claimant of the allegations so that she could defend herself and her professional reputation.

- *The respondent prevented the claimant from discussing matters during May, June and July 2015 with John Cameron who would have been able to provide her, the respondent and the Review Panel with evidence to rebut the allegations regarding the claimant's actions as DPA and allegations regarding her honesty.*

- *The claimant was not permitted to approach the Review Panel with further information or to approach Mr Burns.*

- *Ms Graham failed, in her letter of the 29th July, to rebut the allegations made regarding the claimant's honesty and integrity.*

The detriments said to flow from the third disclosure were:-

- *Donald Morrison confirmed in an email following his meeting with Mr Burns on the 20th April 2015, that Mr Burns had "clearly stated that the current investigation was not from NHS A&A". The investigation was being carried out by PSD, but it had been commissioned and supported by the respondent. In Mr Morrison's subsequent email of the 3rd May, he made a number of untruthful allegations regarding John Cameron and the claimant and made clear that he regarded the investigation into mis-claiming by the practice to be resultant directly from the information that he had provided to the claimant.*

- *Ms Graham, in an email of the 4th May to Donald Morrison, knowingly misled him when she stated that "Mr Cameron is acting on behalf of PSD and not NHS A&A. I have not agreed to this approach and have been seeking a copy of his report*

for several weeks." There was no final report at that stage, but Ms Graham had seen an interim report.

The detriments said to flow from the fourth disclosure were:

- *Mr Burns and Ms Graham had a copy of John Cameron's report following his examination of Ms McQueen's son, and they knew from this that there was no evidence to support Ms McQueen's allegation that her son's treatment by Mr McKie had been negligent. The Board should have dealt with Ms McQueen's complaints under the NHS complaints procedure but they failed to do so, and this gave licence to Donald Morrison and Michael Morrow to make untruthful complaints to the respondent which they did not show to the claimant and did not give her an opportunity to respond.*

The detriments said to flow from the fifth disclosure were:

- *John Cameron's investigation showed widespread mis-claiming of NHS fees in Donald Morrison's practice and this was reported to Ms Graham. (see 4 above for the detriments).*

The detriments said to flow from the sixth disclosure were:-

- *Without investigating the veracity of the complaints made by Donald Morrison, which Ms Graham knew or ought to have known were untrue, she proceeded to set up the Review Panel rather than address the complaints about the claimant using the respondent's complaints procedure.*

- *Ms Graham did not rebut or indeed respond to Donald Morrison's letter of the 24th August.*

- *The respondent knew or ought to have known that by permitting Donald Morrison to progress vexatious and unfounded allegations, it gave him licence to tell others that the respondent was supporting him. He was thus able to besmirch the claimant's reputation.*

- *The claimant's removal from a national committee demeaned and marginalised her.*

- *The respondent's failure to make the Review Report confidential was humiliating and demeaning to the claimant and compromised her professional reputation and integrity.*

The detriments said to flow from the seventh disclosure were:-

- *The respondent failed to deal with the complaints made by Michael Morrow in accordance with the NHS complaints procedure, and this gave Michael Morrow licence to continue to make untrue allegations about the claimant which he knew to be untrue and which had been shown to be untrue.*

- *The way in which Michael Morrow was treated by Mr Burns was in complete contrast to the way in which the claimant was treated, particularly regarding her grievance. The respondent failed to treat the claimant fairly and abdicated their duty of mutual trust and confidence. This allowed Michael Morrow and Donald Morrison to demean the claimant amongst her peers, and the respondent compounded this by removing the claimant from the national committee.*

The detriment said to flow from the eighth disclosure was:-

- *The claimant additionally reported to John Cameron that in an interview with her, Michael Morrow had told her that he had*

adhered to what the practice manager had told him to do even when this was wrong, unethical and contrary to NHS General Dentist regulations. The claimant believed Michael Morrow should be investigated regarding these infection control issues and she asked John Cameron to include him in the investigation. Michael Morrow held the claimant responsible for the referral to the GDC, and also made allegations that she was dishonest. The failure by the respondent to deal with these complaints, and the attempt by Mr McHattie to get the GDC to discontinue their proceedings, gave Michael Morrow and his solicitor licence to consider that these actions had subjected the claimant to a demeaning and humiliating outcome.

The detriments said to flow from the ninth disclosure were:-

- *The failure of the respondent to deal with the complaints of Michael Morrow appropriately, or at all, together with the fact Mr McHattie wrote to the GDC to say the outcome of the Review was that the sanction applied to Mr Morrow had been overly harsh resulted in Mr Morrow's solicitor writing to the GDC making an accusation of dishonesty. The GDC wrote to the claimant and John Cameron for further information. When the claimant discovered this, it was the last straw leading to her resignation.*

- *Mr Morrow knew the allegation of dishonesty was unfounded, as did the respondent. However, instead of Mr McHattie writing to the GDC to state the allegations were untrue, he merely wrote to say that after serious consideration he had nothing to add. He took ten days to make that response.*

- *Ms Milliken had reached an agreement with Michael Morrow that the respondent would do all it could to prevent the case against him proceeding.*

The detriments said to flow from the tenth disclosure were as above".

255. The first issue for the Tribunal to determine is whether the detriments alleged to have occurred did occur and if so, did the action/omission amount to a detriment. The term "detriment" is a familiar concept in discrimination law and courts and Tribunals have generally taken the view that it covers a wide range of conduct and treatment. The House of Lords, in the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The matter is to be viewed subjectively.

256. We, having regard to the list of detriments set out above, firstly concluded the following actions/omissions did occur:-

- there was a failure to deal with complaints made against the claimant in accordance with the appropriate NHS complaints procedure;

- there was a failure to support the claimant appropriately at the meeting with Mr Morrow and his solicitor in February 2015;

- the claimant was misled regarding the nature of the Review;

- the claimant was treated in a fashion completely contrary to the complainers;

- the claimant was instructed not to speak to Mr Burns;

- the claimant was instructed not to speak to Mr Cameron and this prevented her from carrying out her role as DPA;

- Mr Burns failed to rebut the allegation made by Donald Morrison that she had been involved in an investigation in which she had declared a conflict of interest;

- The claimant was not permitted to provide the Review panel with further information;

- Ms Graham failed, in her letter of 29 July to Donald Morrison, to rebut the allegations made regarding the claimant's honesty and integrity;

- Mr Burns failed to correct Donald Morrison's erroneous belief that the respondent had no part to play in the PSD investigation and further that the investigation into mis-claiming by the practice had resulted directly from the information he provided to the claimant;

- The review panel was set up without preliminary investigation of Donald Morrison's complaints;

- Ms Graham failed to respond to Donald Morrison's letter of 24 August;

- The respondent knew, or ought to have known, that by permitting Donald Morrison and Michael Morrow to repeat unfounded allegations, it gave them licence to tell others the respondent was supporting them;

- The respondent failed to make the Review panel Report confidential;

- Mr McHattie's attempt to have the GDC reconsider whether to proceed with action against Michael Morrow, and his failure to respond with comments when invited to do so, gave Michael Morrow and his solicitor licence to consider that the Board supported them and

- The claimant was removed from chairmanship of a national committee.

257. We further concluded that these actions and/or omissions were detriments suffered by the claimant. We considered it clear that a reasonable worker would, or may, take the view that the treatment was in all the circumstances, to his/her disadvantage,

258. The next issue for this Tribunal to determine is whether, in terms of Section 47B Employment Rights Act, the claimant was subjected to one/some/all of these detriments on the ground that she had made a protected disclosure. Section 48(2) provides that in complaints brought under Section 47B, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

259. We were referred to an extract from Harveys Encyclopaedia regarding Section 47B, and it is helpful to set this out:-

> *"This formulation means that there is a causative element, namely that the protected disclosure materially influenced (in the sense of being more that a trivial influence) the employer's treatment of the whistleblower: Fecitt v NHS Manchester [2012] IRLR 64. The more stringent test from discrimination law ("in no sense whatsoever due to") is not to be imported here; also, it is not enough to consider whether the act was "related to" the disclosure in some looser sense: Harrow London Borough v Knight [2003] ICT 140. Moreover, the test here is not the same as that for dismissal for whistleblowing in section 103A where it must be shown that the protected disclosure was the reason or principal reason for the dismissal, a generally tougher test: Eiger Securities LLP v Korshunova [2017] IRLR 115."*

260. The representatives agreed that the cases of ***Harrow London Borough v Knight*** (supra) and ***Fecitt v NHS Manchester*** (supra) set out the test to be applied by this Tribunal when considering whether the claimant was

subjected to detriment on the ground she made a protected disclosure/s. This Tribunal must analyse the mental processes which caused the employer to act as it did. In the ***Fecitt*** case Elias LJ stated, at paragraph 45, that:-

> "*In my judgment, the better view is that Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in Section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not."*

261. Further, in paragraph 51, Elias LJ continued:-

> *"I entirely accept that, where the whistleblower is subject to a detriment without being at fault in any way, Tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer."*

262. Mr Miller also referred the Tribunal to the recent case of ***Beatt v Croyden Health Services NHS Trust*** (supra) and we had regard to paragraphs 24 – 35 and 94.

263. Mr Miller invited the Tribunal to conclude that firstly the claimant told the respondent of practice deficiencies which they did not want to hear about; and, secondly, that Ms Graham found herself engaged in a "*turf war*" with PSD and promoted the external review as a way of taking back control. We have set out below the reasons why we could not accept/reach these conclusions.

264. We considered the detriments suffered by the claimant fell into two broad categories. The first such category was the respondent's failure to deal with the complaints made by Mr Morrow and Mr Morrison against the claimant, either at all, or in accordance with the appropriate NHS procedure. There were three points to this category: (i) the respondent informing the claimant of the complaints in a piecemeal fashion; (ii) the respondent's failure to deal with the complaints and (iii) the complaints procedure.

265. We examined the evidence regarding these matters. Mr Burns told us that he did not initially consider the complaints to be personal to the claimant, and for this reason, he did not think about using the complaints procedure. Subsequently, following Mr Morrison's letter of 30 June, he made it clear to Ms Graham that Mr Morrison could not make unfounded allegations and that if he had evidence to support what he said, then he should bring it forward. Mr Burns was aware Ms Graham arranged to meet Mr Morrison to discuss the respondent's position. Mr Burns did not follow this up and did not issue any letter to Mr Morrison to emphasise the point. He concluded that as no evidence was brought forward by Mr Morrison, there was no action to be taken.

266. Mr Burns, in relation to the complaints raised by Mr Morrow, understood that they had been addressed by Ms Milliken.

267. Mr Burns did not disclose any of Mr Morrow or Mr Morrison's complaints to the claimant, because responsibility for the dental team rested with Ms Graham and Ms Milligan. He was aware, following Mr Morrison's letter of 30 June, that Ms Graham was concerned about raising unsubstantiated allegations with the claimant and wanted to first see what evidence Mr Morrison had to bring forward. Mr Burns did not disagree with that position.

268. Ms Graham had an opportunity to discuss the allegation regarding the doctoring of a letter with Mr Morrow and his solicitor at the meeting in February 2015. Ms Graham thought the matter was an "administrative error": she apologised for it and thought this was an end to the matter. Ms

Graham was not aware Mr Morrow repeated the allegation in his letter of 14 April to Mr Burns.

269. Ms Graham accepted she was shocked when she saw the tenor of the letter of 30 June from Donald Morrison. She had a concern regarding unsubstantiated allegations being raised with the claimant and decided to ask Mr Morrison to bring forward his evidence to support those allegations. There was a three week delay in doing so, and the allegations were only disclosed (by way of a redacted letter) to the claimant after this meeting.

270. Ms Graham did not write to Mr Morrison following the meeting on 29 July, to confirm the respondent's position that Mr Morrison must either produce evidence to support the allegations, or withdraw them. Furthermore, Ms Graham failed to write to Mr Morrison, after his letter of 24 August and production of information which he said supported the allegations, to inform him the evidence did not support the allegations.

271. Ms Graham did not consider the concerns raised by Mr Morrow and Mr Morrison to be complaints, and this explained why did she did not process them through the complaints procedure.

272. The respondent's witnesses were not familiar with the Can I Help You document and each appeared to have a different view about when that procedure should be used and by whom. The dominant view was that it was for use by patients who had a complaint about their treatment, however it was accepted that the terms of the policy were wider than this.

273. We considered the evidence regarding the Can I Help You procedure was wholly unsatisfactory and we were left uncertain whether this would have been the applicable procedure to use if the respondent had processed the concerns as complaints. It appeared to this Tribunal that the respondent could equally have addressed the concerns under the disciplinary procedure and invited the claimant to attend a disciplinary investigation. That said, these matters were not material in circumstances where the

respondent did not consider the concerns were complaints and did not utilise any procedure to deal with them.

274. Mr Burns and Ms Graham repeatedly stated there was no issue with the claimant's integrity.

275. We, having had regard to the above evidence, concluded the respondent initially failed to recognise the concerns as complaints about the claimant, and subsequently, when it was clear the concerns were complaints about the claimant, failed to deal with them appropriately. We asked ourselves why this happened, and the answer is inextricably linked to the second category of detriments.

276. The second category of detriments concerned the different treatment afforded to the complainers (Mr Morrow and Mr Morrison) to that afforded to the claimant. The difference in treatment included the following points:-

- Mr Burns met with Mr Morrison to hear his concerns – this contrasted with the fact Mr Burns at no time met with the claimant to either hear from her or offer her support;

- Mr Burns acted almost immediately upon hearing the concerns of Mr Morrow and Mr Morrison, to establish an external review – this in contrast to complete inaction regarding the complaints made against the claimant;

- Mr Morrow and Mr Morrison had open access to Mr Burns – this in contrast to the claimant who was told not to speak to Mr Burns;

- The complainers were told of the external review prior to the claimant; and the complainers were told of the terms of reference of the review panel – this in contrast to the claimant who was told the review panel was not looking at her/her role.

- Mr Burns failed to correct Mr Morrison's mistaken beliefs that (i) the respondent was not involved in the PSD investigation into mis-claiming; (ii) the investigation was caused by his reporting of information to the claimant and (iii) the claimant had been involved in the McKie investigation and PASG even though she had declared a conflict.

- Ms Graham challenged Mr Cameron regarding ownership of the investigation report; wanted to share it with the dentists; instructed that a criminal investigation was not to take place and mistakenly believed it was for the Board to decide from whom and how much of the mis-claimed fees would be recovered.

277. We were left with the distinct impression that Mr Burns, Ms Graham, Ms Milliken and Mr McHattie`s desire to appease Mr Morrow and Mr Morrison, both of whom were represented by Mr Taylor lay at the heart of this case. The respondent appeared to "*favour*" these dentists, and this was illustrated by the fact there was a complete inability on their part to act robustly where those dentists were concerned. This impression was created by a number of factors, which included: (i) Mr Burns met with Mr Morrison to hear his concerns without obtaining any understanding of the background or the investigations which were taking place. He thereafter, very quickly, decided upon an external review of the "*new model*" without checking the veracity of the concerns, doing any investigations or comparisons with other cases and without considering whether the concerns could be rebutted and an apology given. There appeared to be an unseemly rush to address the concerns of two dentists who were, at that time, going through performance management for poor clinical standards, restricting NHS work and infection control issues (Mr Morrow), and an investigation for mis-claiming fees (Mr Morrison). (ii) Ms Graham's desire to "*support*" Mr Morrison by sharing with him Mr Cameron's uncompleted report into the investigation regarding mis-claiming, and deciding there was to be no criminal investigation notwithstanding the mis-claimed sums amounted to in the region of £300,000.

278. We cannot answer the question why the respondent favoured the complaining dentists, but we considered that it was the respondent's desire to appease the complaining dentists, and their inability to deal robustly with them which dictated the way in which they dealt with these matters.

279. We asked ourselves whether the fact the claimant made protected disclosures (by reporting information concerning poor clinical standards, infection control and mis-claiming) materially influenced the respondent in their treatment of the claimant. The critical question is whether any adverse inference can be drawn from the fact the respondent favoured the dentists. We acknowledged the, quite frankly, bizarre way in which the respondent dealt with the complaints against the claimant, but we were not at all satisfied that the respondent's treatment of the claimant was influenced by the making of the protected disclosures.

280. We reached that conclusion because we were satisfied the respondent favoured the dentists insofar as they were weak when dealing with Mr Morrow and Mr Morrison. We considered that no-where was this more starkly illustrated than Mr McHattie's failure to comment to the GDC. Here was an opportunity to set out chapter and verse why the allegation was untrue and not believed by the respondent, but they failed to do so. We were entirely satisfied that Mr McHattie's failure to comment was not influenced (materially or otherwise) by the fact the claimant had made protected disclosures, but it was influenced by the fact Mr McHattie was not prepared to deal robustly with Mr Morrow. There was almost a reluctance to get involved. Mr McHattie's comment questioning what they could do to stop Mr Morrow repeating his unfounded allegations, really summed matters up.

281. We accepted the detriments occurred, and we also accepted the way in which the respondent dealt with the claimant throughout this period was bizarre: that said, there was no evidence, either direct or by way of inference, which pointed to the respondent being materially influenced by the disclosures made by the claimant.

282. Mr Miller invited us to find that the respondent did not want to hear about the issues the claimant was reporting and that this materially influenced the way in which they treated her. We, in considering this submission, noted there was no hint, in the evidence of Mr Rowland, that he was in any way whatsoever displeased about the claimant reporting these issues. The issues were, it appeared, part and parcel of administering primary care; further, it was Mr Rowland who gave authority for the PSD investigation into the mis-claiming to be widened.

283. Mr Miller also invited us to find that Ms Graham felt the claimant was heavily influenced by Mr Cameron, and therefore more inclined to prosecute than support, and that she wanted to wrest control away from him. There was no dispute regarding the fact the claimant was influenced by Mr Cameron: she worked closely with him and sought advice and support from him. There was, however, no evidential basis for the suggestion that because of that involvement the claimant was more inclined to prosecute than support.

284. We accepted that Ms Graham did try to limit Mr Cameron's involvement by (a) querying who owned the investigation report prepared by Mr Cameron; (b) wanting to share his report with the dentists before he had done so and (c) instructing the claimant not to speak with Mr Cameron. We concluded however, that this was much more about Ms Graham and Mr Cameron, than any attempt by Ms Graham to subject the claimant to a detriment.

285. We, in conclusion, decided that even if the claimant made protected disclosures, she was not subjected to detriment on grounds of having made those disclosures. The respondent's treatment of the claimant was not materially influenced by the fact the claimant had made protected disclosures. The respondent's treatment of the claimant was caused by their inability to deal robustly with the complaining dentists; their desire to appease those dentists and their blinkered approach to the review. We, for these reasons, decided to dismiss this complaint.

Was the claimant constructively dismissed?

286. We had regard firstly to the terms of Section 95 Employment Rights Act which provides that for the purposes of this Part, an employee is dismissed by his employer if 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.

287. We also had regard to Section 103A Employment Rights Act which provides that an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) is that the employee made a protected disclosure. We have decided above that the claimant did not make any protected disclosures.

288. The claimant provided further particulars of the breaches of contract relied upon and it is helpful to set these out. The claimant argued the breaches were cumulative and that she resigned in response to the accumulated breaches.

- Mr Burns failed to protect the claimant from untrue allegations of dishonesty made by Michael Morrow and his solicitor when he knew these allegations to be untrue (2015);

- Mr Burns and Ms Graham received untrue vexatious complaints from Michael Morrow and Donald Morrison; they failed to establish the veracity of the complaints and failed to treat them in accordance with the respondent's complaints procedure or whistleblowing policy. Instead, a flawed Review was set up with inappropriate terms of reference (April/May 2015);

- The claimant informed John Cameron of alleged fraudulent activity at Donald Morrison's practice. Ms Graham tried to take over the PSD investigation either to conceal the finding of £300,000 mis-claimed, or

to protect Donald Morrison with whom she had a conflict of interest. The respondent ordered the claimant not to have any communication with John Cameron (April – June 2015);

- When the claimant informed Ms Graham of Donald Morrison's inappropriate behaviour, Ms Graham failed to support her but instead fully supported Donald Morrison (April – July 2015);

- The claimant was very concerned on 18 May that she was not being told the truth. The claimant was not told the Review was the result of complaints against her which the respondent knew to be untrue (May – June 2015);

- On 18 May 2015 the claimant phoned Ms Graham for support, but Ms Graham failed to respond to the claimant's voice mail. The respondent continued with the Review knowing that the terms of reference given to the claimant and others did not reflect the actual business of the Review;

- On 2 June 2015 the claimant provided Ms Graham with examples of other occasions when Donald Morrison had made untrue allegations about other practitioners. Ms Graham failed to act on this information;

- On 30 June Donald Morrison made further untrue allegations regarding the claimant, and the respondent shared this with the Review panel;

- Ms Graham told the claimant on 15 July that she would come back to her with a formal response about protecting her and her reputation, but she did not ever do so;

- Ms Graham, at the meeting on 21 July, failed to inform the claimant of the full extent of the written allegations which had been made;

- On 21 July the claimant learned Ms Graham had failed to tell her that one of the remits of the Review panel was to look into the claimant's role;

- The claimant informed Ms Graham that Donald Morrison had defamed her to one of his patients. The respondent failed to respond to this and, when Ms Graham met with Donald Morrison on 23 July she did not force him to withdraw the allegations, even though she had told the claimant she would do so;

- Ms Graham contacted Kirsteen Henderson and Irene Black and informed them of the allegations against the claimant in circumstances where the respondent knew or ought to have known the allegations were untrue;

- Ms Graham refused to release the minutes of her meeting on 23 July with Donald Morrison;

- In the period July 2015 to January 2016 the respondent was offering support to the complainers but failing to rebut allegations which they knew to be untrue;

- In the period 17 – 24 August, Ms Graham failed to advise the Review Panel that they had been set up with inappropriate terms of reference. The complainers were permitted to address the Review panel without challenge. The claimant was not permitted to rebut the untrue allegations which had been made.

- The Review panel was not aware that the claimant did not know of the allegations which had been made against her.

- Ms Milliken asked the claimant to write to John Cameron to say that funding had been withdrawn (24 September 2015);

- On 5 November the claimant found out by chance that Ms Milliken had authorised an investigation into the claimant's computer to investigate the allegation that she had acted dishonestly in relation to a letter.

- On 6 October 2015 Ms Taylor informed the claimant that Mr McHattie had withdrawn the Board from a national pilot into Quality Improvement. This was done without consultation in circumstances where the claimant was chair of the pilot and appointed to that post by the Scottish Government.

- The claimant submitted a formal grievance on 13 October 2015 which Mr Burns failed to deal with timeously.

- On 17 October 2015 a questionnaire drafted by Mr McHattie, which was to be sent to all dentists in the Board's area was not passed to the claimant for approval.

- On 20 October the claimant emailed Ms Milliken to make it clear she felt she was being excluded from carrying out tasks and making decisions.

- October 2015 to 12 January 2016 the respondent decided that ongoing work regarding the list of concerns in relation to dentists would be taken over by Ms Maura Edwards, Clinical Director of the Public Dental Service and the Consultant in Dental Public Health, when this was specifically the role of the DPA.

- 21 October 2015 Ms Graham and/or Ms Milliken decided the Report was not confidential and released it to the complainers. The respondent prepared a statement, the purpose of which was to protect its reputation should there be publicity regarding the Review.

- On 12 January 2016, following her return to work after a period of stress-related absence, the claimant learned of a number of things done by Mr McHattie which put her registration with the GDC at risk. The claimant discovered that (i) in September 2015 Mr McHattie wrote to the GDC to say that a committee chaired by the claimant had treated Michael Morrow too punitively and he invited the GDC to reconsider proceeding with the referral and (ii) Mr McHattie received notification from the GDC to comment upon an allegation that the claimant had acted dishonestly. Mr McHattie, despite knowing the allegation to be untrue, responded that he had no further comment to make.

289. The Court of Appeal (Lord Denning), in the case of W**estern Excavating v Sharp** (above) stated that:-

> *"An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once."*

290. The representatives agreed that:-

- the employer's conduct must amount to a material or fundamental breach of the contract of employment;
- the employee must leave in response to the breach and
- the employee must not delay too long before resigning, following the breach of contract.

291. We have set out above the instances, the cumulative effect of which was, it was said, to breach the contract of employment. The above instances come under the umbrella heading of a breach in the implied duty of trust and confidence. In the case of ***Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347*** it was held that there is implied in a contract of employment, a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It was further held that any breach of this term is a fundamental breach amounting to a repudiation of the contract since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

292. In **Malik v BCCI [1997] IRLR 462** Lord Steyn in the House of Lords stated that, in assessing whether or not there had been a breach of the implied obligation of mutual trust and confidence it was the impact of the employer`s behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively.

293. In the case of **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** the Court of Appeal held that in order to result in a breach of the implied term of trust and confidence, a "*final straw*", not itself a breach of contract, must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee 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. The test of whether the employee's trust and confidence has been undermined is objective.

294. The claimant asserted there had been a breach of the implied duty of trust and confidence arising from six material factors: (i) by subjecting the claimant to a series of detriments for making disclosures as part of her job (whether or not these were protected disclosures); (ii) by acting in a manner calculated or likely to place the claimant's GDC registration in jeopardy; (iii) by failing to deal timeously or at all with the claimant's grievance; (iv) by actively misleading the claimant regarding the content and progress of complaints against her, and by acting in a way which favoured the complainers over the claimant; (v) by consciously or subconsciously ignoring or at least undervaluing the claimant's interests and rights in an unreasonable and biased desire to mollify the complainers (or some of them) at the expense of her reputation and the credibility of her role and (vi) by producing and allowing to be distributed a flawed report at the BDA Scottish Dental Practice Committee.

295. Mr Miller submitted that if the claimant's PIDA claim succeeded, then it was self- evident that her contract was materially breached. The PIDA claim has not succeeded and accordingly we do not need to deal with (i) above any further.

296. We next examined each of the alleged breaches of contract in turn (and we have dealt with these in a different order to that set out in the submission). The fourth material breach related to actively misleading the claimant regarding the content and progress of complaints against her and by acting in a way which favoured the complainers over the claimant. Mr Miller summarised this as carrying out a flawed and unnecessary review.

297. The claimant saw the letter of complaint which Mr Michael Morrow sent to Ms Graham on 24 November 2014. The claimant drafted a response to this letter, which Ms Graham signed. The claimant accordingly knew at this time that Mr Morrow had an issue with the delay in referring him to the GDC, and with a letter she had sent.

298. The claimant accompanied Ms Graham to a meeting with Mr Morrow and his solicitor in February 2015, and she knew, from this meeting, that Mr Morrow's solicitor was alleging she had doctored the letter, and that she should be reported to the GDC for this.

299. The claimant was not provided with a copy of Mr Morrow's letter of 14 April 2015 to Mr Burns, nor given an opportunity to comment on it.

300. The claimant was not aware Donald Morrison met with Mr Burns on 20 April 2015 to discuss his concerns regarding the process, which included concerns regarding the role of the claimant.

301. The claimant, accordingly, was not aware of Mr Morrow's letter of complaint to Mr Burns, or Mr Morrison's oral complaints to Mr Burns, when she was told of the fact there was to be an external review.

302. There were a number of very curious actions taken by Mr Burns which included meeting with Donald Morrison, his wife and the Dental Practice committee chairman, Simon Morrow, without having briefed himself as to the background and without a note taker being present; accepting the complaints made by Mr Morrow and Mr Morrison at face value without carrying out any form of testing, or verification, of what they said; no effort was made to try to investigate what had actually happened and to defend the actions of the respondent; not approaching HR for advice regarding the allegations made against the claimant and not sharing the entirety of the information he held with Ms Graham, Ms Milliken and Mr Fraser.

303. Mr Miller submitted there was, from the outset, partiality in the handling of the complaints inasmuch as the dentists making the complaints were being favoured. This was put to Mr Burns and Ms Graham who both denied the suggestion. However, the actions of Mr Burns and Ms Graham gave the distinct impression that they bent over backwards to accommodate the complaining dentists and, at times, particularly the actions of Ms Graham (see below) virtually fought their corner. Ms Graham defended her actions by telling us that it is the Board's role to support individuals: we do not doubt that, but the issue in this case was what appeared to be a complete loss of perspective when dealing with the complainers, and an inability to deal with them robustly.

304. Mr Burns was the only person who was in possession of all the information from Mr Morrow and Mr Morrison. Mr Burns shared with Ms Graham what he had been told by Mr Morrison, but he did not share with her the complaints raised by Mr Morrow. Thereafter, on 23 April 2015, when he met with Ms Graham, Ms Milliken and Mr Fraser, he "briefed" them but did not provide copies of Mr Morrow's complaints or full details of the issues raised by Mr Morrison. It appeared Mr Burns had, by then, decided an external review would take place to look at systems and processes, and accordingly he disclosed only information relevant to this. We considered this action by Mr Burns led to the fundamental confusion which ensued, and by this we mean that on the one hand, the Board thought the external review was to look at systems and processes; on the other hand, the complainers thought the external review was to look into their (entire) complaints and in addition to this (a) the claimant was told the review was to look only into systems and processes, but the summary of complaints noted Mr Morrow's complaint regarding doctoring the letter and (b) the review panel strayed into matters outwith systems and processes.

305. Mr Burns' letter to Donald Morrison on 29 April (page 241) referred to the discussions which had taken place during their meeting on 20 April, and confirmed an external review would take place. Donald Morrison responded to that letter on 3 May 2015 (page 262) stating he was glad the issues were

being taken seriously, and that an external investigator was to be appointed to "look into the problems we have had, and are still having". Mr Morrison then made specific reference to the claimant and made it clear be believed that the fact he approached the claimant with concerns regarding clinical standards and mis-claiming had resulted in the investigations into his practice.

306. Two issues arose from this letter: firstly, it was crystal clear that Donald Morrison understood the external review was to look into all of the concerns he had raised, and this included his concerns regarding the claimant. We considered that understanding would have been bolstered by the fact Mr Burns asked Donald Morrison to keep the fact of the review confidential because the claimant and her team had not yet been informed about it. Secondly, Mr Burns missed the opportunity to correct Donald Morrison's inaccurate belief that his reporting of concerns to the claimant was linked to the investigation into his practice.

307. Ms Milliken drafted the terms of reference for the external review in circumstances where she had not been provided with the details of the concerns raised by the complainers. Ms Milliken accepted that in describing that the review would look into the "*concerns*" raised, she had not known what those concerns were. Ms Milliken must, however, have realised that her "*summary of complaints*" was a completely inadequate summary of the matters raised by the complainers. This was then further compounded by the fact the review panel were given the full complaints, but the interviewees were only given the summaries.

308. The confusion caused by the terms of reference and the full complaints being disclosed to the review panel were compounded by the fact the panel strayed into matters outwith systems and processes. They concluded the sanctions applied to Mr Morrow were "*overly punitive*" in circumstances where they had not been provided with all of the relevant paperwork regarding Mr Morrow's PASGs. Furthermore, the review panel were not provided with any information regarding Mr Morrison, and the investigations

undertaken by Mr Cameron: the review panel was not told of the fact Mr Morrison had confessed to mis-claiming fees. The only information they had to consider was what Mr Morrison told them.

309. The review panel heard the dentists' complaints (even though they were not going to deal with them) but they did not put these matters to the claimant to give her an opportunity to comment. Further, once the claimant realised Mr Morrow had included his complaint regarding doctoring the letter, she prepared a rebuttal document, but this was not permitted to be provided to the review panel.

310. We make no criticism of the respondent in deciding to have an external review, and no criticism of them limiting the focus of that review to systems and processes. The criticism of the respondent lies in the fact they did not tell the complainers this and did not make it clear to them that their complaints about the claimant would not be dealt with by the review panel. It was clear to this Tribunal (having had the benefit of hearing all the evidence) that had they done so, it would have led to consideration of how best to deal with those complaints (which the respondent must have known were not simply going to go away).

311. Ms Graham knew the allegation made by Mr Morrow regarding doctoring a letter was unfounded and, further, she believed the matter could be explained by there having been an administrative error. Ms Graham took no action to alert Ms Milliken to this, or have it removed from the summary of complaints, or to have information provided to the panel. Either the review was to deal with systems and processes, in which case the allegation of doctoring a letter should not have been included; or, if the allegation was to be included, a rebuttal should also have been included. The failing of the respondent lay in the fact they allowed the allegation to be placed before the review panel without responding to it, or allowing the claimant to respond to it, in circumstances where they knew it to be wrong.

312. In summary:-

- the respondent did not inform the claimant of Mr Morrow's letter of 14 April, and she only learned the allegation regarding doctoring a letter was being repeated when she received the summary of issues prepared by Ms Milliken for the review.

- The respondent did not inform the claimant of the complaints raised by Donald Morrison until they provided the claimant with a redacted copy of his letter of 30 June.

- The claimant was not made aware of the full extent of the complaints made by Mr Morrow and Mr Morrison until just prior to her resignation.

- Mr Burns failed to take the opportunity to correct Mr Morrison's erroneous beliefs prior to the external review.

- The remit of the external review was confused and the respondent should either not have permitted the allegation regarding doctoring the letter to be placed before the review panel, or they should have included the rebuttal of the allegation.

- The respondent ought to have made clear to the complainers that their complaints regarding the claimant would not be dealt with by the review panel.

- The respondent, by their actions and omissions, gave the impression that the complainers were being given preferential treatment. This was illustrated by the fact they had open access to Mr Burns in circumstances where the claimant was not permitted to speak to him, or to Mr Cameron. And, by the fact they were given carte blanche to raise complaints to the review panel notwithstanding the terms of the remit.

313. We concluded, having had regard to the above matters, that the respondent disclosed complaints to the claimant in a piecemeal way; denied her an opportunity to fully understand and respond to those complaints and compounded this by the confused remit of the review panel and the impression the complainers were being given preferential treatment. We considered that an employee is entitled to know of complaints made about them and to have either an opportunity to respond to what is being said, or have their employer respond on their behalf. The claimant was denied this. We concluded the actions and failings of the respondent in this respect amounted to a breach of the implied duty of trust and confidence.

314. The fifth alleged breach of contract related to ignoring or undervaluing the claimant's interests and rights in an unreasonable and biased desire to mollify the complainers at the expense of her reputation and the credibility of her role. Mr Miller termed this as post-review favouring of the complainers over the claimant. There were two particular matters to be considered, and they were (i) the document history search and (ii) the meeting with Mr Morrison.

315. There was no dispute regarding the fact Ms Milliken and Mr McHattie met with Mr Morrow to discuss the review panel Report. Mr Morrow expressed dissatisfaction at that meeting regarding the fact his complaints about the claimant had not been addressed by the review panel. Ms Milliken undertook to have the IT department carry out a document history search regarding the doctored letter. We acknowledged Ms Milliken may have been trying to satisfy Mr Morrow and resolve the issue once and for all, but in the opinion of this Tribunal she made two fatal errors: firstly, the IT department was instructed to carry out the document history search, and to do this they had to interrogate the claimant's computer. The claimant was not told about this, and subsequently discovered it by accident. Secondly, Ms Milliken did not ever challenge Mr Morrow to substantiate the allegation or explain why he would not accept the explanation already given. Further, she did not write to Mr Morrow following the IT search to make it crystal clear to him that he should desist from making unfounded allegations.

316. Mr Burns compounded matters when he wrote to Mr Morrow offering an unreserved apology. No such apology was ever offered to the claimant.

317. Ms Milliken and Mr McHattie also met with Mr Morrison to discuss the Report and ascertain whether it addressed his concerns. They failed to take the opportunity to issue a robust response to Mr Morrison to inform him the information provided in his letter of 24 August did not support his allegations, and accordingly he must either withdraw them or they would be treated as unsubstantiated. Instead, no response was ever issued to Mr Morrison following his letter of 24 August.

318. We have had the opportunity of hearing all of the evidence in this case and looking at a lengthy chronology of events. We have referred above to the piecemeal way in which the claimant was informed of complaints and the fact she had no opportunity to respond to these complaints. The fundamental issue in this case was that in circumstances where the respondent had all of the information, and where the claimant had no right of reply, it fell to the respondent to make that reply on the claimant's behalf. They failed to do so. The complainers repeated their complaints – in Mr Morrow's case, he repeated them to the highest level – and there was a stark absence of a response. The respondent, by their omission, left the claimant high and dry and it fell to her, when she was given the opportunity by the GDC to make a response, to defend herself.

319. We concluded, having had regard to all of the above points, that the respondent by its actions and omissions, breached the implied duty of trust and confidence.

320. The eighth alleged breach of contract related to producing and allowing to be distributed a flawed report at the Scottish Dental Practice committee. Ms Milliken took advice to the effect that the Report would have to be disclosed in a Freedom of Information request and accordingly the decision was taken to circulate the Report freely and without any restriction. The complainers were provided with a copy of the Report and it was not marked confidential.

The respondent took this action in the full knowledge the complainers were both still repeating their complaints regarding the claimant. There appeared to be a careless disregard for the consequences of this action. This was evidenced by the fact Mr Morrison asked for the report to be included as an agenda item at the Area Dental Practice committee.

321. The respondent took no action to protect the claimant's reputation being damaged by the wide circulation of the report and they took no action to address matters once the report had been circulated. We were satisfied that the respondent, by their actions and omissions, breached the implied duty of trust and confidence.

322. The second alleged breach concerned the respondent actions and omissions in dealing with the GDC. The respondent's PCDG decided in January 2014 (page 201) to refer Michael Morrow to the GDC. The referral was made by Mr McHattie in January 2014, but the referral was lost or misplaced, and accordingly not progressed until November 2014.

323. Michael Morrow had made an allegation against the claimant that she had deliberately concealed the doctoring of a letter. That allegation was repeated by Mr Morrow's solicitor in his submission to the GDC. The GDC wrote to Mr McHattie on 25 November 2015 (page 757) enclosing a copy of the letter from Michael Morrow's solicitor, and inviting any comments or observations he wished to make.

324. Mr McHattie responded to that letter on 10 December (page 798) stating that: "*having given significant consideration with regards to Mr Morrow's observations in response to the allegations, I can confirm that NHS Ayrshire and Arran have no further comments to make with regards to Mr Morrow's observations.*"

325. Mr McHattie told the Tribunal that he felt all of the information had already been provided and he did not want to be seen again as being overly punitive by rebutting his [Michael Morrow] concern. Mr McHattie did not

think Michael Morrow's allegation "*held any water"* and he felt his letter of response did not accept any criticism of the claimant.

326. Mr McHattie accepted the allegation being made by Michael Morrow was a serious one alleging dishonest conduct, and could, if proven, have put the claimant's registration at risk.

327. We noted Mr McHattie, in stating that he felt all of the information had already been provided, did not explain what he thought that information was and when it had been provided. Further, Mr McHattie accepted he, at this time, knew Ms Milliken had asked IT to investigate the document's history, and he could have included this information in his response to the GDC, but did not feel it was "*worth while commenting*". He also knew the claimant had produced a lengthy rebuttal document dealing with this allegation (amongst others).

328. The respondent's witnesses (Mr Burns, Ms Graham, Ms Milliken and Mr McHattie) all said they thought Michael Morrow's allegation was groundless and was explained by an administrative error having been made. The real issue in this case was that they did not stand up and say this on behalf of the claimant, or allow her to make her own rebuttal of the allegation.

329. The letter from Mr Morrow's solicitor to the GDC devoted a page to this allegation against the claimant. Ms Graham had initially looked into the matter when it was first raised by Mr Morrow, and obtained an explanation from the claimant and Ms Slaven regarding the administrative error. Ms Milliken subsequently looked into the matter and asked the respondent's IT department to carry out a document history search. Ms Milliken, at the point at which she did this, knew the allegation was groundless, but she was trying to obtain information to explain which letter should have been sent to Mr Morrow, and thereby explain the error. Mr McHattie could have provided this information to the GDC and could have explained the basis upon which the respondent rebutted the allegation and the basis upon which they had concluded there was an administrative error.

330. Mr McHattie's statement that no further response was required because all of the information had already been provided was incorrect insofar as the GDC was concerned. We acknowledge that Mr Morrow had been told of the basis upon which Ms Graham and Ms Milliken rebutted the allegation, but how was that information to get to the GDC if not provided by the respondent. Mr McHattie, in response to questions asked of him in cross examination, accepted the GDC did not know Ms Milliken had written to rebut the allegation, and that the only way they would get to know of this was if he [Mr McHattie] told them of this in his letter.

331. We could not understand Mr McHattie's reticence to deal with, and respond to, this matter. The suggestion that he did not want the respondent to be seen as being "*overly punitive*" again was simply not acceptable in circumstances where (see below) that finding was unreliable.

332. Mr McHattie accepted that he knew, when he sent the response to the GDC, that the claimant was stressed by the untruthful allegations being made by Mr Morrow. He further accepted that he knew Mr Morrow had repeated those allegations to the GDC, and that he failed to take the opportunity to address this.

333. The consequence of Mr McHattie failing to address this matter was that the GDC had to write to the claimant and seek her comments. Mr McHattie accepted that if the Board had dealt with this matter appropriately the GDC would not have had to do this.

334. The duty of trust and confidence is implied into every employment contract. The claimant was entitled to trust her employer to take every opportunity to rebut the allegations being made by Mr Morrow. We would go further than that and say the claimant was entitled to trust her employer to be robust in her defence once Ms Graham had established that there had been an administrative error. Mr McHattie's actions in failing to make any response to the GDC destroyed and/or seriously damaged that trust.

335. Mr Miller submitted the breach of contract was compounded by the attempt made to influence the outcome of the regulatory process taken by the GDC against Mr Morrow in his favour. We, in considering this matter, had regard firstly to the evidence of Ms Milliken in respect of the meeting she had, with Mr McHattie, and Mr Morrow following the release of the Review report. Mr Morrow emailed Ms Milliken after that meeting (page 625) to set out his understanding of the discussion. Mr Morrow's email not only made clear that he was pursuing the allegation against the claimant, it also set out his expectation about the action the respondent would take regarding the GDC. Mr Morrow stated in that email that there was a commitment by the respondent to write to the GDC this week, to advise:

> *"1. that having conducted a thorough review, the Board has concluded that it's own regulatory procedures in respect of my case were not followed properly;*
>
> *2. that the sanctions imposed on me (including the referral to the GDC) are now considered to have been "overly punitive" and inconsistent with Board practice and procedures;*
>
> *3. that in the whole circumstances as now disclosed to the Board the Board would not have referred me to the GDC and*
>
> *4. that in the whole circumstances as now disclosed to the Board, the Board does not support the current referral."*

336. Ms Milliken did not, in respect of that email, suggest during her evidence that Mr Morrow was incorrect or exaggerating the content of their discussion. With that in mind, we turned to consider the terms of Mr McHattie's letter to the GDC on 11 September (page 623). Mr McHattie, in that letter set out some background, and the findings of the Review panel in relation to Mr Morrow. Mr McHattie stated: *"In relation to the findings identified by the Review Team in relation to Mr Morrow, the review considered the sanctions applied to Mr Morrow were overly punitive and*

appeared to be inconsistent with other NHS Ayrshire and Arran judgements in relation to dental issues. In making their decision to seek review by the GDC, it would appear that the PCDG did not strictly adhere to protocol. In addition there was considerable delay with the referral, as documents seem to have been misplaced or lost. All of this has contributed to a period of stress for Mr Morrow."

337. Mr McHattie, having given that background information, then asked the GDC to "*confirm, given the above circumstances, if the GDC will continue to proceed with this case*". Mr McHattie rejected the suggestion that he was inviting the GDC to reconsider whether to take Mr Morrow through the process and noted he had no authority to do so. He did accept however that he was inviting the GDC to reflect on the review panel findings and the breach of protocol (even though the breach of protocol was not a finding of the review panel, but an assertion made by Mr Morrow's solicitor).

338. We accepted Mr McHattie's evidence that he does not have authority to ask the GDC not to proceed with a referral; but the purpose of the letter must be seen in the context in which it was written. The context was the Ms Milliken and Mr McHattie had agreed with Mr Morrow to write to the GDC to inform them of the outcome of the Review. We acknowledged Mr McHattie's letter to the GDC did not go as far as Mr Morrow wished, but the letter was a clear invitation to the GDC to reflect on the "*failings*" and in light of those failings, decide whether they were going to proceed. A person reading that letter could not be faulted for thinking the letter was a plea in mitigation and an invitation to think again.

339. We accepted it was appropriate to inform the GDC of the Review panel conclusions, but we concluded it was not appropriate for Mr McHattie to ask the GDC if, in light of those conclusions, they were still going to proceed against Mr Morrow. We say that because it was not for Mr McHattie to ask that question, and it highlighted a startling contrast in the way in which the dentists and the claimant were being treated. By this we mean there was a willingness on behalf of Mr Morrow to ask this question of the GDC,

whereas there was not a willingness to put forward a chapter and verse rebuttal of Mr Morrow`s allegations on behalf of the claimant.

340. We, for all of the reasons set out above, concluded the respondent acted in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence when they failed to respond to Mr Morrow's allegations which he placed before the GDC.

341. The third alleged breach of contract was concerned with the way in which the respondent dealt with the claimant's grievance. The claimant's grievance was submitted to the Chief Executive, Mr Burns, on 13 October 2015 (page 664) and it was sent under covering letter from the claimant's solicitor. Mr Burns did not, upon receipt of the grievance, "*go through each paragraph*" because he wanted to "*identify how best to move forward*".

342. Mr Burns wrote to the claimant on 29 October (page 718) stating it was important to try initially to resolve grievances informally and to that end he enquired whether the claimant would be willing to participate in a mediated discussion with Ms Graham. Mr Miller submitted this suggestion by Mr Burns was completely inappropriate in light of the content of the grievance and his knowledge of the conduct of Ms Graham following the submission of complaints from the dentists. We examined each of those points.

343. Mr Burns, had he taken the time to read the content of the claimant's grievance, would have appreciated that Ms Graham was part and parcel of the grievance. The claimant, at point 9 of her grievance, devoted 13 sub-paragraphs which detailed her concerns regarding Ms Graham's involvement in, and conduct of, the matter. It simply was not credible for Mr Burns to suggest that a mediated discussion with Ms Graham was either appropriate or reasonable in the circumstances.

344. Mr Burns knew, in relation to the unsubstantiated allegations made by Mr Morrow and Mr Morrison, that Ms Graham had been of the opinion (at least until 30 June) that the allegations should not be shared with the claimant.

He would also have known, had he read the grievance, that virtually each and every decision made by Ms Graham in relation to the Review and the allegations made by the dentists, was being questioned by the claimant.

345. We considered it relevant also to contrast the actions of Mr Burns regarding the claimant's grievance, to his actions when the dentists complained. Mr Burns, following an email from Ms McQueen and subsequent contact from Mr Morrison, met with him to listen to what he had to say. He thereafter decided upon an external review to look at the respondent's systems and procedures when dealing with performance issues. Mr Burns did not offer to meet with the claimant to understand her concerns; he did not take the time to read her grievance in detail; he did not give consideration to how the claimant wished to have the grievance resolved and he did not put the matter into the hands of HR to enable the grievance procedure to be followed.

346. The claimant responded to Mr Burns and made it clear that she would consider a mediated discussion only after the respondent had taken the action to address the grievance, which she had clearly set out at the end of her grievance letter. Mr Burns still did not put the matter into the hands of HR: instead, he waited for Ms Graham to write to the claimant albeit this was eight weeks after the grievance had been received. He then followed this up with a letter on 11 December, asking if she would give further consideration to a mediated discussion with Ms Graham.

347. It was not until 23 December that Mr Burns confirmed to the claimant that he had requested HR to set up a Grievance Hearing. This was 10 weeks after the grievance had been submitted.

348. We considered that in the circumstances of this case, where Mr Burns (i) knew Mr Morrow and Mr Morrison had made, and continued to make, unsubstantiated allegations against the claimant; (ii) knew these allegations had not been disclosed to the claimant at the time they were made; (iii) knew the claimant was now aware of that; (iv) knew from the terms of the

grievance that the claimant had very grave and multiple concerns regarding her treatment and (v) knew the claimant had been absent with stress, that his response to the grievance was slow, wholly inadequate and inappropriate.

349. We considered the claimant was reasonably entitled to expect the respondent to process her grievance in accordance with the procedure and within a reasonable timescale. We concluded that in the circumstances of this case the slow, inadequate and inappropriate manner in which the respondent dealt with the grievance, amounted to a breach of the implied term of trust and confidence.

350. We, in conclusion, decided the respondent had, by its actions and omissions, as set out above, breached the implied duty of trust and confidence. We accepted Mr Miller's submission that the claimant resigned in response to these accumulated breaches of contract. That submission very much reflected the claimant's evidence and the fact that she was provided with information in a piecemeal fashion. There was a very real sense of dismay regarding the way in which she was being treated and disbelief at what was happening. This was accompanied by despair that senior managers did not appear to be addressing the matter and her emails to Ms Milliken and Mr McHattie latterly, where the claimant virtually pleaded with them to address the "*vile*" and untrue allegations.

351. The breach of the implied term of trust and confidence in the circumstances of this case was a fundamental breach of contract. The respondent, by their actions and omissions, completely destroyed the claimant's trust and confidence in their employment relationship.

352. Mr Hardman, in his submission to the Tribunal, invited us to find that the respondent's conduct had not passed the rigorous hurdle of breach of the implied duty of trust and confidence and that the respondent had, by the time the claimant intimated her grievance, sought to recover the situation. It was submitted that this was evidenced by the fact of offering mediation,

making an apology and by the fact that no grounds for complaint by either dentist were established which warranted investigation or a disciplinary procedure. Mr Hardman referred the Tribunal to the case of ***Assamoi*** as authority for his position that corrective action by the employer had prevented earlier unreasonable behaviour from reaching the stage of a breach of contract.

353. We, in considering Mr Hardman's submission, could not accept, for the reasons set out above that the respondent's actions and omissions did not pass the rigorous hurdle of a breach of the implied duty of trust and confidence. We could not agree that by the time the claimant intimated her grievance they had sought to recover the situation. The claimant clearly set out in her grievance letter, the action she wished the respondent to take in order to resolve her grievance. We considered that given this context, and the fact that two pages of the grievance concerned the claimant's criticisms of the actions (or omissions) of Ms Graham, the offer of mediation with Ms Graham was wholly inappropriate. Furthermore, the offer of an apology, without more, was also inappropriate and did nothing to rectify the fact the respondent had missed each and every opportunity presented to it to rebut the allegations.

354. The fact there were no grounds for complaint established could not be described as corrective action taken by the respondent. The fact there were no grounds for complaint had been known to the respondent since February 2015 (regarding the allegation of doctoring the letter) and from July/August 2015 when Mr Morrison was asked to provide evidence to support his allegations and could not do so. The fact there were no grounds for complaint was not due to any action taken by the respondent corrective or otherwise.

355. We next considered whether the claimant left in response to the breach and whether she delayed too long before resigning. We had regard to the terms of the letter of resignation (page 817). The claimant, in the letter of resignation, referred to the matters included in her letter of grievance, the

manner in which the grievance had been dealt with, the repercussions of the respondent's failure to act appropriately to support her and matters related to a letter written by Mr McHattie on 10 December. The claimant stated that she considered that "*together with the other matters of which you are aware from previous correspondence (1, 2 and 3 above) the Board's actions in relation to the matters concerning the GDC's approach to it in November 2015, to be so serious that they comprise "the last straw" giving rise to a repudiatory breach of my contract of employment .. with immediate effect."*

356. Mr Hardman invited the Tribunal to find Mr McHattie's letter of 10 December 2015 to the GDC was not a "*last straw*" because it was not an incident forming part of a course of conduct over a period of time. Mr Hardman, in support of his submission, referred to an extract from Harveys Encyclopaedia, regarding the last straw doctrine, and it is helpful to set out the extract. It provides:

> *"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.*
>
> *A number of cases illustrate this … Lewis v Motorworld Garages Ltd [1985] IRLR 465, where Glidewell LJ expressly commented that: "the last action of the employer which leads to the employee leaving need not itself by a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"*

> *However, in Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493 the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history."*

357. Mr Hardman referred to the ***Omilaju*** case, at paragraphs 19 – 22, and submitted the last act must be part of what had been going on before insofar as if there was a breach of contract, but the employee did not resign and affirmed the contract, the employee could not subsequently rely on those acts to justify constructive dismissal unless s/he could 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.

358. Mr Hardman invited the Tribunal to find the alleged last straw in this case was not of the same character as the acts prior to the claimant's grievance, and he described Mr McHattie's letter as innocent, bland and innocuous which did not contribute to a series of earlier acts.

359. Mr Hardman also invited the Tribunal to find the claimant had expressed a loss of confidence in the employer in July 2015 and again in her letter of grievance in October 2015, yet she had continued to work in her role and she had thus affirmed the contract.

360. We considered each of those submissions. We have set out (above) the paragraph from the letter of resignation where the claimant made clear that she considered the Board's actions in relation to the matters concerning the

GDC's approach to it, to be so serious as to comprise a last straw. The case law to which we were referred makes clear that in order to be a last straw, the act must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term: the last act must contribute something to the breach even if relatively insignificant.

361. We could not accept Mr Hardman's submission to the effect that Mr McHattie's letter was "*innocent, bland and innocuous*" and that nothing more could be said. The letter was a missed opportunity to put forward the Board's position that rather than doctoring a letter, there had been an administrative error. It was an opportunity to explain what action the Board had taken to investigate the allegation and to explain why they considered it to be unfounded. We considered that to describe the letter as not relating or referring to any allegations she had made was not accurate in circumstances where Mr McHattie had been invited to comment on the letter from Mr Morrow's solicitor which included (amongst many other things) the allegation that the claimant had doctored a letter.

362. The letter was not "*innocent, bland and innocuous*": it was weak and it was a continuation of the earlier acts of the respondent where they had failed to take the opportunity to respond to the allegation and had failed to challenge Mr Morrow to produce evidence to support the allegation or withdraw it. Mr McHattie accepted in cross examination that the only way in which the GDC would know Ms Milliken had instructed a document history search is if he told them in a response. He also accepted that he failed to take the opportunity to address the untruthful allegations, which he knew were causing stress for the claimant.

363. We were entirely satisfied, based on the evidence, that Mr McHattie's letter was an act in a series of earlier acts which cumulatively breached the contract, and which added to the breach. Mr McHattie's letter was the last straw which caused the claimant to resign.

364. We finally considered Mr Hardman's submission that the claimant had indicated a loss of confidence in her employer in July and October, but she had affirmed the contract of employment by continuing to work in her role. The claimant, in an email to Ms Graham on 27 July 2015 (page 549) stated that she would not be taking up the offer of special leave because she had lost confidence in the organisation and felt that she could not guarantee that such a period of leave would not be used against her at some time in the future.

365. The claimant also, in the grievance letter (page 664) made reference to the fact that recent events had caused her considerable stress and anxiety and that as a result she had lost trust and confidence in her employer.

366. We could not accept Mr Hardman's submission that the claimant had either delayed in resigning or had affirmed the contract. The claimant clearly stated she had lost trust and confidence in the employer, and in the letter of grievance she explained the basis for this. She also set out in her letter of grievance, the actions she considered the Board had to take in order to resolve the grievance. We could not accept the suggestion that the claimant had, by allowing the employer an opportunity to resolve the grievance, thereby affirmed the contract of employment.

367. We should state that if we are wrong in our above conclusion, and the claimant did affirm the contract, we considered the actions of Mr McHattie, in responding to the GDC as he did on 10 December, to be a breach of the implied duty of trust and confidence in its own right. Put simply, a dentist was making an allegation of dishonesty regarding one of the Board's employees, and rather than rebut the allegation with chapter and verse why the allegation was unfounded, Mr McHattie did nothing; and, he did nothing without reference to the claimant. The fact the claimant subsequently learned of this from the GDC and discovered her employer had not sought to rebut the allegation on her behalf was a fact which in itself amounted to a breach of the implied duty of trust and confidence.

368. We, in conclusion, decided the actions and omissions of the respondent with regard to the way in which they treated the claimant, amounted to a breach of the implied duty of trust and confidence and a material breach of contract entitling the claimant to resign. We decided the claimant was constructively unfairly dismissed.

Employment Judge: Lucy Wiseman
Date of Judgment: 24 August 2017
Entered in Register: 25 August 2017
and Copied to Parties