EMPLOYMENT TRIBUNALS

Claimant: Ms. Charlotte Salam
Respondent : The Hoxton Surgery

Heard at: London Central by CVP **On:** 4,5 November 2024

Before: **Employment Judge Goodman**

Representation
Claimant: Andrew Otchie, counsel
Respondent: Hafiza Suleman, solicitor

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The respondent is ordered to pay the claimant £5,588.70. This comprises a basic award of £888.05 and a compensatory award of £4,705.65

REASONS

1. The claimant was employed by the respondent as a medical secretary from November 2020. In July 2023 she was suspended for investigation of a data breach, which led to her being given a final written warning towards the end of September. She remained off sick with anxiety and did not attend an appeal meeting. In February she indicated that she wished to come back to work on a phased return. Waiting for a response, she resigned by e-mail on the 22nd of February 2024. She then brought proceedings for unfair dismissal.

2. A claim for discrimination because of sex or maternity has been dismissed on withdrawal.

3. The unfair dismissal issues were summarised by Employment Judge Joffe at a case management hearing on 12th of June 2024 as being whether the respondent's actions over a period amounted to a breach of the implied term of trust and confidence, and whether the claimant resigned in response to the breach. The respondent's alleged actions were:

(1) doctors bullying the claimant in staff meetings, humiliating her and shouting at her
(2) no answers being provided to the claimant's emails of complaint
(3) no answers being provided to the claimant's grievances
(4) Mr Shahzad telling the claimant she could not work remotely anymore and had to return her laptop
(5) suspending the claimant on 19th of July 2023 and asking her to return the laptop and leave the premises without telling her why she was being suspended
(6) subjecting the claimant to a formal disciplinary process and accusing her of gross misconduct despite the fact that she had not been trained on IGPR
(7) not carrying out a fair or proper disciplinary investigation
(8) ignoring the claimant's e-mail of 12 February 2024 about returning to her role
(9) not responding to the claimant's phone calls in February 2024
(10) ignoring the claimant's 15th of February 2024 fit note
(11) not making contact with the claimant when she was ready to return to work

Evidence

4. The tribunal heard evidence from the claimant, **Charlotte Salam**, from her line manager, **Khurram Shahzad**, the practise manager, and from Dr **Jennifer Darkwah** and Dr **Wande Fafunso**, both partners in the practice.

5. There was a hearing bundle of 171 pages, plus some additional pay slips about bonus payments. Other emails were attached to the claimant's witness statement.

6. At the conclusion of the evidence, each side made submissions about the law and facts. Judgment was reserved.

Findings of Fact

7. The respondent is an NHS general practice of four partners. The partners employ a salaried doctor, two nurses, a healthcare assistant, a practice manager, his assistant, a receptionist and a medical secretary. There are 9,000 registered patients.

8. The claimant started working at the practice as an agency worker providing cover as required, from 26th of January 2020. She started employment in the permanent role on 30th November 2020, working four days a week. She passed probation in April 2021. There was a review of hours on the 29th of December 2021, following which she worked five days a week, but starting at 10:00 am, so that she could get children to school.

9. In September 2022 the claimant's mother suffered a stroke, and at the same time she was going through a divorce. There was some kind of conversation with Mr Shahzad about time off at which he mentioned going on to state benefit. She wrote to one of the partners whom she found sympathetic, Dr Jenny Darkwah, on the 21st of September 2022 complaining of "lack of support at this difficult time", even though she had reported the stroke to the practice manager. She marked this e-mail "without prejudice" and told the tribunal that she did not know exactly what these words meant, but she was worried about losing her job if she made any kind of complaint. Dr Darkwah responded sympathetically and the claimant

took some time off work, returning on 1st November 2022. She then asked to reduce her hours from five days a week to three, working 9:30 to 5:00. Next day she asked if she could alter this to four days a week, one of those days being worked from home. This too was agreed. It is disputed whether there was a review on the 4th of December 2022 to see how things were working, but the arrangement continued.

10. In May 2023 the claimant's working time was reduced to three days at the practice, none at home. Neither she nor Mr Shahzad has given any account of the conversation And as before there are no documents to confirm the arrangement. It seems this was because she could not get an adequate internet signal at home. This had not yet been implemented in July however.

IGPR

11. Although the claimant had long worked as a medical secretary, she had worked in private practice for five years before joining the respondent, and so had no experience of using an NHS IT system for sending confidential documents called IGPR.

12. The claimant continued to send private medical reports and records out by recorded delivery, as she had previously done in NHS practice. She was to be shown how to use IGPR by her predecessor as medical secretary, Hannah Phillips, who was leaving to start a nursing training, but worked occasional hours on a zero hours contract basis thereafter, but whatever she was shown was inadequate and as the claimant did not understand the system. It seems that some of the doctors preparing the reports did not know IGPR well either, because in 2021 investigation of a complaint of delay showed that some reports were in their inboxes for up to six months (according to the claimant, though Dr Fafunso disputes that the wait ever longer than 6 weeks). In 2021 the practice manager, Khurram Shahzad, asked the claimant to use the IGPR system. He told the tribunal that it would save her the time spent photocopying medical records and going to the post office to send them. She explained she did not know how to use IGPR and Hannah Phillips was asked to show her. The claimant says this took "less than two minutes": she was just told to press a button to get the file and send it to the solicitors by e-mail.

13. The claimant registered for a webinar on the updated IGPR system on 10 February 2023. She says it was a tutorial selling the new software, not a training tutorial, as it had appeared to be.

14. On the 9th of March 2023 the claimant had an annual appraisal, conducted by one of the partners, Dr Fafunso, accompanied by the practice manager Mr Shahzad. This seems to have been the first time since the probation review that her performance was appraised. Ahead of this meeting the claimant completed a questionnaire (7th of March 2023). She said that the workload was too much for the hours worked, now she had gone down to four days a week. She recorded as achievements that she had used colour coding on the two week cancer pathway spreadsheets making it easy to easy to track down patients who had not attended appointments, and colour coding for overdue medical reports, that she had started to send medical records by IGPR, and that she was saving time by typing partners meeting minutes during the meetings rather than afterwards.

Asked what was not going so well she said: “not all doctors are trained on IGPR use and some reports go overdue”. She added that there could be team training, so GPs could watch the IGPR video. Under “development”, she said that she had undertaken an IGPR course, but in evidence said this was not in fact true, and she had not been on any courses, just the webinar which turned out to be promotional.

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15. We have no notes of the appraisal or the development plan which the respondent completed after it, but there must have been some as the claimant says she refused to sign them. (It should be noted here that the responded has pleaded that the claimant did sign the post-appraisal document, but at the start of the hearing it was conceded that they were looking at the 7th of March 2023 document prepared by the claimant before the appraisal). The claimant says that when she tried to raise IGPR training, Dr Fafunso brushed this aside, saying he was not concerned with private work but the NHS work, and even that he shouted at her. Both Dr Fafunso and Mr Shahzad deny there was any shouting, although in evidence neither was able to say exactly what was discussed at the appraisal. The only contemporary record is in the form of an e-mail the claimant sent that afternoon to Dr Darkwah:

> “I wonder if next week we could have a catch up? Had my appraisal today but not feeling like things went very well. It's left me feeling to say the least quite depressed”.

When Dr Darkwah was next at work and read the e-mail she went to see the claimant, who explained she was very unhappy about signing the record of her appraisal. Rather than making a formal grievance, which they discussed, she wanted a new appraisal. Dr Darkwah asked Mr Shahzad to talk to the claimant about the grievance procedure, and he downloaded the policy and printed it out for her. As far as she understood it, Mr Shahzad was to set a date for a new appraisal, and she left it there. Mr Shahzad did not arrange a further appraisal.

The MDT Meeting

16. There was a clinical meeting every week, which the claimant led. All staff came: doctors, nurses, administrators. One of the claimant’s tasks was to prepare the spreadsheet of the two week wait of cancer patients, to see they were moving through. At one of these, on the 15th of June 2023, it seems that two patients had not attended their appointments, others had not been identified on the spreadsheet. Dr Fafunso, who led on the two week cancer pathway, spoke at some length about these errors. The claimant felt humiliated at having her shortcomings discussed so publicly. The nurses started laughing. She left the meeting before it ended. Later, the two nurses came to see her, and reassured that they were not laughing at her, but at Dr Fafunso being so exercised.

17. Next day the claimant sent an e-mail marked “private and confidential without prejudice”, to Mr Shahzad, his assistant Kristy Brinjolfsson, and to the partners, Dr Hussain, Dr Parsonage and Dr Fafunso. (Dr Darkwah was now on sabbatical). She apologised for leaving the meeting. She said the spreadsheet had been completed on time, tasks and phone calls had been actioned, she had given the practice extra time to complete it. She felt unappreciated. If this was not working, the system needed to be changed to a better one. She added:

"maybe addressing these issues you have with the job in a private meeting would be less humiliating".

She went on to point out that her current workflow was becoming a job for two people, she could clear tasks down at the end of the day but next morning have 102 more. It was a full time job, being covered in four days, and in July she would be dropping down to three days. She mentioned a new plan to have someone working on reports, taxi medicals and private incoming work, to divide the job up and make it more manageable. She now felt "very anxious and ill" but had attended work so as not to let the surgery down. She wanted to talk about this when her mental state was better, as currently she felt quite anxious.

18. This complaint was never discussed with the claimant. There was no email acknowledgement either.

The Data Breach

19. On 18th of July 2023 Kristy Brinjolfsson, Mr Shahzad's PA, investigated a complaint about a medical file not being sent to solicitors. Looking at the administrator sent box, she identified that the claimant had sent an e-mail to solicitors with two attachments, one the unredacted file of medical records, not to be read by the patient or their solicitors, the other the redacted file, which was intended for the patient and third parties. She asked the claimant why she had sent both, and got the answer "we have always done it like that".

20. Kristy Brinjolfsson told Dr Parsonage, and they reviewed other items and sent box. In all, 13 emails sent to solicitors or insurance companies had included the unredacted medical records.

Investigation and Suspension

21. On the 19th of July, at the conclusion of a clinical meeting, the claimant was asked to stay behind for a learning event analysis. It was in fact an investigation meeting with Drs Hussain, Parsonage and Fafunso, Mr Shahzad, and Kristy Brinjolfsson. The claimant was asked what training she had had, and replied that she had been taught how to do it by Hannah Phillips. Dr Parsonage asked why the claimant was not sending the reports through IGPR, as distinct from emailing them as attachments, and, in the words of investigation note: "it came to light that she can't, only the GP going through the report can, but they have been sending reports back to CS (the claimant) for authorisation. So she has been emailing them". Mr Shahzad asked the claimant why she had not opened the attachments before sending them (which would have shown that one of them was marked strictly confidential and unredacted), to which the claimant had no response. The notes show that from now on GPs were to send their own reports to third parties, using IGPR, and Dr Parsonage would do a training session herself the following day, (she had not had IGPR training).

22. In the meantime Mr Shahzad told the claimant she was suspended because of a data breach. Two days later he confirmed in a letter. It was then explained that she had to be suspended so that she could not access patient records or emails during investigation.

23. The respondent then got a full record of all reports generated through the system. The report showed 54 reports of medical records dispatched, but they could only track 14 outgoing emails, (apparently because emails were deleted when the sent box was full). These extend from August 2022 to the 14th March 2023. The sent box is a generic e-mail address. The respondent said that these must have come only from the claimant, but there was no evidence that Mr Shahzad had in fact checked that these dates matched when the claimant was working. His evidence was that from time to time locum secretaries worked for the practice, including Hannah Philips, and it was possible that they too may have sent records. Mr Shahzad, answering a question relating to a dispute about how much support was given to the claimant on workload, was not able to say which locum secretaries were hired or when. While giving evidence to the tribunal, he said that he had taken a statement from Hannah Phillips about whether she downloaded medical record files to send them by e-mail. This is not mentioned in his witness statement, and there is no statement from her in the hearing bundle. Emma Lees, the consultant with Peninsula Business Systems, who conducted a disciplinary hearing and wrote an outcome report, does not refer to any statement from Hannah Phillips, although the report says that she was "spoken to as part of this procedure".

Disciplinary Action

24. Mr Shahzad decided there should be a disciplinary hearing. Breach of patient confidentiality is a serious matter for doctors and potentially gross misconduct on the part of staff.

25. The claimant was invited to meeting to be conducted by one of the partners with Kristy Brinjolfsson as note taker. The claimant had recently joined a trade union, and wanted her representative to accompany her. She objected to Ms Brinjolfsson being the note taker, when she had participated actively in the investigation, as had the partners. The respondent decided to use an outside third party for the disciplinary hearing. Emma Leese, of Peninsula Business Systems, met the claimant and her representative, Trevor Knowles, on the 23rd of August 2023. The invitation to the meeting is not in the bundle, but it appears from the transcript of the meeting that Mr Knowles had received the one page note of the investigation meeting with the claimant on 16th of July 2023, but nothing more.

26. Trevor Knowles presented the claimant's case. In essence, the claimant had received no training on the IGPR system, other than being shown what to do by Hannah Phillips, the outgoing medical secretary, and she had "erroneously been sending reports to solicitors via e-mail, which was what the outgoing medical secretary Hannah Phillips had shown her". The investigation carried out by the practice had not looked at the claimant's concerns about handover from Hannah Phillips on using the IGPR system. Hannah Phillips had not been interviewed about what she had told the claimant to do. The disciplinary invitation made no reference to IGPR or any evidence about its use or training. The claimant's own understanding was that only GP's could transfer medical reports on IGPR, so emailing patient records to third parties was the only exception to the rule on using IGPR for confidential data, because it was not NHS work and IGPR did not use third party addresses. She was happy to undergo IGPR training. It was also

suggested that she was being victimised because of her previous complaints about Mr Shahzad and Dr Fafunso. The claimant was then questioned. She confirmed she had not had training, she did not know she was doing anything wrong, and she had not been given any training notes on handover. She had been told to go into IGPR, download the files and attach them to the e-mail to the third party. Hannah Phillips had said to her: "I'm not here to train you like I'm leaving". It was a "2 minute thing". This was at the point where Hannah Phillips is coming in on an as and when basis, and was asked to show the claimant how to use IGPR, after Mr Shahzad had asked her in 2021 to start using it. Only the doctors and the medical secretary used IGPR. The system generated 2 reports, and the claimant did not know that she was only supposed to attach one of them. It was a task she did on a weekly basis. No one had checked her work.

27. Ms Leese then asked Mr Shahzad to answer a list of questions which he did by e-mail. He said she had completed IGPR software training online by watching training videos, as shown in her appraisal checklist. He said that the wording about the unredacted file being for internal use only could only be read by opening the file first, as it did not appear in the document title. He could not say if the timer together deleted the I'm redacted far before sending it. He could not say that the 40 files not shown in sent list were processed correctly, because they had been deleted. Asked if the system training online covered downloading and uploading files specifically, he said "yes". He had not had any complaints from recipients.

28. In the hearing Mr Shahzad told the tribunal that the claimant should obviously have opened the attachments to check them before she sent the e-mail off. The claimant's response that she was not aware that she was supposed to check a document that a doctor had asked her to send to a solicitor. She saw IGPR as replicating the process by which doctors would place the copied medical file in an envelope for her to address and send.

29. Emma Leese prepared a disciplinary report dated 3rd of September , with 8 appendices, including the investigation notes, Mr Shahzad's answers to question, the list of the 14 emails sent out, Mr Knowles's written representation, and a transcript of the meeting itself. There is nothing from Hannah Phillips.

30. The Report concludes that the claimant said that she was trained to send the attachments in this way by Hannah Phillips, but "there is no confirmation to show that HP trained CS in this way. Therefore, dismisses this as mitigating evidence". The claimant would not open the attachments to check what they were. Miss Leese speculated this was down to pressure of work, but nonetheless, it was "careless", and she should "attempt to understand the data that is being shared especially in such sensitive environments". At paragraph 24 Ms Leese noted from the investigation of the 19th of July 2023 that the claimant believed she had been taught to generate the reports, save the files and upload the two attachments, but added "this in fact contradicts what HP (sic) and the belief of the manager KS".

31. Ms Leese concluded (29) that the claimant's actions:

> "are gross negligent (sic) but not deliberate and wilful".

The claimant had a clear disciplinary record and "there appears to be some

learning in this case", but not reading what you are sending when dealing with extremely sensitive data was a risk to the practice, and her actions were gross misconduct. However, there were mitigating circumstances, namely the lack of formal training, no monitoring by colleagues, the length of time it had gone on, and no evidence that her actions were wilful or deliberate. A final written warning was appropriate.

32. She then recommended that the employer provided training on appraisal, performance management, investigation, and disciplinary and grievance, and refresher IGPR training, to mitigate the risk of this happening again. There should be regular spot checks and file audits. Training records must be monitored regularly, in line with the staff training and development matrix. It was for the employer to decide whether to accept these recommendations. The employee would have a right of appeal.

Final Written Warning

33. Two weeks later, on the 21st of September 2023, Mr Shahzad wrote to the claimant saying that the independent consultant had confirmed there had been serious misconduct by a breach of patient confidentiality, that her explanation about not receiving training was unsatisfactory because she had received online training from the IGPR website and had a dedicated online training session with the trainer from IGPR before the surgery upgraded. In addition, on the 7th of March checklist she had said that she was happy with the use of the system. She had been given a 12 month final written warning. Improvements are required in her conduct, in processing subject access requests and insurance reports with correct procedures. Any repeat of this conduct or other misconduct could lead to dismissal. The suspension was lifted, with effect from 25th of September 2023. Once she returned to work they would review her training needs matrix and devise a plan to support her. There would be a separate letter with a detailed plan of additional training sessions.

Grievance and Appeal

34. On 29th of September the claimant wrote raising a formal grievance. (There may also have been a letter appealing, because the respondent replied identifying appeal points, and, later, turned down the appeal, but if so it is not in the bundle). The grievance letter refer to her 9th March 2023 grievance to Dr Darkwah, which had not been acknowledged. She had explained at the appraisal that she could not do the job on the part time hours, she had asked for support, but had been spoken to in an inappropriate manner by Dr Fafunso, who "took it upon himself to state that I was not organising workload properly". He had also criticised her in front of everyone at an MDT meeting, putting her down in front of everyone when she complained she did not have enough hours to complete the workload. That should have been done in a private meeting, as some staff members were laughing at her during the meeting. She had followed that up with an e-mail, but "not one of the partners answered my e-mail and no support was offered from your surgery". Next, she objected to the way the discipline and suspension had been handled. She understood that she was to get an answer on the disciplinary hearing within 10 working days, but it took a month, during which she had no communication. Finally she complained that she was never allowed to take holiday on a Wednesday because that was the day of the MDT meeting. She felt

"very bullied and harassed working for your surgery and when I have addressed this in writing I never received any reply from you". She would like this to be answered before her return to work.

35. She was then certified sick, with workplace anxiety, from the 29th of September 2023 onward, in successive one month fit notes.

36. An unknown person wrote to the claimant on behalf of the practice, (dated 4th of December but sent 5 December 2023), referring not to the grievance but to a letter of the 28th September appealing the decision to issue a final written warning. A Peninsula consultant would hear her appeal on the 8th of December 2023. The appeal points were identified as training not being mentioned during disciplinary process, and no evidence for it being provided, not getting the evidence in advance of disciplinary process, and only getting a training matrix on her return to work.

Grievance Hearing

37. The claimant did not attend the meeting on the 8th of December 2023. She says she was too stressed to be able to attend or even write back. She complains of the short notice. When contacted by Mr Hindle, she said she had not had a Teams invitation for the meeting. Mr Hindle invited her to make a written submission. She said that the grievance was her submission. She had informed Mr Shahzad that she was too unwell to attend any further meetings, nor had she been given time to have a representative with her. She believed he had done this "on purpose". She needed more than 24 hours' notice.

38. Mike Hindle of Peninsula prepared a report, dated 19th of December 2023, which refers to a grievance hearing, (not an appeal hearing), and in essence deals of the grievance points. He does not consider the claimant's appeal points, and if he did prepare a separate report on the appeal, it is not in the bundle and is not referred to in the witness statements. The documents he considered were the grievance e-mail, the meeting invitation, the contract of employment and the employee handbook. He quotes comments on the grievance points from Dr Fafunso, Dr Darkwah and Mr Shahzad, and the report mentions appendices which may contain this evidence, but they are not in the hearing bundle.

39. On the 9th of March 2023 verbal grievance to Dr Darkwah, she said she had asked Mr Shahzad to discuss the grievance procedure with her, and Mr Shahzad said that time she would think about lodging a formal grievance but he had heard no more. On the part time hours not being enough for the job, Mr Shahzad had said that the claimant had wanted flexible hours, and he had "provided temps extra on weekly basis to help her". The claimants grievance on that was not upheld.

40. On the way Dr Fafunso spoke to her, he accepted the evidence of Mr Shahzad and Dr Fafunso. On the multidisciplinary team meeting, he does not identify its date, nor does it seem to have seen the claimant's e-mail of 16th of July to the partners, although the email had been sent to Dr Fafunso and Mr Shahzad.

41. On the disciplinary process, it would have been best practice to keep her informed of progress, but there was no legal requirement to inform her about

delays. On holidays, he accepted Mr Shahzad saying that the claimant only came to him at the last minute to ask for leave.

42. Although he did not uphold the grievance, he noted “damage to employer/ employee relationship and that this is causing disturbance to the workplace”. He recommended workplace mediation, and also that the employer conduct training on effective communication and managing behaviour, and harassment awareness.

43. Mr Shahzad sent this report to the claimant. His letter is dated 27th of August 2023. There is no covering e-mail and he does not mention sending it in his written witness statement, but in oral evidence he said that he had offered the claimant mediation on 1st February 2024. The letter says that having considered the report he had decided to dismiss the appeal in its entirety and uphold the original sanction of final written warning due to serious misconduct of breach of patient confidentiality. They were happy to arrange mediation to rebuild the working relationship and if she agreed could she reply “in five working days”, by 4th of January 2024 (sic).

44. The claimant’s last fit note expired 28th of January 2024. She saw her GP on 30th January 2024, who certified she was unfit for work by reason of work related anxiety until the 28th of February 2024. The tribunal does not know whether or when this was sent to the respondent.

45. Mr Shahzad says he sent the Mike Hindle report to the claimant on the 1st of February. Apparently the claimant wrote back saying that she was prepared to enter into mediation. On the 8th of February 2023 the claimant asked to return to work on reduced hours with mediation. On the 14th of February 2024 her GP provided footnote saying that she may be fit for work taking account of the following advice: a phased return to work. The employee was asked to liaise with the patient on a phased return schedule. This is dated the 14th February, and covers the period for 12th of February the 13th of March. The payment sent the fit note to the practice on the 15th of February.

46. Mr Shahzad did not reply to these emails. The claimant says she telephoned as well. On the 22nd of February 2024, the claimant had not had a reply from Mr Shahzad about arrangements for mediation, or a phased return to work. She wrote to Mr Shahzad unless resignation. She said: I wrote to you on the 8th of February informing you that I would like to return back to my job role. I was very fair and gave you more than two weeks’ notice in order to return me to work. My e-mail went unanswered. I then sent you a fit note on 15th of February which stated my return to work on the 12th of February. I had no acknowledgment of my wish to return to work or help in returning me to work. I feel the trust and confidence has clearly broken between us I have suffered a long term sickness from the treatment from your surgery from the bullying and harasment which took place and was not addressed and went ignored. You have clearly forced me out of my job role and left me no choice but to resign. I feel I have been constructively dismissed by your surgery”.

47. A week later, on the 1st of March, Mr Shahzad replied asking if she really wished to resign from the company. He had emailed her to say that they were looking into setting up mediation, had contacted an external company, but had yet to set

a date. If she wanted to reconsider your decision to resign and attend this meeting once we have a date set" she should let him know in five days. Then they would book a date. On the 15th of March, he wrote again saying that he would respect her wishes and accept her resignation. She would get final pay and unused annual leave on the 25th of March 2024.

Remedy

48. The claimant's witness statement says nothing about what happened next. Information emerged from questions in the tribunal. When she presented this claim, she was not represented. She had joined the union too late to qualify for legal help. Solicitors came on record on 12th September 2024. The schedule of loss, dated 4th of October 2024, says: "the claimant has significant childcare commitments and will have difficulty finding further employment". She seeks a full loss of earnings from the date of dismissal to the date of judgement, with a further £10,000 future loss of earnings. The claimant said that she had already applied for work for one day a week at the time she resigned, hoping to increase her income by working additional hours over and above the three days a week for the respondent, and was offered the additional work after her resignation. She had since been able to increase this to two and a half days a week, but could not say when this took place. She had applied for other part time work, both in the NHS and the private sector, mentioning "six or seven" applications and a few interviews, but she was not currently applying because she was happy with her current employer, even though was too few hours. She hoped for "extra in future". She was unable to say when she had last been paid in her new employment, or how much. She has not disclosed any documents about her search for work or her current earnings. She told the tribunal that she had not been told she had to survive documents, but the case management order on disclosure of documents says "this includes documents relating to financial losses".

49. The schedule of loss says nothing about loss of bonus. In the witness statement the claimant complains that she only got a £50 annual bonus in May, when others got £100, and was told being part-time was the reason, although other part-time staff got more. The respondent then disclosed wage slips showing that in each of the previous three years she had in the summer been paid a £250 bonus. The claimant clarified that she had been paid less than another employee, AW. The respondent then produced December payslips for the claimant and AW, showing that each had received £50.

50. The case management order also identifies a claim for unauthorised deductions from pay between 12th and 22nd of February 2024, after the claimant was fit for work. The claimant, having now seen the pay slips, concedes that when she was paid in March 2024, she was properly paid for this period, and for outstanding annual leave.

Relevant Law

51. This is a case where the employee resigned and so must establish that in law this amounts to a dismissal. By section 95(1) of the Employment Rights Act 1996, a dismissal can occur where:

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

52. As made clear in **Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27**, it is not enough that the conduct is unreasonable. It must amount to a fundamental breach of the contractual employment terms such that the employee can treat the contract as at an end by reason of the employer's repudiatory conduct. **Woods v WM Cars (Peterborough) Ltd (1981) IRLR 347**, upheld in the Court of Appeal, and approved by the House of Lords in **Malik v BCCI** makes clear there can be:

"implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Industrial tribunal's function is to look at the employer's conduct as a whole and to 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".

53. Where there is a series of actions they can be looked at cumulatively. The precipitating cause may not be weighty of itself, and viewed by itself may not always be unreasonable, but if it contributes to the breach of the implied term of trust and confidence, it may prove to be the last straw – **Omilaju v Waltham Forest (2005) ICR 481**. The law on this is summarised by the Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust 2018 IRLR 833**. When looking at "last straws" a tribunal should ask itself what was the most recent act or omission on the part of the employer which triggered the resignation, had the employee affirmed the contract since that act, if not, was the act or omission itself a repudiatory breach of contract, and if not, was it part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amount to a repudiatory breach of the *Malik* term. Finally, did the employee resign in response, or partly in response, to that breach.

54. If the employee is able to establish that there was a section 95(1)(a) dismissal, the tribunal must go on to consider whether the dismissal was fair or unfair having regard to the factors in section 98(4), that is, having regard to the reason shown by the employer (which) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

55. As explained by Sedley LJ, at paragraphs 21 to 29 in **Buckland v Bournemouth University Higher Education Corporation (2010) ICR 908 CA):**

" establishing a constructive dismissal does not automatically mean that the dismissal was unfair. That is so, even where the repudiatory breach of contract in question is a breach of the implied obligation not, without reasonable and proper cause, to act in a manner likely to destroy or seriously damage the relationship of confidence and trust (see **Malik and Mahmud v Bank of Credit and Commerce International SA (1998)**

AC 20 HL). In such a case it would still be open to an employer to show that such a dismissal was for a potentially fair reason and if the employer is able to discharge that burden, it will then be for the ET to decide whether the constructive dismissal for that reason fell within the range of reasonable responses and was fair"

and

"I recognise that it may well be difficult for a Respondent to make good an alternative case as to the fair reason for a constructive dismissal. In a constructive dismissal case, a Respondent would need to show that the conduct which entitled the Claimant to terminate the contract (thereby giving rise to the deemed dismissal by the employer) amounted to a reason that was capable of being fair for the purposes of Section 98 ERA (see **Berriman v Delabole Slate** [1985] ICR 546 CA)."

Discussion and Conclusion

56. It is convenient to group together some of the issues listed as weakening or breaching mutual trust and confidence, starting with the allegations of not responding to complaints and grievances. The first complaint is of lack of support at the time of her mother's stroke in September 2022. It may well be the Mr Shahzad was brisk or unsympathetic, but Dr Darkwah's response to the claimants complaint was immediate and helpful, and adjustments were made to her working time to suit her. The next complaint is about the appraisal in March 2023. It could well be that Dr Fafunso was inexperienced in conducting appraisals and there was too much criticism in the blame sandwich, at any rate the claimant experienced the advice on how to get more out of her working time, as criticism. The claimant's reaction to this was immediate, and Dr Darkwah again took appropriate action to speak to her about it, and the claimant was referred to the grievance policy. Her understanding however was that rather than lodge a grievance, she just wanted a new appraisal, and this seems to have got lost. Doctor dark wall left to go on sabbatical. Mr Shahzad seems to have expected a formal grievance, rather to deal with the informal grievance. It is unusual that he should leave the appraisal documents unsigned, rather than following this up, either by arranging a new appraisal, or by further discussion. By itself this does not breach trust and confidence, but the respondent did lose the opportunity to resolve this informally, always a better way to deal with complaints and grievances, especially in small workplaces where many things are done by discussion rather than put into emails, and where employees worry that unusual formality will mark them out as troublemakers.

57. A serious breach of trust occurred at the June MDT meeting. Dr Fafunso may not have shouted, but the reaction of the nurses showed that his communication on what the claimant was or should have been doing was at least emphatic. When the claimant expressed her upset at what she saw as public humiliation, none of the recipients of this e-mail responded to it, either in writing or in person, and Dr Fafunso appears not to have read it at all. (The amended response denies it was ever sent, but it there is there in the claimant's nhs sent box, printed off for the bundle on 16 September 2024). Mr Shahzad said in tribunal that criticising the claimant's work in front of all the practice staff was not humiliating or bullying. Whatever his opinion at the time, ignoring the claimant's e-mail complaining about her treatment will have weakened her trust in her employer, and her confidence that she would be treated fairly. In essence, her grievance was that there was insufficient time to get the job done properly, even when she was

putting in unpaid hours to finish it, as well as having to have this discussion in public. That is a valid complaint: there may have been a discussion to have in private about the claimant's performance or workload, but it should not be conducted in public. The claimant got neither explanation nor apology.

58. It was against this background that the claimant was suspended on the 19th of July for the data breach. Suspension, even on full pay, and for good reason, is a shock, and inevitably damages the employment relationship. At a stage when an employer has to conduct an investigation while the employee might interfere with evidence, it can be justified. It is possible that Mister Shahzad did not say a great deal about the reason for suspension at the time, or if he did, that the claimant was too shocked to take it in, But this is put right in the letter that came two days later, although many, perhaps most employers, would not have waited two days, but would have sent an e-mail confirming and explaining the decision by the end of the day or at the beginning of the next.

59. Of the complaint that the claimant was not allowed to work from home and was asked to return her laptop, the factual position is unclear. There seems to have been some decision on 23 May not to work from home any longer because of inadequate Internet. She still had the laptop in July. Returning the laptop when suspended could relate to the need to investigate without the risk of interference by the person being investigated, except that it was the claimant who wrote to Mr Shahzad on 31st of July asking how to return the work laptop, and Mr Shahzad who replied the same day saying that she could return it at the disciplinary meeting, as Emis (which gave access to records was inactive. This episode is puzzling and does not show conduct undermining trust and confidence.

60. All these matters will have contributed to the claimant's dissatisfaction and lack of confidence in fair treatment, but she kept coming to work, no doubt because as a single parent she had to work.

61. The principal matter contributing to the decision to resign must be the handling of the disciplinary process. It should have been clear from the claimants explanation and respondents investigation that this all hinged on what she had in fact been taught about IGPR. She always maintained that she followed what Hannah Phillips had told her, but there is no sign that Hannah Phillips was interviewed. (There is also no evidence whether other people had sent out any of these reports, and if they did, whether they did the same). It could be that Mr Shahzad had a brief with word with Hannah Phillips which he passed on to Emma Leese, but that is speculation. In essence, the claimant's error was not know that when she was asked to send a report and the IT system produced two reports, she was supposed to select only one of them. When the claimant said she knew how to use IGPR, she did not know what she did not know. It was not a matter that required elaborate training. It just required a secretary, a doctor, or Mr Shahzad, to point out that the machine would have two files of reports (this assumes that every patient's file had to be redacted, which is unlikely). It was not obvious to the user that one of them was specially confidential, as this would require opening to review its content. As Ms Leese found, this was not wilful or deliberate error. The question then arises whether a final written warning, whereby any kind of misconduct in the next 12 months could lead to dismissal, was appropriate.

62. The ACAS Code says this of penalties:

> 19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.
>
> 20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

63. Of course, sending records to a patient's representative where a doctor had deemed that some of the content was harmful to the patient and should not be disclosed, is serious, and could have a harmful impact on the practice. There is no evidence, fortunately, that it did have a harmful impact on the practice or its patients. It is however doubtful whether moving straight to a final written warning for an employee with hitherto satisfactory service and a good record, who had not been told that one of the files generated by IGPR should not be sent, was useful or fair. Some employers would have treated it as a training point and not imposed a penalty at all. Some would have moved to a first warning to reinforce a message to staff that even inadvertent data breaches are serious. The decision seems to have rested with Mr Shahzad, as Dr Fafunso says he was not involved with the process at all, Dr Darkwah was on sabbatical, and there is no mention of the other partners' involvement, despite the two and a half week delay communicating the report to the claimant.

64. Whatever could have been re examined and possibly corrected in the disciplinary process by way of an appeal was lost, because although the respondent acknowledged an appeal letter and summarised the appeal points, and later sent a letter declining to change the outcome, there is no sign that the independent consultant actually considered the appeal points, one of which concerned the adequacy of the investigation Into the claimant's training.

65. The consultant did consider the grievance. He would have been handicapped by not having more detailed input from the claimant, for example the missing emails, But it is interesting that he recommended training on, for example, bullying, and effective communication, which suggests he considered the respondent's handling of the claimant was lacking, despite not upholding the complaints of bullying and ineffective communication.

66. It is also hard to understand why, when the claimant complained that getting a letter on 5th of December for a meeting on the 8th of December, and that her representative could not attend at short notice, the meeting was not re arranged, as suggested in the Code of Practice. Mr Hindle noted that although the claimant said she was unwell, the fit note said did not say she was not fit to attend meetings, only unfit for work; this was his reason not to postpone. Rearranging the meeting so as to give the claimant more notice, and exploring whether more notice and getting a representative to attend, was a reasonable step to take.

67. The respondent is also not able to explain why it took the best part of 10 weeks

from receiving the claimant's appeal and grievance to write to her, and then set a meeting to discuss them at only three days' notice. The long silence - there is no sign that the appeal and grievance were even acknowledged - can only have increased the claimant's anxiety, and will have reinforced her apprehension that the respondent had no intention of dealing with these than they had with the earlier complaint on 16 June.

68. Assuming that the decision on the appeal or grievance were communicated to the claimant on the 1st of February, which is when Mr Shahzad said he offered mediation, the claimant promptly said that she was prepared to engage in mediation and went to see her doctor about returning to work. Her intention seems to have been genuine. Not getting any answer either on arranging the phased return or the mediation was her last straw.

69. How much of this was a breach so serious as to repudiate the contract? Taking an employee to task about her performance in front of her colleagues, to the point where she has to leave the meeting she is supposed to lead, is serious, the more so when her complaint about it is ignored. Using a disciplinary procedure where there is "reasonable and proper cause" is not repudiatory, however difficult the experience for the employee. But using the procedure in a dilatory way, and refusing to address possible errors in the investigation in an appeal process, and refusing to shift a grievance or appeal (whichever it was) meeting given at short notice, after ten weeks delay, all coming after ignoring a complaint to the practice about her perception of a humiliating experience a month earlier, was cumulatively damaging to trust and confidence, and in the circumstances it is reasonable to see this as repudiatory of the implied term of trust and confidence in an employer to deal with the employee fairly and in accordance with its own procedures. The claimant nonetheless was willing to return to work and engage in mediation so that she could continue. The respondent has not explained why her emails and telephone calls were not answered. The explanation given to the tribunal – that it was necessary to source a mediator and agree a date - was not provided to the claimant. It would not have been difficult to do that. This two week silence, on top of the earlier long silences, caused the claimant to conclude that respondents still refused to engage in her return to work, And her trust in them was at an end.

70. It would be reasonable for an employee who was beginning to doubt whether they would ever be able to get back to work, at a point when she was existing on statutory sick pay only, to start to look for another job. It does not undermine the conclusion that it was respondent's conduct that caused to resign when she did.

71. The tribunal finds that the claimant was dismissed within the meaning of section 95 one C. What's that unfair? The respondent has not advanced to reason, although it might relate to the claimants capability managing D I QPR disclosure. If that was the reason, it does not account for long delays and failure to communicate with the claimant before or after the data breach. The employer's conduct with regards to the investigation the appeal and the grievance was not equitable, nor merited by the claimant. The dismissal was unfair.

Remedy

72. The claimant was under 41 at the date of dismissal and is entitled to a basic award of one weeks pay for each complete year of service, so three weeks at £294.35 per week.(The schedule of loss states annual salary was £14, 935.84, but the March 2024 pay slip gives annual salary as £15,006.37, to which £300 is added for the two bonuses paid). The basic award is £883.05.

73. Assessing the compensatory award is much more difficult. The claimant was questioned about her income since dismissal at the end of her evidence, in the early afternoon of the first hearing day. By the end of the second hearing day she was still unable to provide the information. Solicitors had been on the record for six weeks. It was clear from list of issues that remedy would be decided at this hearing. She had made no mention of any additional income in her schedule of loss complied the month before.

74. The tribunal has to decide whether she did intend to undertake the extra day's work in addition to her job with the respondent. This is hard to understand if she was only fit for a phased return - how would she have the energy to do an extra day then? It is also hard to understand when the history of her working time adjustments suggests that if she had asked to work more time at the Hoxton surgery, they would have gladly increased her hours.

75. That suggests an ongoing loss of 2/3 of her salary from the date of resignation.

76. The wholly unknown factor is when she was able to increase her working time to her current 2 1/2 days, and when, as she mentioned, she did additional days as holiday cover. There is a loss of two days a week pay for an unknown period until she was able to increase hours, and then a loss of half a day a week after that. Another factor to be taken into account in what is a just and equitable compensatory award having regard to loss is that the claimant is no longer actively seeking additional work elsewhere. Doing the best it can with the limited information available, the tribunal proposes to award the claimant two-thirds of her previous weekly pay, for a period of five months.

77. Any overpayment, if she started the additional hours during this five months, will balance out the ongoing loss of half a day thereafter. There is no award for future loss because the claimant has made it clear that she is comfortable working her current hours although she hopes for more.

78. Net pay has been taken from the wage slip for the 30th of June 2023, the last in the bundle before she was on statutory sick pay. At that point she was working 25 hours at 39.9 per hour. Her gross and pay includes the £250 bonus. Assuming that she paid tax at 20% and National Insurance at 12% on that bonus, the net bonus payment will have been £170. That amount has been deducted from her net payment of £1,532.89, representing net wages (ex bonus) for the month at £1,462.89. As she had since reduced her hours from 25 to 20 per week, and the hourly rate has gone up from £13.91 to £14.39, a proportionate adjustment is made for each change. That results in net monthly pay of £1,210.69 per month. Two thirds of that is £807.13 per month. For five months therefore the award is £4,035.65.

79. There is no award for pension contributions because the claimant was not in the pension scheme.

80. Had she continued working it is likely she would have received a £250 bonus in the summer, £170 net.

81. There is also an award of £500 for loss of statutory rights to reflect the fact that if she loses her job in the next year or so she will not be able to claim unfair dismissal. Proposed changes to qualifying service requirements are unlikely to have become law in that time.

82. The total compensatory award is £4,705.65.

83. The claimant has not claimed state benefit since dismissal so the recoupment provisions do not apply.

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Employment Judge Goodman

Date: 6 November 2024

JUDGMENT SENT TO THE PARTIES ON

14 November 2024

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FOR THE TRIBUNAL OFFICE