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EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Jordan**

Respondent: **Princess Alexandra Hospital NHS Trust**

Heard at: **East London Hearing Centre**

On: **13, 14 & 15 December 2016 & In Chambers on 16 December 2016**

Before: **Employment Judge C Hyde**

Members: **Mr D Kendall**
Mrs S Amatuzzi

Representation

Claimant: **Mr A Burrow (Counsel)**
Respondent: **Ms E Melville (Counsel)**

RESERVED JUDGMENT

It is the unanimous judgment of the Employment Tribunal that: -

1. The complaints under the Equality Act 2010 alleging discrimination arising from disability and failure to make reasonable adjustments were not well founded and were dismissed.

2. The complaint under the Employment Rights Act 1996 alleging constructive unfair dismissal was not well founded and was dismissed.

REASONS

Preamble

1. Written reasons are provided for the above judgment as the judgment was reserved.

2. The reasons are set out only to the extent that the Tribunal considers it necessary to do so and in order for the parties to understand why they have won or lost. Further the reasons are set out only to the extent that the Tribunal considers it proportionate to do so.

3. All findings of fact were reached on the balance of probabilities.

The Claims and Issues

4. By a claim which was presented on 22 April 2016 Mrs Jordan complained that she had been subjected to disability discrimination under the Equality Act 2010 in the respects set out below. She also subsequently presented an amendment to her Claim Form which was granted in September 2016 whereby she alleged that she had been unfairly constructively dismissed. Further in her Claim Form she complained that she had been subjected to unlawful deductions of wages. This claim was subsequently withdrawn.

5. There had been a Closed Preliminary Hearing which took place by telephone on 20 June 2016 chaired by Employment Judge Brown and a further Preliminary Hearing took place on 26 September 2016 chaired by Employment Judge Foxwell. At the latter hearing the unlawful deduction from wages claim was dismissed on withdrawal and the constructive unfair dismissal claim was added by amendment.

6. At the start of the merits hearing, the Claimant produced an amended list of issues which the Tribunal marked as [C2]. It was not agreed by the Respondent.

7. By the time of the merits hearing, the fact that the Claimant was disabled was admitted by the Respondent. She had been diagnosed with primary biliary cirrhosis ("PBC") in January 2010 and subsequently in May 2015 she was diagnosed with systemic lupus erythematosus ("SLE"). At the commencement of the hearing when the Tribunal clarified with the Claimant what the effects of the disability were, it was stated by Mr Burrow that it was fatigue. The more extensive way in which the case was put in the further amended list of issues which was presented at the time of closing submissions was not agreed, namely that the primary effects of the two conditions on the Claimant were extreme fatigue, poor concentration, disturbed sleep patterns and a higher risk of psychological stress.

8. The Tribunal considered that it was neither in the interests of justice, nor consistent with a fair trial, to widen the scope of the effects after all the evidence had been heard. Having said that the Tribunal had regard to the medical evidence and the Claimant's impact statement on which the concession of disability was based and it was apparent there that the fatigue was not of a simply mundane sort but was severe.

That was also the only effect that was put to witnesses or was discussed during the case. There was reference to the Claimant needing a considerable amount of sleep but there was no reference to disturbed sleep.

9. By the end of the evidence the Claimant's case had also narrowed somewhat. She complained that she had been treated unfavourably in relation to her section 15 discrimination arising from disability complaint in the following ways:

9.1. By the Respondent suspending her pay in October 2015 (as notified in a letter dated 23 October 2015) with effect from 14 September 2015.

9.2. By the Respondent accusing the Claimant in a letter dated 30 December 2015 of not adhering to the Respondent's absence management policy; and

9.3. By the Respondent extending the formal attendance procedure period against the Claimant (as notified to the Claimant also in a letter dated 30 December 2015) following a meeting which the Claimant did not attend on 17 December 2015, for non-attendance at meetings that she had advised the Respondent she was too unwell to attend.

10. There was a further element of complaint under section 15 which was not pursued as such at the hearing, but was relied on in support of the constructive unfair dismissal complaint. Thus the Claimant complained about Ms Lorraine Nixon's conduct in unilaterally and incorrectly amending the Claimant's contractual working hours in March/April 2015.

11. The Claimant further alleged under section 20 of the Equality Act 2010 that the Respondent had failed to make reasonable adjustments.

11.1. She alleged that the Provision, Criterion or Practice ("PCP") was a requirement in the Respondent's attendance policy at paragraphs 8.2 and 8.3 that the Claimant had to report her absence on a daily basis by telephone.

12. The Claimant contended that this PCP put her at a substantial disadvantage in comparison with persons who did not have her disability and who were required to report the same or similar occurrences of sickness absence. In relation to the nature and extent of the substantial disadvantage suffered by the Claimant, it was contended that the effects of her disability, principally the extreme fatigue, prevented her from contacting the Respondent daily by telephone and therefore she was unable to comply with the sickness absence policy. The Claimant it was alleged was consequently placed at a substantial disadvantage by having to undergo the Respondent's formal attendance management procedure with the associated increased risk of dismissal.

13. The Claimant submitted that a reasonable adjustment would have been to allow her to report her sickness by email. This was a matter the Tribunal would need to determine.

14. The Tribunal noted, as the further amended list of issues produced by the

Claimant on the last day of the hearing shows, that there were substantial amendments to the way in which her case was put particularly in this regard.

15. The Respondent submitted in relation to the disability discrimination complaint that they did not have the requisite knowledge of the effects of the disadvantage on the Claimant and they relied on evidence in the case.

16. Also in relation to the section 15 claim, the Respondent contended that if the Claimant was treated unfavourably in the respects alleged that there was objective justification for this. The objective justification relied upon was as set out in paragraph 13 of the amended grounds of resistance at pages 72 – 73 of the bundle. Counsel for the Respondent indicated at one stage that she would amend the details of the objective justification in relation to the second allegation of suspending the Claimant's pay, but in the event this did not appear to have been done. The Tribunal therefore assessed the grounds as pleaded by the Respondent in the amended grounds of resistance.

17. An issue also arose as to whether the Claimant's allegations of disability discrimination were out of time. It was accepted that complaint about events on 30 December 2015 were in time. The Claimant contended that the earlier matter complained of also namely the letter of 23 October 2015 was a continuing act with the letter of 30 December 2015. The Respondent did not accept this.

18. In relation to the constructive unfair dismissal, the Claimant relied on all the matters which were complained about above as acts of disability discrimination. Further, she contended that there was a last straw which fulfilled the test in the case of *Omilaju v Waltham Forest LBC* [2005] IRLR 35. The last straw relied on by the Claimant was her contention that Ms Nixon had not been in contact with her for an extended period in the run up to her resignation on 24 August 2015. The contention that there had been no email contact between May and August 2015 was not disputed. The Respondent disputed however that these matters taken singly or together constituted breaches of the Claimant's contract and further they disputed that the Respondent's conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence between themselves and the Claimant.

19. They further contended that the alleged conduct did not cause the Claimant's resignation and that if the conduct amounted to breaches of contract the Claimant had affirmed such breaches and/or delayed unduly before resigning.

20. In the pleadings settled by her lawyers the Claimant's case was put until the last day of the hearing on the basis that she had resigned without notice on 23 August 2016. The document in the bundle (p647A) which was said to constitute the letter of resignation was dated 24 August 2016 and ostensibly gave one month's notice of resignation which was due to expire on 24 September 2016. The Tribunal asked Mr Burrow to clarify the Claimant's position on this and in his closing submissions he confirmed that the Claimant's position was that she had resigned with notice on 24 August 2016 which was consistent with the letter at page 647A.

21. The Respondent relied on these discrepancies and their case that they had not received this resignation letter. They further relied on the agreed fact that on 1

September 2015 the Claimant had had a conversation with one of the witnesses, Mrs Hartgrove, who was employed as senior HR Associate by the Trust. Mrs Hartgrove had kept a detailed file note of the conversation, the contents of which the Claimant did not dispute. Indeed, Mrs Hartgrove was not cross-examined about it. In that file note, there was no reference whatsoever to the Claimant having submitted her resignation already on 24 August 2016. Further, various matters were discussed which the Claimant readily accepted in cross-examination gave the impression that the employment was ongoing. For example, there was reference to rescheduling a missed Occupational Health appointment.

22. It was agreed at the beginning of the hearing that this hearing would be limited to issues of liability and that the Tribunal would only move on to deal with remedy if and when that became appropriate.

Evidence adduced

23. The parties had agreed a bundle of documents marked [R1] which was contained in three lever arch files and which ran to just under 1000 pages. Further, during the course of the hearing by agreement or with the Tribunal's leave further documents were added.

24. The Tribunal then heard evidence from the Claimant whose witness statement was marked [C1] and on behalf of the Respondent the Tribunal heard evidence from Ms Lorraine Nixon, Head of Clinical Administration within the Trust, who was responsible for the management and supervision of 85 staff including the Claimant consisting of secretaries, clerks and typists. She gave her evidence in chief by way of two witness statements, the first was marked [R2] and the second was marked [R3]. The admission of the second statement [R3] was the subject of dispute. The Tribunal gave the Respondent leave to adduce this supplementary evidence. Albeit it was being adduced late namely on the first day of the hearing, notice of the supplementary evidence had been given on 8 December and the matters covered by the statement had been foreshadowed by some other evidence before the Tribunal and were in any event relevant. The witness statement attested to matters which were relevant to the issue of the Claimant's capability which was relevant in terms of the PCP relied on and her ability to comply with it. It was also relevant to assessing the need for adjustments and the reasonableness of any such adjustments. It was also relevant to issues of credit but in granting the Respondent leave to adduce this statement and the three additional documents the Tribunal advised the Respondent that undue time should not be spent on cross-examining on issues of credit.

25. The final witness on behalf of the Respondent was Mrs Carmelle Hartgrove and her witness statement was marked [R4].

26. Finally, both parties presented written outline closing submissions which were marked respectively [C3] on behalf of the Claimant and [R5] on behalf of the Respondent. Each representative supplemented these orally.

Relevant Law

27. There was no dispute about the statement of law which was helpfully and

succinctly set out in Ms Melville's closing submissions at paragraphs 1 – 19 inclusive. In addition, Ms Melville gave the Tribunal a copy of the judgment in the case of *Mari v Reuters Ltd* UKEAT/0539/13 (30 January 2015). She relied on paragraph 40 of that judgment. The Tribunal adopted her statement of the law but it is not proportionate to repeat it in this document as it was not disputed by Mr Burrow.

Findings of Fact and Conclusions

28. The factual issues on which the Claimant relied for her section 15 and section 20 claims and the constructive unfair dismissal claim overlapped almost completely.

29. The Claimant worked for the Respondent as a medical secretary at various locations and grades from October 2008.

30. The first matter chronologically which was raised was the allegation that Ms Nixon unilaterally amended the Claimant's contracted hours in March 2015 to 25 hours per week. It was clarified that this was a reference to Ms Nixon's action following the meeting with the Claimant on 31 March 2015, whereby she submitted a change of hours form in respect of the Claimant without the Claimant having confirmed that this was what she wanted to do (pp381 and 389).

31. Ms Nixon held a meeting with the Claimant on 31 March 2015 after the Claimant returned from a period of ill health on 9 March 2015, at which point she had attended a return to work interview with her supervisor, Ms Dianne Miller. Ms Miller kept a note of the discussion which was not disputed and the Claimant signed the relevant parts of it. During that meeting it was noted that there was a requirement for the Claimant to be referred to Occupational Health. Further, in the context of whether it was appropriate for there to be any reasonable adjustments that could be made, Ms Miller noted that the Claimant's hours had been adjusted, following advice from Occupational Health. Although the notes were somewhat cryptic, the Claimant agreed that she had told Ms Miller that Occupational Health had told her that her hours could be adjusted at this time because it was part of the Claimant being on flexible working. We did not hear evidence from Ms Miller, but it was apparent from the document and it was not disputed by the Claimant that her reduced working hours started from that time. Indeed, the Claimant's case throughout was that she worked those reduced hours from 9 March to 27 March 2015.

32. Ms Nixon was subsequently unhappy about the fact that the Claimant appeared to have effectively put herself on the restricted hours from 9 March. The only evidence before us of Occupational Health advising on or expressing a view about reduced hours was in the subsequent Occupational Health report which was produced following a visit by the Claimant on 16 March 2015 (pp379-380). The Tribunal accepted the Respondent's contention that on the face of the wording of the report, Occupational Health was informed about the reduction of hours and that it was ongoing at that point as opposed to them having advised that there should be such a reduction of hours before it took place.

33. There was also a dispute between the parties as to whether this was the same as the Claimant being on flexible hours. It was not disputed that sometime prior to that, because of the Claimant's long-standing medical condition, it had been agreed that she

could work her 37.5 hours flexibly as long as she made up the relevant number of hours over the course of a month. There were also processes in place for checking, albeit loosely, that she fulfilled that requirement. The Respondent saw a reduction of the requirement of total hours worked to 25 hours per week as a different proposition. It did not appear to the Tribunal that it was necessary for us to make a finding about that distinction, although it is correct that the policy document maintains such a distinction. The main point was that on the evidence before us it was apparently on the Claimant's own initiative that hours were reduced for that period, without prior consultation with or notice to or agreement by the Respondent. Further, the duration of the reduction was not something that the Occupational Health department appeared to have advised and it certainly was not agreed that it should end on 27 March. The Claimant apparently unilaterally brought it to an end.

34. One practical effect of the Claimant's variation to her working hours in March 2015 was that there was no agreement by the Respondent to pay her for a full week's work despite working less than the agreed total weekly hours over the course of the month.

35. This was relevant context to the meeting on 31 March 2015. Ms Nixon had been notified of the return to work meeting which took place on 9 March 2015. This led to her referring the Claimant to Occupational Health but she was rather concerned about the way in which the change had been brought about to the Claimant's working hours. She kept a contemporaneous note which the Tribunal considered on the balance of probabilities to be a reliable note of the meeting. However, no notes are ever verbatim and this one did not purport to be either. The Claimant accepted as noted in the file note that she had confirmed that she had forgotten to tell Ms Nixon that she had reduced her hours when she had returned. Thereafter it was apparent that Ms Nixon was concerned with regularising the position so that the Claimant was not being overpaid, or paid for a full week's work without proper authorisation. During the meeting, she contacted Human Resources to confirm that the Claimant would not have to pay back the overpayment of her wages for March 2015 because she had been paid on a full-time basis because there was no documentation supporting a reduction in hours for that month. She also noted that the Claimant was worried about the overpayment. This was not disputed by the Claimant.

36. The dispute between the parties was about whether the Claimant told Ms Nixon during this meeting that she had actually returned to working full-time hours as of 30 and 31 March 2015. The Claimant later asserted this in an email that she wrote to the Respondent dated 15 May 2015 in which she questioned the subsequent reduced pay that she had received in respect of April 2015. There was no reference to the Claimant returning to full-time hours in Ms Nixon's note of the meeting of 31 March. The Tribunal's focus was on whether Ms Nixon had acted after this meeting in a way which was likely to constitute a breach of the contract, viewed from the Claimant's perspective. There was certainly discussion about how the extra hours would be covered if the Claimant was only working 25 hours a week going forward.

37. The Claimant's contention during the hearing was that her understanding was that having already returned to full-time working at the end of March 2015, she was merely giving consideration to the possibility of working 25 hours a week going forward but that a definite arrangement about that was not reached during this meeting. Ms

Nixon, the Tribunal considered, clearly believed that that was what the arrangement was going forward. The Tribunal considered that her actions during the meeting and subsequently were clearly designed to regularise the position administratively both for the Claimant's benefit so that she was not in a position where she was being overpaid and was then required to repay sums to her employer, and indeed to protect the Respondent's position so they were not paying the Claimant for hours which she was not working. The Tribunal also noted that Ms Nixon acted promptly to give the Claimant the benefit of the extra pay that she had received even though she had worked 12.5 hours a week less than she was paid for in most of March 2015. Ms Nixon did not quibble about this and agreed with Human Resources that the Claimant could still get full pay and would not be chased for recovery of the overpayment.

38. The Tribunal considered that these circumstances indicated that Ms Nixon was trying to act in the Claimant's interest. This is also apparent from the sympathetic tone of her correspondence with the Claimant subsequently. Ms Nixon's actions after the meeting on 30 March clearly demonstrated that she understood that the Claimant wanted to continue working 25 hours a week. This was demonstrated to the Claimant by the email sent to her on 1 April (p384) in which Ms Nixon provided the relevant paperwork to the Claimant to complete a flexible working application so that it could be processed.

39. When the Claimant failed to return the paperwork relating to the reduced hours, and commenced a period of holiday, which both parties knew she was about to take, again out of a desire to protect the Claimant from being in a position where she had been paid more than she was entitled to, Ms Nixon asked for the change of hours form to be processed although Ms Jordan had not signed it, in the expectation that in due course on the Claimant's return from holiday she would confirm that this was in line with her wishes (pp 388 and 389).

40. It appeared to the Tribunal that the form clearly should not have been submitted without a signature from the Claimant and this was the matter that the Claimant complained about. To the extent however that the Claimant complains that this was an act which constituted a breach of contract, the Tribunal considered that it was important to bear in mind the background and the state of knowledge about it on the part of both the Claimant and Ms Nixon at the time.

41. The change form was then processed and as a result the Claimant received pay for 25 hours per week in April 2015. She then sent a detailed email to the Respondent on 15 May 2015 to query the reduced hours (p405).

42. Having reviewed the email of 15 May 2015, the notes of the meeting on 31 March 2015, the change form and the emails which Ms Nixon sent internally and to the Claimant which clearly confirmed that it was her understanding that the Claimant would be continuing to work five hours a day, the Tribunal did not consider that there was much evidence to support the Claimant's contention at the hearing that she had actually told Ms Nixon during the meeting on 31 March 2015 that she had ceased working five hours a day on 27 March 2015. The first statement to this effect appeared in the Claimant's letter of complaint on 15 May 2015 but notably she does not say in that letter that she told Ms Nixon this. Whilst it is possible that the Claimant mentioned it and Ms Nixon did not notice it, it is clear that Ms Nixon did not understand this to be

the case because it would have made no sense for her to have filled out the change form if she was aware that the Claimant had now returned to full-time working.

43. Matters were somewhat complicated by the fact that the Claimant was on sick leave after her period of annual leave.

44. On the balance of probabilities therefore the Tribunal was satisfied that this was not made clear to Ms Nixon in the meeting and this omission explains Ms Nixon's subsequent actions.

45. As far as the Claimant was concerned although she was clear in her letter of 15 May 2015 that she had not agreed at the meeting that she would be working 25 hours a week, she clearly knew that this was Ms Nixon's understanding of the position from Ms Nixon's email to her (pp384) sent the day after the meeting on 31 March 2015.

46. When she raised the matter of the reduced hours from April with Ms Nixon in the 15 May email, Ms Nixon referred the correspondence to Mrs Hartgrove who discussed it with the Claimant and looked into the situation. In brief the Respondent agreed that the change form should be revoked and that the Claimant's hours should be amended to full-time working from 1 April 2015. Mrs Hartgrove authorised that the back pay should be included in the Claimant's pay in May 2015. In her witness statement the Claimant complained that she was not reimbursed in respect of the underpayment until July 2015. However during her evidence she corrected this and stated that she had not been repaid until her June 2015 payslip. It is clear however from the authorisation of Mrs Hartgrove which was dated 21 May 2015 (p409) that Mrs Hartgrove did what she could to reinstate the money as soon as possible. We were not shown any payslips so we were unable to make a finding as to whether the money was repaid to the Claimant as intended in her May payslip or in her June payslip. However, the Respondent notified the Claimant of the position by a letter which was sent by email on 21 May 2015 (pp 412 and 412). The circumstances surrounding the change form as the Tribunal has found above were outlined to the Claimant in that letter and also she was told that her pay had been reinstated to cover the April and May reductions.

47. The Claimant did not protest about this outcome and no further correspondence or evidence relating to this matter was placed before us.

48. In the letter to the Claimant of 21 May 2015 Mrs Hartgrove also invited the Claimant to a meeting on 17 June 2015 in Ms Nixon's office to review the existing flexible working arrangements. Once again this appeared to the Tribunal to be appropriate action on the Respondent's part given the recent misunderstanding and the 25 hours a week working that the Claimant had initiated in March 2015. It was perfectly reasonable for the Respondent to want to clarify the position and to formalise and check what was appropriate for the Claimant if necessary.

49. The Tribunal considered therefore that the first matter complained of as constituting a matter which was a breach of contract was not made out in the circumstances set out above. Even if it had been a breach of contract, the Tribunal noted that this was a matter which occurred in April 2015 and the Claimant apparently became aware of the reduction in hours in about May 2015, some two weeks or so into the month after the pay was reduced in April 2015. The matter was then resolved

within a week of raising the matter with the Respondent, in the Claimant's favour. Nothing further was raised about this. In the circumstances therefore, the Tribunal would in any event have considered that the Claimant had delayed too long before raising this as a breach of contract.

50. It appears that thereafter the Claimant had a period when she was working along the same lines that had been agreed flexibly previously, namely that her start and finish times were flexible as long as she worked the fulltime hours over the course of a month. She was also on a structured return to work. This lasted from mid-June to 8 July 2015 when she was expected to return to normal working hours from 8.30am to 4.30pm (p 417C).

51. By now the Claimant was awaiting a liver transplant and the Respondent and her managers were aware of this.

52. The next matter complained about was the letter dated 23 October 2015 to the Claimant telling her that her pay had been suspended with effect from 14 September 2015 (p 568). It was written by Ms Nixon and copied to Mrs Hartgrove. The two managers had liaised about the sending of this letter and its wording. Both accepted that there should have been reference to the precise period of sickness absence that was being referred to as a period when the Claimant had failed to comply with the policy and to a further applicable provision of the policy, namely Section 10. The letter cited Sections 8.1 and 8.2 of the policy. The former section required every member of staff who was not on annual leave or authorised absence to attend work unless prevented from doing so by illness. Where a member of staff was prevented from attending work due to illness the procedure for reporting sickness absence must be followed and certificates provided as required.

53. The Tribunal's consideration centred on Section 8.2 which provided as follows:

> *"**First day of absence***
>
> *Staff must report their sickness absence, including occasions when they have agreed to work outside their normal working week, to their immediate line manager or another designated manager by telephone at the earliest opportunity. Where genuine incapacity prevents this, it is the individual's responsibility to arrange for a friend or relative to do so on their behalf. The line manager should follow up with a personal telephone call as soon as is practicable in the individual circumstances.*
>
> *When notifying absence an individual must give the reasons for the absence and how long it is expected to last.*
>
> *Sending text messages, emails or leaving voicemail messages is not an acceptable means of informing a manager of absence. If for any reason a text is received or a message left, this will not be considered an acceptable substitute for speaking to the line manager."*

54. Although the letter appeared to quote Section 8.2 of the policy, in fact the policy produced at the Tribunal did not refer to emails. The quote therefore above which was

set out in the letter to the Claimant was erroneous in that respect. No questions were asked of any of the witnesses about this.

55. The letter continued to cite Section 8.2 as follows:

> *"It should be noted that late notification of sickness absence or failure to comply with the attendance procedure may, where there is no justification, result in disciplinary action and/or loss of pay.*
>
> ***8.3 DAILY NOTIFICATION***
>
> *Until a clear indication on the duration of the sickness is provided, the employee must telephone the manager or nominated person on a daily basis to advise them of their continued sickness and if possible their expected return to work date."*

56. In the next main paragraph the letter continued that as the Claimant had not complied with the above procedure for reporting sickness her pay would be suspended from 14 September 2015. She was informed that if she wanted to discuss anything in this letter she should contact Ms Nixon on the telephone number on the letter (pp568 – 569).

57. Section 10 of the attendance management policy at page 687 of the bundle set out three paragraphs under the heading *"Arrangements for keeping in touch"*. This referred to the expectation on both the employees and the managers of keeping in touch with each other on a regular basis. That was said to be monthly as the minimum.

58. The Tribunal did not consider that any of these provisions was exceptional. They appeared to be in accordance with normal employment practice.

59. The significance however of these matters needs to be judged against the chronology and events which led up to this matter.

60. The Claimant complained about the 23 October 2015 letter as both an incident of breach of contract which is relevant to the constructive dismissal claim and as treatment which was in breach of section 15 of the 2010 Act in relation to a disability. It was relevant in relation to the Equality Act complaint for the Tribunal to make findings about why Ms Nixon wrote the letter and the circumstances of this. The Respondent's case was that by the time the letter was written there were various factors which led the manager to attempt to 'flush the Claimant out' because she had failed to be in touch for quite some time in line with the policy.

61. The Claimant commenced her current sick leave on 14 September 2015. She did not telephone her employer on that day but a phone call was made to the employer by her sister at 11.25am on 14 September. She explained that the Claimant's medication was having an adverse effect on the Claimant but that the Claimant's sister would update the Respondent. The Tribunal considered that on the basis of that information the Respondent should have accepted that the procedure was probably complied with on that occasion because the procedure allowed for somebody else to

make the phone call on the employee's behalf if the employee was by reason of illness unable to make the call. However, no indication was given by the Claimant's sister or anyone else on her behalf as to how long the Claimant would be away from work for. The Respondent noted contemporaneously that on neither 15 nor 16 September 2015 did they get a telephone call. On 16 September at 1.12pm, an email was then sent to the Claimant by Ms Nixon (p 549). The Tribunal considered that it was sympathetically worded and asked the Claimant how she was doing and noted that it was out of character for her not to have advised Ms Nixon of her absence. Within the hour the Claimant responded also by email copied to both Ms Nixon and Mrs Hartgrove and apologised for the failure of her sister to be in contact with Ms Nixon to update the Respondent. She stated that all she had been doing was sleeping due to the fact that her systemic lupus had flared up. She gave a description of her condition and said that she had been to her doctor but would not be seeing her normal doctor until the following afternoon. The Tribunal considered that it was clear from the prompt response and from the content of the email that the Claimant was aware that it was important that somebody should have updated the Respondent on a daily basis as the Claimant apologised twice for her sister's failure to do this. Ms Jordan also explained that she had not done this because her *"voice is not that great"*. This confirmed that the Claimant was aware that the first option should be a telephone call from herself. Once again she did not however attribute the failure to call to a difficulty caused by her condition. She described that she had a cold and throat infection and her voice was very limited. She conceded that she was in error. However, she indicated that she would inform the Respondent by email the following day of the position once she had been to the doctor.

62. Mrs Jordan sent an email on 17 September 2015 at 11.47pm to inform Ms Nixon that she had been signed off until 30 September 2015. She also stated that she had put a copy of the fit certificate in the post. The Tribunal considered that the clear implication from this email was that she had been signed off by her GP having visited the GP as she had described she would in her previous communication and that the sick certificate was a normal fitness to work certificate from a general practitioner.

63. It emerged during the hearing that the only certificate that was sent to the Respondent for the period before the letter of 23 October 2015 was sent to the Claimant, was a sick certificate covering the period 23 September 2015 to 6 November 2016. And it was also clear in respect of that certificate that the assessment by the doctor took place on 23 September 2015. Various certificates produced by the Claimant during her subsequent sickness absence had been backdated by the doctor but this one clearly referred to a visit on 23 September 2015. The Tribunal considered that in those circumstances the Respondent was entitled to believe that there was no sickness certificate produced by the Claimant in respect of the period prior to 23 September 2015. The self-certification process only allowed self-certification for one week and the period from 14 September to 23 September exceeded this. Even if it were a matter of the Claimant self-certifying as she indicated she had done in her oral evidence, for the first time, the information that she gave the Respondent in her email of 17 September 2015 clearly gave the impression that it was not a self-certificated period but a period which was covered by a doctor's sick note. There was also the discrepancy between the period covered because she indicated that she had been signed off until 30 September and the subsequent sick note which covered a period to 6 November 2015. The Respondent therefore was entitled to be rather concerned

about whether the Claimant had indeed complied with the procedure, especially in the light of the Claimant's clear acknowledgement in her email of 16 September that she was aware of the correct process. The Tribunal also took into account that there had been a number of occasions over the preceding year when the basic requirement of the procedure of a sick employee to telephone their employer had been emphasised and reiterated to the Claimant at meetings and in writing.

64. By an email dated 28 September 2015 sent at 2.05pm, the Claimant sent the sickness certificate just referred to covering the period 23 September to 6 November 2015. It also included a scan of a letter from the Claimant's Consultant dated 23 September 2015 which gave some background to the Claimant's medical condition and indicated that the Consultant was not surprised that the Claimant was struggling with work issues. Her next appointment there was in two months. In due course Ms Nixon obtained the Claimant's permission to send that letter to Occupational Health.

65. The Tribunal noted that the sickness absence reporting policy explained the reasons why the daily phone calls were necessary until the duration of the sickness was established. From the Claimant's point of view, the indication that she had given a timeframe for the sickness by her email of 17 September 2015 was not credible because she did not have a sickness certificate signing her off until 30 September and that period of time was far in excess of the period that she was allowed to self-certify for.

66. There was then a dispute as to whether the Respondent had received the sickness certificate by the email of 28 September 2015 (p 554). When this matter was discussed in detail with Ms Nixon it appeared that the most likely explanation was that the Claimant had indeed sent the sick note dated 23 September 2015 to Ms Nixon, but that what Ms Nixon continued to request from the Claimant in her email to the Claimant of 2 October 2015 was the sick note which had been promised on 17 September by the Claimant, which related to the period of sickness prior to 23 September 2015. Once again the Tribunal considered that the communications from Ms Nixon to the Claimant were sympathetically worded and not unduly formal. The level of formality was appropriate.

67. In the letter seeking the sick certificate although it did not specify which sick certificate she was referring to, Ms Nixon acknowledged that the Consultant's letter had referred to the Claimant having work worries. She indicated to the Claimant that she felt it would be beneficial therefore to refer her back to Occupational Health for advice and guidance and asked if the Claimant was happy for her to send the copy of the Consultant's letter to Occupational Health.

68. There was no dispute that the Claimant then agreed to Ms Nixon sending the Consultant's letter to Occupational Health later on 2 October 2015 and this was done. Also, the Claimant scanned the sick note of 23 September 2015 once again and sent it to the Respondent at the same time on 2 October 2015.

69. After Mrs Hartgrove had become more closely involved with matters in May 2015 she had advised Ms Nixon to have an initial formal attendance management meeting with the Claimant. This was initially scheduled for 24 September but the Claimant was unable to attend and then it was rescheduled for 9 October 2015. The Claimant did not

dispute that she had received the letter dated 1 October 2015 informing her of this meeting (p 558).

70. By the time the meeting of 24 September was scheduled, the Claimant had accrued approximately 69 days of sickness in a rolling 12 month period (p 545) which under the Respondent's policy was considerably in excess of the 14 days of sickness which would have triggered the initial formal attendance management meeting. The 69 days' sickness was in four episodes in November 2014, March 2015, a single lengthy period from mid-April to mid-June which was a substantial period of that 69 days and then one day on 23 July 2015. When the Claimant was given notice of the rescheduled meeting in the letter of 1 October 2015 which was due to take place on 9 October 2015, the Respondent then added the subsequent sickness which consisted of a further day on 2 September 2015 and then the ongoing period from 14 September 2015 (stated in error as 2014).

71. The Tribunal noted that the letter to the Claimant from Ms Nixon on each occasion explained that the manager's aim was

> *"to support and assist you to improve your attendance by giving you the opportunity to meet with me to discuss any underlying issues that may be affecting your ability to attend work. We may also look at areas such as your fitness to undertake the full range of your duties, any adjustments that may need to be considered either to your role or to your workstation, the need for an Occupational Health service referral and any additional programme of support"*.

72. The Claimant was informed of her entitlement to be accompanied by a representative of a recognised trade union or a work colleague not acting in a legal capacity at the meeting. She was also invited to make every effort to attend at the appointed time and to confirm with Ms Nixon that she would be attending.

73. The Claimant did not notify the Respondent of her intention not to attend or of her inability to attend these meetings. There were contemporaneous emails from Mrs Hartgrove describing the circumstances of the Claimant's non-attendance at the meeting and that Ms Nixon had made attempts to call the Claimant both on that occasion and on many previous occasions and that she had left messages which the Claimant had not returned and that the Claimant simply emailed fit notes. The Claimant did not dispute that this was fair description of what had taken place to that point. Mrs Hartgrove also recorded that in accordance with attendance management policy she had advised Ms Nixon to make a decision in the Claimant's absence, namely to put the Claimant on the first stage of the policy procedure due to the Claimant being significantly outside of the Trust's attendance standards and adjustments having been made.

74. The Claimant was informed of this outcome by letter dated 9 October 2015 from Ms Nixon and the letter explained why Ms Nixon had come to take this step. The Tribunal again noted that Ms Nixon did not send an overly formal letter and started the letter by asking after the Claimant's health and whether she was ok. She however reminded the Claimant that the Claimant had failed to call and speak with her. She also reminded the Claimant that in the letter inviting her to the meeting of 1 October

2015 the Claimant had been warned that *"failure to attend could result in a decision being made in your absence"*. She was informed that the first stage of the formal procedure would start from 9 October 2015, the date of the letter, and would last for a period of 12 months during which the Respondent would continue to monitor the Claimant's sickness absence. She also advised the Claimant that if she incurred further absence it may be necessary to meet again to discuss the Claimant's attendance in line with the attendance management policy which might result in the procedure being progressed to the next stage of the process. The Claimant was informed of her right to appeal against the decision and to whom she should direct such an appeal. She did not in the event submit an appeal. Indeed, she does not complain in these proceedings about this letter and the notification to her.

75. There was also the failure to attend formal attendance management meetings on 24 September and 9 October and the failure to notify the Respondent in advance or to give any reasons for non-attendance.

76. At the hearing, as part of the supplementary evidence which the Tribunal gave the Respondent leave to adduce, they additionally relied on complaints from colleagues around 19/20 October 2015 about the Claimant partying and working privately whilst off sick. Ms Nixon had apparently received this information as a result of the Claimant's work colleagues feeling that they were not being fairly treated and that undue pressure was being put on them in the Claimant's absence. As part of the evidence contained in Mrs Hartgrove's witness statement she also described that there were some ten vacancies in the department at about this time and that the department was therefore under some considerable pressure. Whilst Ms Nixon also relied on this additional evidence as explaining the need for the letter which was in robust terms to the Claimant on 23 October, the Tribunal accepted that her dominant reason for writing the letter was to prompt the Claimant to get in touch with her about her sickness. The Tribunal considered that the genuine reason for writing the letter was the pressures that Ms Nixon was under, the lack of clarity as already outlined above about the periods when the Claimant was validly off sick and the need for Ms Nixon to address this, having regard to the Respondent's business of providing a service, and to a lesser extent, the need to avoid disaffection on the part of the remaining staff.

77. It emerged that the Claimant had celebrated her 40th birthday at about this time. The Tribunal did not criticise her for that in any way or consider that it was in any way blameworthy. These matters were referred to simply in the context of the Respondent explaining the pressures they were under which led to the writing to the letter complained about.

78. In addition, in her oral evidence, Mrs Hartgrove took a more robust line in relation to the breaches of the procedure by the Claimant, consistent with her being the Human Resources advisor. She was also quite firm and clear that without regard to the issue of the complaints from colleagues there was ample justification for writing a letter threatening to suspend the Claimant's pay as a means of getting the Claimant to make the oral contact which was a requirement under the procedure during the initial period on a daily basis and then subsequently after the sick note was sent in dated 23 September, there was a requirement on her to do contact her manager orally periodically.

79. The Tribunal accepted the Respondent's submission that the letter was written in pursuit of a legitimate aim i.e. to discuss the Claimant's sickness absence with her. The wider aim was to ensure compliance with the Trust's sickness reporting requirements and, more generally, with the Trust's attendance management policy. The aim of the policy was stated as being *"to ensure the efficient and timely management of absent staff…and so as to ensure that there is a fair procedure to manage employees back to work, or otherwise to fairly dismiss them due to capability after a period of time. It allows for workforce planning in the light of absences"*: paragraph 25 of Ms Nixon's statement R2.

80. We also accepted that the letter was a proportionate means of achieving that aim. Indeed, having received the letter, the Claimant contacted the Trust in writing on 27 October (p 571) and then by telephone on 30 October (p 575). The letter sent by the Claimant to Ms Nixon was quite detailed.

81. The Tribunal also noted that their procedure anticipates that the Respondent can use the tool of suspension of pay in circumstances where there has been a failure to comply with the procedure. The Claimant had not provided any justification for her failure to comply and so suspension of pay was appropriate. In addition, in the letter informing the Claimant about suspension of her pay she was invited again to discuss matters with Ms Nixon. And in the event, as a result of the Claimant doing so, Ms Nixon was able to inform the Claimant that the pay suspension would not proceed. This complaint is related to a certain extent to the further two complaints about persistently accusing the Claimant of not adhering to the sickness policy and extending the formal attendance procedure against the Claimant on 30 December. The facts found therefore are relevant to all three of these complaints.

82. The Respondent conceded that the letter was *"unfavourable treatment"*. They disputed however that it was written because of something arising in consequence of the Claimant's disability, namely her sickness absence, but because of her failure to comply with the attendance management policy and/or to attend meetings. The Tribunal considered that there was no evidence that the failures were, themselves, a consequence of the Claimant's disability. Other equally disabled employees were potentially capable of complying with the policy and attending meetings.

83. In any event, even if the Tribunal was wrong about that, the letter was justified in the circumstances set out above.

84. The Tribunal also considered whether this amounted to a breach of the implied duty of trust and confidence and was satisfied for the reasons set out above that it did not.

85. The next complaint was about persistently accusing the Claimant of not adhering to the Respondent's sickness policy. It was confirmed by the Claimant that this was a reference to the two letters of 23 October and 30 December 2015. The circumstances leading up to the writing of the letter of 23 October 2015 have been set out above. The Claimant accepted in cross-examination in respect of that letter that she had not adhered to the attendance management policy in a number of respects.

86. The Tribunal also found in terms of the context leading up to the writing of the 23

October letter that the Trust had certain targets to meet in terms of responding to correspondence and the secretarial service was clearly essential to meeting the tight 72 hour turnaround. The Claimant accepted this in her evidence.

87. In relation to the earlier point about suspending the Claimant's pay, the evidence was that there were several occasions not least on 14 September through her sister and on 2 September when the Claimant herself had telephoned the Respondent at about or prior to 11am. In addition, the phone call from the airport took place prior to 11am. There was therefore little basis for a finding that there was substantial disadvantage to the Claimant in being required to make a telephone call *"at the earliest opportunity"* to notify the Respondent of her illness.

88. In relation to the letter of 30 December 2015 (p 597), the Respondent extended the current stage 1 for two months to expire on 17 December 2015 following the Claimant's failure to attend the meeting scheduled for 17 December 2015. She contended that she had indirectly notified the Respondent that she would be unable to attend due to ill health by way of the Occupational Health report which was dated 16 December 2015 following a telephone Occupational Health assessment of her on that day. It was correct that the report of that date recorded (p 595) that the Claimant had said to Dr Naghavi, the Consultant Occupational Health doctor, that the Claimant did not think *"that at present she is fit to return to work. She is feeling unwell and has informed me that she cannot attend the meeting with management on 17 December"*. The Tribunal had no evidence before us to satisfy us that that letter had reached the managers at the time that they convened the meeting on 17 December. Indeed the earlier Occupational Health report in March took some days to reach Ms Nixon. Also, Ms Nixon's evidence was that she thought it probably had not reached her by the time of the meeting and Mrs Hartgrove was also quite firm on this.

89. The Tribunal considered that if the Claimant was able to conduct a telephone consultation at which she was able to inform the Occupational Health on 16 December that she could not attend the meeting the following day, on the balance of probabilities it was likely that she could also have contacted her employers to inform them of this ahead of time. The Tribunal considered that it was perfectly reasonable and appropriate for the Respondent to take some action and that given the range of options open to them as set out in the policy, they took the most neutral action that they could by extending her stage 1 period by a further two months. Mr Burrow put to the Tribunal during the hearing that they should not have extended it at all. It did not appear to the Tribunal that this was a position which could be substantiated given the purpose of such meetings was to ensure the welfare of the employee and to ensure that the Respondent's need for people to carry out the work was being safeguarded.

90. The Respondent contended that the letter of 30 December 2015 did not persistently accuse the Claimant of not adhering to the Respondent's sickness policy by stating that the Claimant had failed to attend a scheduled meeting, as alleged. The letter stated that she had not attended the meeting for the second time which was correct. Further, in the letter inviting her to the meeting on 11 December 2015 (p 591) the Claimant had been warned that a failure to attend could result in the decision being made in her absence. Indeed, this is what had occurred when the Claimant had failed to attend the earlier meeting on 9 October. The Claimant was therefore clearly informed of and must have been aware of the potential for action being taken in her

absence.

91. A further point which overlaps with the complaint about the extension of the formal attendance procedure against the Claimant on 30 December was that by analogy with the case of the *Trustees of Swansea University Pension & Assurance Scheme v Williams* [2015] IRLR 885 the Tribunal accepted the Respondent's submissions that being placed within the formal attendance management procedure is not unfavourable treatment in any event.

92. Further, as with the allegation above about suspending the Claimant's pay in the letter of 23 October, if the treatment was unfavourable it was not because of something arising in consequence of the Claimant's disability for reasons already set out above in that context.

93. Further in the alternative, the steps taken on 23 October and 30 December were justified in the circumstances. Finally, they did not amount to a breach of the implied term of mutual trust and confidence as for the reasons set out above and in the circumstances.

94. Turning to the complaint about extending the formal attendance procedure against the Claimant on 30 December, the same points apply in this context as have been made above. The Tribunal reached the same conclusions.

95. The Tribunal next considered liability under section 21 of the 2010 Act in respect of failure to make reasonable adjustments. The Respondent accepted that paragraph 8.2 of the Trust's attendance management policy constituted a PCP for the purposes of section 20(3) of the 2010 Act. However, they disputed that it put the Claimant at a substantial disadvantage compared with persons who were not disabled. In particular as set out above, the Tribunal found that the Claimant was able to call in when she wanted to on the occasions referred to above such as before she departed on her holiday.

96. Paragraph 8.2 relates to the reporting on the first day of absence and as noted above the requirement was to call *"at the earliest opportunity"*. A large part of the Claimant's case was put on the basis that she was required to call in, in the morning or early. This is not what the procedure required. Further, as already noted, the Claimant was able to phone the Trust prior to 10.41am to query an issue relating to her pay on 30 October 2015 (p 575). She was also able to travel to the airport early to go on holiday abroad, to attend GP appointments on numerous occasions and, on her own admission, she worked at weekends privately until September 2015 whilst off sick. Further, the Respondent relied on evidence that was available to them which suggested that she was still working privately through to November/December 2015. This was partly the evidence from the supplementary documents, one of which was a record which was processed by Ms Nixon's department which indicated that the Claimant was described as the medical secretary for a Consultant in private practice in about November 2015 (p 589A). This evidence was disputed and the Tribunal considered it appropriate in the circumstances not to make findings based on it.

97. Further, the Claimant never stated at the time that her disability put her at a disadvantage when it came to sickness reporting by telephone. As was set out above,

she referred in September 2015 to her voice not being up to it as a result of suffering from a cold and then in early September 2016 in a telephone call made by her to Ms Hartgrove at 9.30am, the Claimant told Mrs Hartgrove that she was not able to call and speak to Ms Nixon *"as she clashes with her"* (p 648). Further, in her email to Ms Nixon in February 2016 (p 614) she responded to Ms Nixon's repeated request that the Claimant should contact her by phone and not email to update her as this was in line with the Trust policy by stating that she found it *"easier emailing you, that way there is no confusion"*. Ms Nixon responded by repeating to the Claimant her request that initial contact was made by telephone. Neither of the reasons put forward by the Claimant was related to her disability.

Equality Act Time limits

98. As set out above it was conceded that events which took place on 30 December 2015 were brought within time in relation to the Equality Act complaints. The Tribunal's findings above did not establish any liability on the part of the Respondent in relation to that letter or indeed the earlier matters.

99. However, the Tribunal states for the avoidance of doubt that if these had been acts of disability discrimination the Tribunal would have found that the letter of 30 December 2015 was continuous with the letter of 23 October 2015. They were two letters written at various stages of the sickness absence monitoring and involved the same manager and the same Claimant and the same sickness.

Constructive unfair dismissal

100. Against the findings set out above the Tribunal finally had to consider the complaint of constructive unfair dismissal. The Tribunal's findings above meant that the Claimant has not established that there was any breach by the Respondent of the implied duty of mutual trust and confidence on which the Claimant relied.

101. The date of termination of the Claimant's employment was in dispute. There were many examples in the correspondence and in the bundle of the Claimant having sent correspondence to the Respondent both by post and email in the time frame considered by the Tribunal. The Respondent disputed that the Claimant had established that she had resigned from the Trust by her letter dated 24 August 2016. Ms Melville confirmed during her closing submissions that it was not the Respondent's position that the Claimant was still employed. The Respondent contended that they did not receive notification that the Claimant had resigned until they received a copy letter from the Claimant's solicitors dated 20 September 2016 asserting that she had indeed resigned as set out above without notice on 23 August 2016. This letter was addressed to the Tribunal seeking amendment of the claim to include constructive unfair dismissal (p 56).

102. The Tribunal considered that there was room for considerable doubt about whether the Claimant had sent her resignation letter to the Respondent as alleged on 24 August in the light of the conversation that the Claimant had with Mrs Hartgrove on 1 September 2016 and also her failure to send the letter by some means which was verifiable such as email and/or recorded delivery - methods which were known to her.

103. It appeared to the Tribunal however that the date on which the Respondent was given notice that the Claimant was seeking to amend her claim to allege unfair constructive dismissal was communication to them that the Claimant had resigned. Her resignation therefore took effect from 20 September 2015. By this time the Claimant was on nil pay and had been so since 26 July 2016. There is therefore no further pay due to her in any event.

104. The main issue in relation to the resignation was whether the Claimant resigned as a result of the alleged breaches or any repudiatory conduct by the Respondent. The Tribunal has already found above that the Respondent's conduct did not amount to breach of contract. But further, during her oral evidence the Claimant agreed when it was put to her that she resigned because of her inability to continue to work due to her health and because she *"couldn't be doing with it anymore"*. The Tribunal noted in this context that in her letter of resignation the Claimant did not give any explanation or relate her motivation for resigning to any conduct by the Respondent.

105. The Tribunal considered the Claimant's contention during her conversation with Mrs Hartgrove on 1 September 2015 that she was not happy about the lack of contact between herself and Ms Nixon from about the end of March/beginning of April 2016 through to early August 2016, against the rest of the evidence. The Claimant first alleged in the conversation with Mrs Hartgrove that Ms Nixon had not been in touch with her *"the whole time that she had been off sick"*. This, the Claimant readily accepted in cross-examination, was not an accurate statement of the position. Further although she criticised Ms Nixon for not being in contact with her during a difficult time when she had been in hospital, the Claimant again readily accepted that she had not informed the Respondent at the time that she was in hospital. Indeed the sick notes which were provided during that period were for extended periods and simply referred to the Claimant's conditions which were in existence already. For example, the Claimant asserted during her conversation with Mrs Hartgrove that she had been in Addenbrooke's Hospital from May to July. There was no evidence to confirm such a lengthy stay in hospital and indeed such medical evidence as the Claimant had produced did not substantiate an in-patient admission at that point at all.

106. In any event however, there was no information available to the Respondent which would have led them to believe that the Claimant was in hospital during this time. The medical certificates which were provided to the Respondent at the material times were sent by the Claimant's GP surgery. Thus Ms Nixon and Mrs Hartgrove and indeed the Respondent would have been entitled to have concluded that the Claimant was therefore visiting her general practitioner in order to be certified unfit for work. We were not satisfied therefore in the circumstances that the Claimant had resigned as a result of any conduct or blameworthy conduct on the part of the Respondent.

107. The timeframes would have been relevant in relation to the constructive dismissal claim if we had found that the Respondent had acted in breach of their contract which we clearly have not. In any event, it was noteworthy that the last substantive act that the Claimant complained about in the context of the constructive unfair dismissal was the writing of the letter of 30 December 2015 and the action taken which was communicated to her in that letter. Her resignation, on her case, did not come about until August/September 2016. During that time the Claimant continued as before and was in receipt of sick pay and there was no suggestion of any grievance or

any statement of continued discontent. In all the circumstances therefore, the Claimant would not in any event have been able to rely on the conduct up to 30 December 2015 as constituting breaches of contract because she would have been deemed to have affirmed such breaches. In the alternative, she had delayed for too long before submitting her resignation.

108. In all the circumstances therefore, the claims were not well founded and were dismissed.

Adjustments during the hearing

109. Both parties had made representations to the Tribunal in respect of adjustments during the hearing for the Claimant and for a witness on behalf of the Respondent, Ms Nixon. The Tribunal discussed them with the parties and accommodated them.

Employment Judge Hyde

9 March 2017