Case No: 2200200/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS:

Ms C Bonner
Ms SJ Murray

BETWEEN:

Mrs D Emerson-Afolabi

Claimant

and

London Community Rehabilitation Company

Respondent

ON: **23, 24, 25, 30 & 31 January 2017**
21 February 2017 (In Chambers)

Appearances:

For the Claimant: Mr O Onibokun, Solicitor
For the Respondent: Mr G Burke, Counsel

RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By a claim form presented on 11 February 2016, the claimant brought claims of constructive dismissal, disability discrimination, harassment and victimisation. The respondent resists all of the claims though it accepts that the claimant is disabled for the purposes of the Equality Act 2010.

2. The claimant gave evidence on her own behalf. The respondent gave evidence through Claude Denton, Temporary Senior Probation Officer; Lisa Anderson, Assistant Chief Officer; Brenda Yearwood, Senior HR Adviser and; Patsy Wollaston, Assistant Chief Officer. The parties presented a joint bundle of documents and any references in square brackets in the judgment are to pages within that bundle.

The Issues

3. The parties agreed a list of legal and factual issues relevant to this case and these will be referred to more specifically in our conclusions.

The Law

Constructive dismissal

4. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides that an employee shall be taken to be dismissed by his employer where the employee terminates the contract, with or without notice, in circumstances in which he is entitled to do so by reason of the employer's conduct.

5. The case; Western Excavating Limited v Sharp 1978 IRLR 27 provides that an employer is entitled to treat him or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach of the contract or which shows that the employer no longer intends to be bound by one or more of its essential terms. The breach or breaches must be the effective cause of resignation and the employee must not affirm the contract.

6. The case: Malik v Bank of Credit and Commerce International SA 1997 IRLR 462 provides that the implied term of trust and confidence is breached where an employer, without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

7. In London Borough of Waltham Forest v Omilaju [2005] ICR 481, the Court of Appeal stated that a final straw should be an act in a series whose cumulative effect amounts to a breach of trust and confidence and it must contribute to the breach. An entirely innocuous act on the part of an employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.

Direct discrimination

8. Section 13 of the Equality Act 2010 (EqA) provides that a person (A) discriminates against another (B) if because of a protected characteristic, (in our case disability) A treats B less favourably than A treats or would treat others.

Victimisation

9. Section 27 EqA provides that a person (A) victimises another person (B) if A subjects B to a detriment because a) B does a protected act or b) A believes that B has done, or may do, a protected act.

10. The protected acts in question are listed at section 27(2) EqA.

Harassment

11. Section 26 EqA provides that a person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic …… and the conduct has the purpose or effect of –

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

12. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.

Failure to make reasonable adjustments

13. Section 20 EqA provides that where a person (A) applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled it is the duty of (A) to take such steps as it is reasonable to have to take to avoid the disadvantage.

14. Section 21 EqA provides that a failure to comply with a section 20 duty constitutes discrimination against a disabled person.

Discrimination arising in consequence of disability

15. Section 15 of the Equality Act 2010 (EqA) provides that a person (A) discriminates against a disabled person (B) if – a) A treats B unfavourably because of something arising in consequence of B's disability, and b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

16. Under the Code of Practice on Employment, the definition of something arising in consequence of employment includes anything which is the result, effect or outcome of a disabled person's disability.

17. In considering the issue of proportionality, we must ask ourselves whether the treatment of the claimant was reasonably necessary to achieve the stated aims. Allonby v Accrington & Rossendale College and others [2001] EWCA 529. Put another way, could the aims reasonably have been achieved by a less discriminatory route and do the respondent's aims outweigh the discriminatory impact of the treatment/measures.

Burden of Proof

18. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

19. In determining whether treatment is by reason that the person has done a protected act, the relevant question is to ask why the discriminator acted as he did. In other words, what consciously or unconsciously was his reason? Chief Constable of West Yorkshire v Khan [2001] IRLR 830

20. The leading authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258 That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved the burden passes to the respondent to prove that it did not discriminate.

Submissions

21. We heard oral submissions on behalf of the parties. The respondent also provided written submissions and we were directed to some authorities. These have been taken into account.

Findings of fact and conclusions

1. The claimant was employed by the respondent and its predecessor as a probation officer from 1 February 2006 until her resignation on 13 February 2016.

2. The respondent is a community rehabilitation company involved in managing offenders under probation supervision. It was originally part of the Probation Service until around June 2014, when the service was split into 2 parts: National Probation Service (NPS) which retained responsibility for high risk offenders and; London Community Rehabilitation Company (CRC) - the respondent - that looks after low risk offenders.

3. The claimant suffers with obesity, sleep apnoea and mobility and mental health issues and it is common ground between the parties that at the relevant time she was (and is) disabled for the purposes of the EqA.

Constructive Dismissal

4. The claimant alleges that the respondent breached the implied duty of mutual trust and confidence by various actions it took from March 2015 onwards. Our findings and conclusions in relation to those matters are set out below:

Accessing and emptying the claimant's locker

5. By way of background, following the split between NPS and CRC, they continued to share the same building and office space. However, in February 2015, the decision was taken that for purposes of confidentiality and data protection issues, they should occupy separate offices or floors. As part of that process, a review of the seating arrangements for NPS/CRC staff was carried out and one of the outcomes was that a desk that had been temporarily allocated to the claimant in December 2014 was assigned to an NPS officer, Grace Benamaisia.

6. The claimant was on sick leave between October and December 2014 and extended annual leave, between 13 January and 2 March 2015, following gastric surgery. She returned to work on 3 March 2015 to find that her personal locker had been opened and items removed. Her locker had been opened by Sarah Jukes, the respondent's Facilities Manager, at the request of Mo Warnock, (MW) a Senior Probation Officer at NPS. MW then emptied the locker and placed its contents in storage. The claimant contends that on her return to work, when she went to retrieve her belongings from the store room, she discovered that jewellery and £30 was missing.

7. The claimant completed an Incident form complaining about the actions of MW, followed by a formal grievance, using the respondent's grievance procedure. [240-244, 255] However, she was advised that as MW was employed by NPS, the respondent's complaint procedures did not apply and that she would have to raise her complaint with NPS.

8. The claimant duly raised a complaint with NPS and on 5 May 2015, Diane Bartram, NPS Complaints Investigator, wrote to her with the outcome of the investigation. The claimant was told that NPS were unable to resolve the whereabouts of alleged missing items as there was no clear evidence as to what was in her locker or that if items had gone missing, it was due to the actions of NPS staff. She was also advised that as the matter was now in the hands of the police (the claimant had reported the matter) NPS were unable to take matters any further. [385-391]

9. Notwithstanding the role of NPS in this incident, the claimant blames her line manager, Claude Denton, (CD)Temporary Senior Probation Officer, for the opening of her locker. Although that is the claimant's position now, we note that at the time she did not blame him as her various letters of complaint to the respondent were about the actions of MW. CD denies any involvement in this and told us that he was unaware of the locker opening until after the event. CD was however aware that items were removed from the claimant's re-assigned desk and at the time he emailed NPS and raised his objections, in the strongest terms, as he considered the move insensitive and unnecessary given that the claimant was due back shortly from her leave. [216-217].

10. We understand that the revised seating arrangements caused some tension between NPS and CRC staff and that comes through quite clearly in CD's email. The claimant accepted in cross examination that it appeared from the email that CD was fighting her corner. If CD had been aware of the opening and removal of items from the claimant's

locker, we believe he would have reacted in similar vein. That he did not leads us to accept his evidence that he had no knowledge of the actions of NPS.

Negative Reaction to the Claimant's appointment to Board of Directors

11. At a supervision meeting between the claimant and CD on 2 April 2015, the claimant informed him that she had been appointed to the role of Board of Directors of the Probation Institute of England &Wales. The claimant contends that CD queried why she had not sought his permission before accepting the role and whether she would be able to cope with the additional duties given that she was complaining of stress. CD's notes of the supervision meeting contain a brief footnote about that conversation. He records that he congratulated the claimant on the appointment but expressed concern as the effect on her stress levels, conflicts with her role in the department and whether workload relief would be available [306] The claimant does not accept the record as accurate, in particular, that CD congratulated her. What she does accept however is that she was not able to tell him at the time what the role entailed or whether there would be any workload relief. The claimant did not make her own notes of the meeting.

12. On 20 April 2015, CD sent an email to his line manager, Patsy Wollaston, (PW) about the claimant's appointment to the Probation Institute. In it, he expresses concern as to the demands of the role, how much work relief may be required and the impact of stress on the claimant. The claimant confirmed in evidence that this accurately reflected the concerns raised with her at her supervision meeting with CD. [351] In the email, CD also makes the point that he was not aware of the application beforehand as the claimant did not discuss it with him. This has been interpreted by the claimant as him objecting to her appointment and categorically complaining about the fact that she did not seek his prior approval, which he denies. We consider this to be a gloss on what was actually said and believe that a similar gloss was applied by claimant in her assertion that she was berated for not obtaining prior permission.

13. Here we have an employee who has an RAAP (Reasonable Adjustment Action Plan) in place because of workload and stress, who was proposing to take on another role, without, as it turned out, any workload relief being available in respect of her core role. In those circumstances, it was understandable that CD was concerned and we consider that it was entirely within his remit as manager to question how the appointment would impact on the claimant in terms of her health and performance.

Verbal Abuse

14. On 15 September 2015, the claimant made a formal complaint against CD who she accused of swearing at her over the phone by saying: "*I don't fucking give a damn who you consult with", "You fucking listen to me"*. The background to this is that on 14 September 2015, a service user turned up for an appointment with the claimant having been released from prison earlier that morning. According to the claimant, the service user became aggressive towards her and had to be escorted from the building by security. The claimant sent an email to CD the same day informing him of the incident and requesting that the offender be allocated to somebody else as she no longer wished to supervise her. [594-595]. In his reply, CD indicated that he expected the claimant to

file an incident report. He also queried the need to re-assign the service user but said he would discuss the matter with her when he was back in the office a couple of days later. [598-599]. In the meantime, after a number of missed calls between them, they spoke on the phone and it is during this conversation that the alleged verbal abuse occurred.

15. Mr Denton denies using the "F" word but accepts that he told the claimant that he didn't damn care who she consulted, which he regretted and apologised for by email later. [605] When asked what prompted his outburst, he told us that he was annoyed because the claimant wanted him to address the incident but instead of sending him an incident report said she needed to consult with her union on it. [639-640]

16. During evidence, the claimant said that the service user in question was going for her throat. However she did not say this in her statement at the time, neither did her witness, the security guard, in his statement (which the claimant apparently wrote on his behalf) [635-637] when challenged in cross examination, the claimant backtracked, stating that the service user was pointing towards her and she thought she was coming for her throat. In the notes of a meeting on 19 October 2015 to discuss her grievance against CD, the claimant is recorded as saying, in relation to the incident, that when she arrived at the office the service user was having an altercation with her partner and went for her partner's throat. There is no reference to the service user going for or pointing towards the claimant's throat. [748] The account appears to have evolved over time and the version we have before us is a gloss on what the claimant said at the time. As a result, we are cautious about the claimant's account of the telephone conversation with Mr Denton and find, on balance of probabilities, that he did not verbally abuse the claimant as she alleges.

Refusing to deal with Claimant's email of 15 September regarding Claude Denton's actions on 14/9/15

17. On 15 September 2015, the claimant sent an email to CD, copied to Brenda Yearwood (BY) Senior HR Adviser, telling him that she came to work feeling very frightened of him and that she had decided to take out a grievance because of his alleged verbal abuse, referred to above. [613]

18. The claimant's email was sent at 11:00. At 11:30 on the same day, BY responded, urging the claimant to sit down with CD to discuss her concerns before going down the grievance route. [612]. That approach was consistent with the informal stage of the respondent's grievance procedure and cannot, in our view, be faulted. [1146]

19. Ignoring that advice, the claimant raised the matter further up the management chain by emailing Alan Jones, Head of HR and Ian Anderson, Deputy Director for Rehabilitation, Partnerships and Stakeholders, copied to Nick Smart, Chief Executive. [614-616]. The claimant contends that she did not receive a reply. However we have seen an email from Iain Anderson to the claimant at 14.21 on the same day in which he suggests that she raise the matter directly with PW in accordance with the grievance policy and procedure. [614, 1146] In response, the claimant told Mr Jones that she did not wish to go down the grievance route. [617] Given this exchange of correspondence, it is difficult to see in what sense the respondent refused to deal with the claimant's email or emails.

Failure to address Claimant's grievance submitted on 25 September 2015 and amended grievance of 10 November 2015

20. On 25 September 15, the claimant lodged a formal grievance against CD relating to the alleged verbal abuse incident. [665 - 675]

21. On 19 October 15' there were two meetings with the claimant. Both meetings were conducted by PW and BY and the first one was to discuss the grievance against CD. When asked what outcome she was after, the claimant said that she wanted an acknowledgment from CD that he swore at her as well as a written apology. [748] The second meeting was described as an informal mediation and CD was present. The claimant and CD gave their accounts of the disputed conversation and neither agreed with the others version. At the end of the meeting they agreed to put the matter behind them and work together at Bexley professionally. On that basis, it was agreed that the claimant, who had been paid to stay at home, would return to work on 20 October. [759]. That agreement should have brought the grievance to an end. However on 20 October at 00.49, the claimant sent an email backtracking on what was agreed, stating that she could not work with CD because of his continual denial that he swore at her. [762]

22. On 10 November 2015, the claimant asked BY to instigate a full grievance. [884] That request was acknowledged on 12 November and the claimant was advised that the respondent hoped to deal with her formal grievance by 7 December 2015.[892] The claimant sent an addendum to her grievance on 13 November. [899-900] and a further addendum on 25 November 15, by way of solicitors letter. [909-910]. As the claimant had indicated that she did not want PW to hear her grievance, it was decided that it would be dealt with by Lisa Anderson (LA), Assistant Chief Officer.

23. On 1 December 2015, the claimant was invited to attend a grievance meeting on 10 December. The invitation letter gave an alternative date of 17 December if she was unable to make the 10 December. [919-920]. The claimant did not respond to the letter and did not turn up for a meeting on the 10th or 17th December. However, in response to separate correspondence, the claimant informed the respondent on 4 December that she had been signed off work for 8 weeks due to severe anxiety and depression [939 & 943] even though the doctor actually signed her off for 5 weeks, from 4 December to 8 January [943]. Following a further assessment on 11 January 2016, she was signed off for another 4 weeks, backdated to 9 January 2016 [1053]

24. On 14 January 2016, during her period of sickness absence, the claimant tendered her resignation by email. [1061]. The resignation was accepted that same day and the claimant was told that she would be written to separately with regards to the arrangements to hear her grievance. [1062]

25. In the meantime, on 15 January 2016, the claimant sends a further grievance alleging disability discrimination.

26. On 21 January, the claimant was sent an invitation to a grievance meeting and offered 2 dates, 25 or 29 January 2016 [1079-1080]. In response, she rejected the invitation on grounds that she had no confidence in LA's ability to hear the grievance given "*the role she had played so far*" in her case.

27. In our view, the respondent made reasonable attempts to deal with the grievance but the claimant placed obstacles in its way, which it did its best to overcome. They acceded to her request for an alternative grievance manager and when the claimant was signed off, they sensibly did not seek to reschedule the hearing during this time. Notwithstanding the resignation they continued their attempts to schedule a meeting. It is unclear how the claimant expected the respondent to progress her grievance. She never suggested that it be dealt with in her absence and no doubt, had the respondent done so, that would have been cause for further complaint from the claimant. There is nothing as far as we can see in the approach taken by the respondent to the grievance up until resignation that was calculated or likely to breach the relationship of trust and confidence.

The respondent's repeated attempts to pressure the Claimant to drop her grievance of disability discrimination

28. The claimant in evidence contended that the respondent applied pressure on her to drop her grievance at a meeting on 10 November 2015. That meeting was to discuss the claimant's email of 6 November 2015 in which she stated that she could no longer work at the RSH (Riverside House) office she had temporarily been assigned to. [824] The claimant refers to this meeting at paragraph 147 of her statement but makes no mention at all of any pressure being applied to drop the grievance. We have also seen the minutes of the meeting and there is nothing within them that suggests pressure to drop the grievance. This allegation is not made out.

The Respondent's failure to implement OH recommendations

29. On 29 September 2015, RPS business Healthcare Ltd, the respondent's Occupational Health (OH) advisers prepared a report in respect of the claimant, following a period of stress related absence, said to be work related. The doctor recommended a number of measures to address the work related issues in order to facilitate the claimant's successful return to work and it is these that she contends were not implemented by the respondent. [694-695] There were 4 recommendations and taking each of them in turn:

i. review of the Claimant's stress risk assessment

30. A stress risk assessment was originally carried out on 26 August 15 but that related to the to the alleged lost property arising from the opening of the claimant's locker in March 2015, referred to above. As the new period of stress was said to be caused by CD, the respondent took the view that, rather than review the existing SRA, a new one was required. It also decided that there was no point doing a risk assessment until the "line manager" issue had been resolved and the claimant was back in the workplace. That approach to us appeared entirely reasonable and the only reason that the respondent did not follow through was because the claimant resigned before it had a chance to do so.

ii. Flexibility with start times

31. In light of her disability, the claimant had in place an RAAP which was last updated on 2 April 2015. One of the adjustments it provided for was a 10.00am start in order to better ensure that the claimant got a seat on public transport [297]. The respondent's normal core working hours are between 9am and 4pm. The claimant contends that the OH recommendation was to allow her to attend at a start time later than 10.00am as they were already aware of her 10.00am start. The respondent does not accept that they were necessarily aware of this and although there is a reference to the previous RAAP, it is not clear that they had a copy. Although the claimant told us that she had informed OH that her start time was 10.00am, we are cautious about that evidence. The claimant was selective in what she told OH. On the one hand she was writing to the respondent expressing suicidal tendencies and telling them that if she killed herself it would be their fault. Yet, according to the OH report, she told the doctor that she was not having self harming thoughts currently. The respondent had already made an adjustment which allowed the claimant to come into work an hour later than normal. In their view this was already a reasonable adjustment and any further adjustment would have impacted on other staff even more. That decision was in our view within the bounds of reasonable management discretion.

iii. Mediation

32. As already stated above, the respondent attempted to mediate the issues between the claimant and CD at a meeting on 19 October 2015 but this was unsuccessful as the claimant withdrew from the agreement reached.

iv. Reasonable time to attend GP and CBT appointments

33. No issue was raised by the claimant in relation to this recommendation.

34. Looking at all of those recommendations, and bearing in mind that it was ultimately for the respondent to determine whether they were feasible, we are satisfied that, to the extent that they were not implemented, the respondent had reasonable and proper cause for not doing so.

Claude Denton handling the Claimant's caseload in her absence

35. The claimant objected to CD covering her cases while she was off sick, claiming that it was against the usual protocol which was for work of an absent employee to be shared out amongst colleagues. CD dealt with this in his evidence. He told us that the usual procedure is to re-assign cases to other staff where a probation office is off or likely to be off for 6 weeks or more. This is what happened when the claimant was off prior to March 2015. However, when she went off again, CD felt duty bound to take on the claimant's workload, such as it was, himself as her colleagues were already overstretched and had little capacity to take on any more work. Regardless of what the normal protocol was, we are struggling to understand why the claimant is critical of CD's actions rather than appreciative of his assistance. In our view his actions were entirely reasonable.

Decision to move the claimant or force her to stay at home rather than impose measures on CD

36. Due to the claimant's original complaint, CD decided to work away from the Bexley office until further notice. [625]. However, that decision proved to be impracticable and was subsequently reversed by BY and PW because the team at Bexley were very busy and needed managerial support.

37. When the claimant returned from sickness absence on 24 September 2015 and realised that CD was back in the office, she emailed PW complaining about this, claiming that his presence was a major stressor that would aggravate her mental health issues. [653] There then followed a discussion between them that evening and it is the claimant's contention that PW forced her to remain at home. The respondent's position on this is reflected in PW's email to the claimant of the same day, timed at 19:31 and no doubt sent reasonably contemporaneously with their discussion. On the issue of remaining at home she says: "*During this evenings conversation, I outlined that due to the contents of your previous e-mails, referencing your mental health and feeling stressed that I felt it would be beneficial for you to remain absent from work until the Occupational Health report is received*". [656] It is clear to us that, notwithstanding any objections the claimant may have had to this course of action, the respondent had reasonable cause to take it in the circumstances. Further, as had been demonstrated, it was not practicable to move CD instead as he needed to be in the office for the other staff, whose welfare the respondent also had to take account of.

12 November 2015 instructing the claimant that she had been temporarily moved to Woolwich (RSH) in order to enable the Respondent to deal with her grievances

38. Following the claimant's rejection of the proposed resolution of her complaint, she continued to maintain that she could not work with CD. As CD was due to transfer out of the Bexley once the Cohort model went live on 7 December 2015 (referred to below), it was agreed between the claimant and PW that she would work from the RSH office in Greenwich until then.

39. The Claimant commenced work at RSH as agreed. However, on 6 November, she emailed PW stating that, having assessed the situation, she felt that it was unworkable because of the travel and stairs and would henceforth be working from Bexley. They met on 10 November 2015 to discuss the matter but it was clear from that meeting that the claimant's position on working with CD had not changed.

40. On 12 November 2015, PW wrote to the claimant informing her that it would not be appropriate for her to work at Bexley while her grievance against CD was being dealt with and that she would be temporarily assigned to RSH with immediate effect. [888-889].

Failure to investigate and/or take disciplinary action against CD for incident on 14.9.15

41. There is considerable overlap between this complaint and that dealt with at paragraphs 20-27 above. If by "investigate" the claimant means grievance investigation then we

repeat our conclusions at paragraph 27 above. If however it means disciplinary investigation, a case had not been established against CD that warranted disciplinary action. There were conflicting accounts of the incident and no independent witnesses. Attempts to deal with the matter by informal mediation had been unsuccessful and there was an outstanding grievance. There was therefore no basis to take disciplinary action against CD.

Decision on 1 December 2015 to rescind the agreement that the claimant be based at Bexleyheath after 7 December 2015

42. In Summer 2015, the respondent designed a cohort model for the supervision of offenders whereby low to medium risk offenders were divided by age, sex, mental health and intellectual disabilities. This involved a major reorganisation of staff, who were asked to indicate their preferred offender group and geographical location in order of preference. The claimant chose Bexley as her first location choice and Greenwich as her second. [570]. The claimant got her second choice of group (26-49 year old males) but was appointed to Lambeth, which was not one of her location choices. [571] She appealed against the Lambeth allocation citing her disabilities and on 7 September she was advised that her appeal was upheld and that she would be assigned to Bexley. [577-578, 584]

43. However, on 1 December 2015, LA wrote to the claimant, who at this time was off sick due to anxiety and depression, informing her that it would not be appropriate for her return to the Bexley office. The letter sets out the reasons. The respondent reasoned that as the claimant had been off with depression and anxiety she needed support to phase her back into work. That support could not be provided from Bexley as there was not going to be a manger in Bexley under the new cohort. It was determined that RSH would be a more suitable location as the manager, Sundeep Chhachhi was considered best placed to provide the necessary support the claimant needed. In addition, the respondent was also concerned about the impact of the claimant's return on her Bexley colleagues, a number of whom she'd had fallings out with in the past. We are satisfied that there was just and proper cause for the decision and that it was made with the welfare of the claimant and the Bexley staff in mind.

44. Having considered all of these issues, we do not consider that any of them amount to breaches of the implied term of trust and confidence, either individually or collectively. In our view the respondent bent over backwards to accommodate the claimants various and increasingly unreasonable requests. In response, the claimant was belligerent, obstructive and uncooperative.

45. The constructive dismissal claim is not made out.

Direct Discrimination

46. The claimant relies on all of the above issues in support of her direct discrimination complaint. To the extent that the respondent's treatment of the claimant amounted to a detriment, in the sense that it was unfavourable, we are satisfied that the explanations given by the respondent for its actions were not because of the claimant's disability.

47. The only additional matter under this heading relates to a complaint the claimant made against a colleague, Lorna Mullings on 6 November 2015, which she says CD failed to investigate. She contrasts this with the way CD dealt with a complaint against her from Jacqueline Goodchild, a receptionist employed by the respondent. CD's handling of the Jacqueline Goodchild complaint was in the list of issues as an incident of discrimination. However, that is no longer sustainable as the claimant conceded in evidence that CD's actions in raising the matter with her had nothing to do with her disability.

48. The claimant complained to CD that Lorna Mullings had failed to respond to her email seeking information about a particular case. It was not a formal complaint, in the sense that there was no incident report. It was more of a grumble. Mr Denton responded by email on the same day and at the same time sought further clarification, which the claimant did not provide. [855] In our view, there is nothing in the response or the general manner in which CD dealt with the matter which suggests disability discrimination.

49. Taking all of this into account, the direct discrimination complaint is not made out.

Discrimination arising in consequence of disability

50. The claimant relies on 4 matters as unfavourable treatment:

    a. ***Mr Denton handling her case load in her absence*** – this is dealt with at paragraph 35 above. We do not consider the actions of CD were in any way unfavourable to the claimant but in any event they were a proportionate means of dealing with the respondent's legitimate aim of keeping court files up to date and compliant, in circumstances where there was little spare capacity for others to take on the additional work.

    b. ***Refusing the claimant permission to undertake additional paid work in her own time writing sessional reports for the NPS.*** Such work required line management approval and it was not given as CD considered it inappropriate for the claimant to carry out such work when she claimed to be suffering from stress. That in our view was a proportionate response to the legitimate aim of exercising duty of care towards employees.

    c. ***Instructing the claimant on 12/11/15 that she had been temporarily moved to Woolwich***. This relates to the matters at paragraphs 38-40 above. It is debatable whether this amounted to unfavourable treatment given the alternatives. That aside, we are not satisfied that this arose in consequence of disability. The respondent's stated reason for the transfer was the claimant's grievance against CD. However, if we are wrong about that, given the claimant's concerns about working with CD and the effect of that on her health, we are satisfied that transferring her temporarily was a proportionate means of the respondent exercising its duty of care towards her.

    d. ***Informing the claimant on 1/12/15 that she had been moved permanently to Woolwich*** – This relates to the matters at paragraphs 42 - 44 above. For the reasons given by LA in her letter to the claimant of 1 December 2015, we are

satisfied that the permanent transfer was a proportionate means of achieving the legitimate aim of protecting the welfare of the claimant and her colleagues.

51. In light of the above, the claim under section 15 EqA is not made out.

Reasonable Adjustments

52. The PCPs are set out below:

    a. ***Requiring the claimant to commence work no later than 10am***. This is dealt with at paragraph 31 above and for the stated reasons we are not satisfied from the evidence that the claimant was at a substantial disadvantage compared to non disabled employees and if she was, a further adjustment to her hours would not have been reasonable.

    b. ***Requiring the claimant to temporarily/permanently relocate to the RSH***. We are not satisfied from the evidence that the claimant was at a substantial disadvantage compared to non disabled employees and for the same reasons at paragraphs 50c and d, it would not have been a reasonable adjustment to allow the claimant to continue working from Bexley.

Harassment

53. The unwanted conduct relates to the matters at paragraphs 11, 14, 28, 35, 37 above. To the extent that we have found that the conduct occurred, we are not satisfied, on balance of probabilities, that it related to disability or that it was reasonable for the claimant to perceive it as harassment. The harassment claim is not made out.

Victimisation

54. The claimant relies on her grievance of 15 September 2015 [616], 25 September 2015 [665-666] and 13 November 2015 [899] as the protected acts. The 15 September email makes a generic reference to CDs "..*bullying and harassing approach to staff*…" [616] In the 25 September grievance, on the very last page, there is a reference to "….. *continuous bombarding and harassment from Patsy and Mr Denton*….". [673] Again this is used in a generic sense and there is no indication that harassment related to disability is being alleged. The first reference to disability related discrimination is in the claimant's email of 13 November [899-900]. We therefore find that this is the only document that qualifies as a protected act. It follows that only detriments occurring on or after 13 November 2015 can amount to victimisation.

55. Of the matter listed as detriments in the list of issues, only the following post-date the protected act:

    a. ***Referring the claimant to OH without her knowledge or consent***. We do not consider this to be a detriment. In any event, the referral on 10 December was made due to the claimant having been off sick since 13 November. The decision was consistent with the respondent's OH policy and we find that it was not done because of the protected act. [971]

b. ***Instructing the claimant to move permanently to RSH***. The reasons for this have already been explored at paragraph 50d above and we are satisfied that it had nothing to do with the protected act.

c. ***Alan Jones' appeal decision confirming the permanent move to RSH*** – Again we find that this had nothing to do with the protected act.

56. The victimisation claims are not made out.

Judgment

57. The unanimous judgment of the tribunal is that all claims fail and are dismissed.

Employment Judge Balogun
Date: 25 April 2017