EMPLOYMENT TRIBUNALS

Claimant: Mrs M Sweeney

Respondent: Merseyside Community Rehabilitation Company Limited

Heard at: Liverpool **On:** 7 and 8 February 2019

Before: Employment Judge Horne
Ms F Crane
Mr B Bannon

REPRESENTATION:

Claimant: In person
Respondent: Ms D Grennan, counsel

Judgment having been sent to the parties on 18 February 2019 and the claimant having requested written reasons in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS FOR RECONSIDERATION JUDGMENT

The claim

1. The claimant presented her claim on 5 August 2015. Following numerous preliminary hearings and extensive attempts to clarify the claim, it was established that her claim included the following complaints:

   1.1. that Ms Kuyateh harassed her in various ways, including by "Allocating the claimant more than 60 cases during the first 11 weeks of her return to work (Allegation 40)";

   1.2. that the respondent was under a duty to make a duty to make adjustments as a result of a practice (PCP6) of allocating the claimant more than 60 cases during the first 11 weeks of her return to work; and

   1.3. that the respondent unfairly constructively dismissed her, by breaching the implied term of trust and confidence; part of the conduct that had allegedly undermined the trust and confidence relationship was the allocation of 60 cases to the claimant during the first 11 weeks of her return to work.

2. The claim also included a complaint of detriment on the ground of protected disclosures. The one detriment allegation that was allowed to proceed was that "her allegations of risk were ignored".

The Judgment

3. On 3 March 2017 the tribunal sent a written judgment ("the Judgment") to the parties. The Judgment declared, amongst other things, that:

   3.1. The claimant was not constructively dismissed.

   3.2. The claimant had made a protected disclosure, but the respondent had not subjected the claimant to the alleged detriment on the ground that that she had made that disclosure.

   3.3. The tribunal had no jurisdiction to consider whether Ms Kuyateh harassed the claimant. This was because the claimant presented her claim after the expiry of the statutory time limit and it was not just and equitable to extend time.

   3.4. The tribunal had no jurisdiction to consider whether the respondent failed to make adjustments in respect of PCP6 because the claim was presented after the expiry of the statutory time limit and it is not just and equitable to extend time.

4. The Judgment also declared that the respondent had failed to make adjustments in two other respects, which we later summarised as "the two failures". At a later hearing we assessed the claimant's remedy for the two failures and awarded the claimant £12,100.00 plus interest of £3,627.18.

5. Written reasons ("Reasons") for the Judgment were sent to the parties on 28 April 2017.

6. Paragraph 56.2 of the Reasons referred to documentary evidence about the claimant's caseload. As that paragraph explained, we had refused to admit that document into evidence. The document is central to this reconsideration application. For convenience, we refer to it as "the Caseload Document".

The appeal

7. The claimant appealed to the Employment Appeal Tribunal ("EAT") against various aspects of the Judgment, including the matters listed in paragraph 3 above. It will be necessary in due course to rehearse some of the detail of what happened during the preliminary stages of the appeal. In summary, however, the appeal has been ordered to proceed to a full hearing on a limited basis and the remaining grounds of appeal have been dismissed. The surviving grounds of appeal, taken from the claimant's amended notice of appeal, all relate, essentially to one point. The claimant contends that the tribunal ought to have considered the Caseload Document.

8. In his written reasons for allowing the remaining grounds to proceed, His Honour Judge Richardson observed that the claimant's argument about the Caseload Document was "right on the cusp between reconsideration and appeal". He therefore stayed the appeal to give the claimant an opportunity to apply to this tribunal for reconsideration.

The reconsideration application

9. By letter dated 30 July 2018 the claimant applied to reconsider the Judgment. Her detailed grounds for reconsideration were dated 19 October 2018 and ran to 59 paragraphs.

The reconsideration hearing

10. During the reconsideration hearing the employment judge asked the claimant to clarify which parts of the Judgment she wanted the tribunal to vary. It took a number of attempts to obtain this information from her. The claimant made it clear that she wanted the tribunal to find that the claimant had been subjected to detriments on the ground of her protected disclosure. What was less clear was whether or not the claimant was interested in revisiting the tribunal's conclusions on failure to make adjustments or harassment in respect of her workload. Eventually it transpired that the claimant wanted us to vary all the parts of the Judgment to which we have referred at paragraph 3. She also wanted the tribunal to alter the Reasons by changing some its findings of fact that had been set out there.

11. We considered the evidence set out below and heard the oral submissions of the claimant on her own behalf and of Ms Grennan for the respondent.

12. In her oral submissions, the claimant advanced a number of further grounds for reconsidering the judgment. We took these into account.

Evidence

13. The respondent prepared a bundle for the reconsideration hearing. With the claimant's consent, we read the bundle in full. On the morning of the second day, the claimant provided excerpts of Ms England's typewritten notes of the original final hearing. We also read these.

14. During the course of the hearing, the parties asked us to refer back to various pages in the original hearing bundle, which we did. The claimant also asked us to re-read the witness statements of Miss Monteith and Ms Goodwin, together with the statements of Mr Kayani and Mr Metherell that had been made for the purpose of the grievance investigation. Unfortunately the claimant did not refer us to any particular passages of those documents and it was not always possible for us to tell precisely which parts the claimant regarded as relevant to her application. We re-read Miss Monteith's witness statement in full and reminded ourselves in broad terms of the contents of the other witness statements.

15. On the first day of the reconsideration hearing, the claimant asked to give oral evidence about the Caseload Document. She wanted to explain each case in detail and tell us how much work was required in relation to each. The respondent objected. After having heard both sides' arguments, we decided not to allow the claimant to give oral evidence. We explained our reasons at the time. Written reasons for that decision will not be provided unless a party makes a request in writing within 14 days of these reasons being sent to the parties.

The grounds for reconsideration

16. In our view it would be disproportionate to repeat all 59 paragraphs of the reconsideration application and engage with each. Rather, we attempted to extract, as fairly as we could, the essential points that the claimant was making from her reconsideration application and oral submissions. We understood the claimant's arguments to be as follows:

16.1. The tribunal should have read the Caseload Document. When the Caseload Document is taken together with the other evidence presented during the original hearing, the tribunal's findings of fact cannot stand.

16.2. The tribunal should not have confined its reading to the documents drawn to its attention by the parties.

16.3. The tribunal should have taken into account Ms Monteith's apparent distress whilst giving her oral evidence and conclude from her emotional state that she was not telling the truth on oath.

16.4. The tribunal should have taken into account that Ms Monteith made a change to her witness statement at the beginning of her oral evidence.

16.5. The tribunal should not have relied on the evidence of Mr Kayani because it had not been tested on cross-examination.

16.6. The tribunal should have realised from the Caseload Document that Ms Kuyateh was allocating Tier 4 cases to the claimant even though, by then, a decision had been made that the claimant was aligned to the Community Rehabilitation Company (which was not contracted to handle Tier 4 cases).

16.7. The tribunal was mistaken in its assessment of the claimant's oral evidence about her workload. In paragraph 56.3 of the Reasons we described her evidence as "inconsistent", adding that, "each time the claimant referred to a sequence of new cases allocated to her and taken away, the numbers were different". The claimant's argument on reconsideration is that we failed to appreciate that the claimant, when giving different numbers, was talking about different case allocations at different points in time.

16.8. The tribunal should have drawn inferences adverse to the respondent from:

16.8.1. The respondent's failure to disclose the Caseload Document or similar documents prior to the original hearing;

16.8.2. Mr Gofton (the respondent's solicitor) deliberately causing an illegible version of the Caseload Document to appear in the bundle; and

16.8.3. Ms Grennan (counsel for the respondent) knowingly allowing the illegible copy to remain in the bundle during the hearing.

16.9. The tribunal should have borne in mind that the claimant was not legally represented and that counsel would have been able to cross-examine the respondent's witnesses more effectively.

16.10. The claimant should be given a further opportunity to cross-examine the respondent's witnesses because she is in a better position to do so having learned from the original hearing and the appeal.

16.11. The tribunal should have taken into account that the respondent had a vested interest in getting rid of the claimant.

16.12. The tribunal should have had regard to the report of the National Audit Office that there is a 34% increase in certain types of crime since the part-privatisation of the Probation Service.

16.13. The tribunal was mistaken in its findings about the claimant's reasons for resigning.

Relevant law

17. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so".

18. Rule 71 sets out the procedure for reconsideration applications. So far as is relevant, it provides that "…an application for reconsideration shall be presented in writing … within 14 days of the date on which the written record… of the original decision was sent to the parties…"

19. By rule 72(1), "An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked… the application shall be refused…"

20. Rule 5 gives tribunals the power to extend time limits specified in the Rules. In deciding whether or not to grant an extension, the tribunal should take account of the public interest in finality of litigation.

21. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. Dealing with cases fairly and justly, includes allowing, where possible, parties to rely on all the evidence upon which they wish to rely that is relevant to the issues to be decided. It also, by rule 2, includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

Our approach to the time limit

22. Broadly speaking, when considering the time limit, we divided the claimant's reconsideration grounds into two categories:

    22.1. Grounds in the first category were either identical to the surviving grounds of appeal, or were relevant to them, in the sense that they might help us decide whether or not the surviving grounds of appeal might cause us to vary or revoke the Judgment. In the light of HHJ Richardson's observations we decided to extend the time limit and look into the reconsideration grounds closely. When considering the merits of these grounds, we did not think it would be fair to hold against the claimant any delay in applying for reconsideration.

    22.2. The second category of reconsideration grounds were those which appeared to us to be either unconnected or only tenuously connected to the surviving grounds of appeal. We did not dismiss these grounds out of hand, or consider that the rule 71 time limit automatically barred her from raising them. When considering the grounds on their merits, however, we thought that it was relevant to consider the claimant's delay in applying for reconsideration. The public interest in finality in litigation was a factor tending to point away from varying or revoking the Judgment.

The reconsideration grounds in detail

23. We now examine the reconsideration grounds in more detail.

Ground 1 – the Caseload Document

24. It is not in dispute that we should consider the Caseload Document. Clearly we cannot do so in isolation. Our task on reconsideration is to evaluate what difference, if any, the Caseload Document would have made to the Judgement. This exercise involves reminding ourselves of the other evidence relating to the claimant's workload from February to April 2014. We examine that evidence below, but before we do so, we think it helpful to deal with the remaining grounds for reconsideration.

Ground 2 – unread documents in the bundle

25. This ground appears to us to be a re-statement of Ground 1. The claimant rightly acknowledges that we warned her that we would not read the entire bundle. If we were wrong to overlook certain documents, the best remedy would be for us to look at them when deciding on the reconsideration application. So far as we are aware, the only document in the bundle that the claimant says we failed to read is the Caseload Document.

Ground 3 – Ms Monteith's emotional state

26. Part-way through Ms Monteith's evidence, the claimant asked for a break. Shortly before that break, the tribunal observed Miss Monteith to be upset. We do not think that this observation could lead us, or should have led us, to draw any adverse conclusion about the reliability of Miss Monteith's evidence. We take this view for a number of reasons:

    26.1. First, it is important to remember what was happening in the room. The claimant was personally cross-examining Miss Monteith and was in a state of heightened emotion herself just before she asked for the break.

    26.2. Second, the subject-matter of Miss Monteith's evidence at the relevant time was capable of causing, if not likely to cause, a tearful reaction. Shortly before the break, Miss Monteith told the tribunal that the claimant's state at a particular meeting had been "very upsetting to see". We also remembered the gradual realisation on Ms Monteith's part that she had not been given the full picture about the claimant's health and working arrangements when she took over as the claimant's line manager.

    26.3. Third, in general, the witness chair is an uncomfortable place for honest and dishonest witnesses alike.

Ground 4 – change to Miss Monteith's witness statement

27. At the start of her oral evidence, Ms Monteith asked to change part of her witness statement. We have gone back to our notes to remind ourselves of what happened. Miss Monteith took the affirmation. She confirmed that the document in front of her was her witness statement and that it bore her signature. She was then asked a series of questions by Ms Grennan about a workflow document that appeared at page 1181 of the bundle. The document appeared to show a 20% reduction in workload. Ms Grennan referred to a possible error in Miss Monteith's witness statement and asked her what that error was. Miss Monteith referred to a passage in her statement which stated that at the end of February 2014 the claimant had only 20 cases. She said that this figure was incorrect: she had seen the number 20 in the workflow document and wrongly taken that number to refer

to the number of cases. Miss Monteith then confirmed that, subject to the correction she had just made, her witness statement was true.

28. To our minds it is a significant part of this exchange that Ms Monteith did not confirm the truth of her witness statement on oath until she had made the correction. That still of course leaves questions unanswered. Why had she signed the document in the first place? Why had she not corrected it before the respondent's legal advisers had allowed the document to be put forward into evidence? In cross-examination the claimant asked Miss Monteith whether she had mistaken the figures in her haste to put her witness statement together. Miss Monteith agreed. That appears to us to be an explanation. In view of that explanation, and Miss Monteith's effort to correct the position before confirming the truth of her statement, we cannot infer that there was any intention on Miss Monteith's part to cover up the true extent of the claimant's workload.

Ground 5 – Mr Kayani

29. The claimant's next point is that, in finding the facts, we wrongly relied on the evidence of Mr Kayani without giving the claimant the opportunity to test that evidence by questioning him. In our view that point is answered by paragraph 157 of the Reasons:

> "We also took into account Mr Kayani's evidence to Mrs McKevitt that the claimant's case load was the same as that of her colleagues. For the same reasons as with the 2013 distribution of work, we found it difficult to make findings without hearing from Mr Kayani and Ms Kuyateh. Had the claimant brought her claim before June 2014, it is much more likely that the respondent would have been able to secure their attendance."

30. As that paragraph indicates, we did not rely on Mr Kayani's evidence. Nor did we find as a fact that the claimant's workload was the same as that of her colleagues. The point we were making was that Mr Kayani would have had highly relevant evidence to give had he been called as a witness and that the delay in presenting the claim had made it more difficult for the respondent to call him.

Ground 6 – allocation of Tier 4 cases

31. The Caseload Document shows that, in February 2014, the claimant's new cases belonged to a range of risk categories including Tier 4. The significance of Tier 4 is that, when the service split on 1 June 2014, all Tier 4 cases became the responsibility of the National Probation Service, with the respondent only taking on Tiers 1 to 3. It was well known in February 2014 that this would happen. By February 2014 the claimant had been informed that she was aligned to the Community Rehabilitation Company rather than the National Probation Service and would not, from June 2014, have any further Tier 4 responsibility. We also know from the oral evidence that, in February 2014 Ms Kuyateh had some responsibility for allocating new cases amongst probation officers. Why, then, the claimant asks, was Ms Kuyateh giving the claimant Tier 4 cases when everyone knew she would shortly cease to have involvement with them? This is a good question, but it does not cause us to vary the Judgment. As we found, the service was in flux, with cases being passed back and forth. There were still over three months to go before the service split. It is quite possible that the Tier 4

cases would have been passed back to the National Probation Service by June 2014. It was not inappropriate to allocate Tier 4 cases to the claimant, who was well used to working within that risk category, provided that proper allowances were made for any additional workload that the higher risk category presented. Crucially, for the purpose of the harassment claim, the fact of allocation of Tier 4 cases to the claimant still leaves us no closer to knowing how Ms Kuyateh treated the claimant compared to any of her colleagues. There is no evidence of how many Tier 4 cases her CRC-aligned colleagues were being given at that time.

Ground 7 – The claimant's oral evidence about workload

32. The claimant invites us to reconsider her oral evidence that she gave about her workload during the course of the 2017 hearing. We have done so in considerable detail. We read the helpful transcript of the hearing provided by Ms England and we consulted our own notes. It appears to us that the claimant gave the following evidence at different times about her workload during the period February to April 2018.

    32.1. Whilst being cross-examined she said:

    "When Gail Churchill went on secondment they started to ratchet up the pressure. I was given 19 cases one day, they would remove 10, they would give me another 19. I'd then find out that somebody was with someone they shouldn't be and there were child protection issues."

    32.2. Later on in cross-examination she said:

    "I have evidence to support that I was given 60 cases during an 11 week period."

    32.3. At around the same point in her evidence, the claimant was asked if she had raised any problems with the Information Technology Systems after she had gone off sick in 2013. In reply she said:

    "Gail Churchill came to my desk and I raised problems with her. I had 38 cases without a support worker."

    32.4. At another point during cross-examination, the claimant said, "I was given 30 cases without a support worker".

    32.5. Ms England's notes show that, in cross-examination, the claimant said that she had been allocated 33 cases without a support worker.

    32.6. When cross-examining Gail Churchill, the claimant put to her (according to Ms England's notes), that she had 34 cases without a support worker.

    32.7. The claimant put to Ms Stott when cross-examining her that she was allocated 33 cases without a support worker.

33. It is clear, having refreshed our memory from our notes of evidence, that the claimant did give different numbers of cases in relation to substantially the same time period. She can only have been referring to the time between late February 2014 (when she started to take on a case load) and 5 March 2014 when her support worker started. We had to take the discrepancy in the numbers into account when deciding on the extent to which we could rely on the claimant's oral

evidence about workload, both during the time that she did not have a support worker and also at other times. That is not to say that we disbelieved the claimant. It is quite possible that the unreliability of her oral evidence was due to the passage of time.

Ground 8 – adverse inferences

Respondent's failure to disclose documents about case allocation

34. Before addressing this reconsideration ground it may be helpful to revisit the procedural history of the appeal to the EAT.

35. A preliminary hearing took place on 25 April 2018 before HHJ Richardson, who decided to adjourn the hearing. Part of the reason for the adjournment was to deal with a proposed ground of appeal based on procedural irregularity and bias. But at paragraph 3 of his reasons for adjourning the hearing, the judge also observed:

> "I would have expected the Respondent to have documents like the [Caseload Document], setting out the workload from time to time of an officer doing risk assessments. I am told by the appellant that both before and after 1 June the same computer system was in use. I should like an explanation from the Respondent as to whether the [Caseload Document] was disclosed by the Respondent; whether any workload documents of the kind to which the Appellant refers were disclosed; and if not, why a reasonable search did not result in the disclosure of these documents, bearing in mind that she had disclosed one to them."

36. The respondent's solicitors provided an explanation by letter dated 30 May 2018. Relevantly, the letter read:

> "The Caseload Document relied on by the Appellant is believed to have been prepared under the nDelius offender management software system used by the Merseyside Probation Trust … prior to the commencement of operations of the CRC on 1 June 2014 …
>
> The nDelius system itself is owned by the National Offender Management Service … which is an executive agency of the Ministry of Justice…
>
> The pre-June 2014 nDelius system itself was archived in the months following the creation of the CRC on 1 June 2014. The pre-June 2014 nDelius data was neither within the Respondent's possession or its control during the course of Tribunal proceedings.
>
> It is also worth pointing out that nDelius is a real-time system, so the lack of a date attributable to the document is significant. The document is thought to show those cases allocated to the Appellant at the time the document was printed by the Appellant. It represents a snapshot at a given point in time without the context of showing which cases were transferred to, or away from the appellant, or on which date. Because of this, even if it has access to the pre-June 2014 systems it would not impossible for the Respondent to recreate this particular document as at the date of disclosure."

37. As we have already mentioned, HHJ Richardson allowed the appeal to proceed so far as it related to the Caseload Document. His reasons included the following passage:

> "… I confess to some surprise that the respondent did not disclose computer-generated documents indicating workload of this kind. The respondent's witnesses must have known that there were such documents; and I would have thought that management would need their own copies of them to track offenders and work.
>
> A number of reasons have been given the nondisclosure by the respondent's solicitor… It is debatable whether any of these is convincing. (1) it is said that the system had been archived; assuming that it is so, archived material can be retrieved. (2) it is said that the system only generated 'real time' information. It is very difficult, with respect, to suppose that the system does not keep information about the SOs and allocation for offenders - it would seem to be critical information to have. (3) it is said that the respondent did not have access to this information (presumably because of the TUPE transfer). I find this difficult to understand - there seems to have been no difficulty obtaining other material pre-transfer."

38. The respondent was ordered to file its formal answer to the appeal. Its answer is dated 30 July 2018. It contained an explanation for non-disclosure of workload documentation. The explanation is essentially the same as the respondent's solicitors gave in their letter of 30 May 2018.

39. The remarks of HHJ Richardson are not conclusively expressed. They appear carefully chosen so as to allow room for the EAT to reach a different conclusion after having heard full argument. Nevertheless, they carry the weight of an appellate body as well as their own persuasive logic. We ought therefore to consider them very carefully. In particular we have asked ourselves whether it would be appropriate in the light of those comments, to draw inferences adverse to respondent about what the claimant's workload actually was. Should we go further and conclude from the non-disclosure that the respondent was trying to cover up the true extent of the claimant's workload?

40. In our view, it would not be right to draw such inferences. The absence of any disclosed case allocation documents is capable of being explained by a deliberate attempt to hide the truth. But there are other possible explanations. We share HHJ Richardson's surprise that there is no enduring record of which probation officer was responsible for supervising an individual offender at a given point in time. If it became known that an individual had committed a serious offence or suffered serious harm whilst under the supervision of the Trust, investigating agencies would want to know the name of the probation officer who was supervising them at the relevant point in time. We would expect there to be an audit trail that would show the supervising officer was. But that does not necessarily mean that the Trust had to keep all iterations of the Caseload Document on its computer system. Nor does it mean that NOMS had to archive all of those iterations following the split in the service. The critical information about who supervised whom could have been retained in a different way, for example on the files of each individual offender. We also take into account that the respondent disclosed contemporaneous e-mails stating the number of cases that the claimant had in April 2014 (see, for example, Reasons paragraphs 161, 165 and 169). One of them, on 4 April 2014, appeared to support the claimant's case rather than that of the respondent. There is no evidence of the respondent having been specifically ordered to disclose those emails.

41. The lack of disclosure by the respondent does not cause us to vary the Judgment.

Alleged deliberate inclusion of illegible document

42. At paragraph 14 of the claimant's grounds of appeal to the EAT, she argued that Mr Gofton had "arranged to place in the bundle an illegible copy of [the Caseload Document], very darkly photocopied to make it so." This was one of the grounds of appeal that was dismissed, as paragraph 1 of the EAT's order of 27 June 2018 makes clear. If there were any room for doubt, paragraphs 32 and 33 of the transcript of HHJ Richardson's judgment emphatically rejected the allegation of impropriety on the part of the respondent's solicitor.

Respondent's counsel allowing the illegible copy to remain in the bundle

43. This allegation was also in paragraph 14 of the grounds of appeal. It was dismissed along with the allegation against Mr Gofton. The transcript of the judgment, and the written reasons on the Allowed to Proceed form, do not expressly mention the allegation against Ms Grennan. We would be very surprised, however, if HHJ Richardson meant to distinguish between Mr Gofton and Ms Grennan when reaching his decision. Had it been the judge's intention to allow any allegation of impropriety against Ms Grennan to proceed, we are sure that he would have made the position clear. Accusations of impropriety against barristers are just as serious as equivalent accusations against solicitors.

44. We have an additional reason for thinking that this ground for reconsideration has no merit. Ms Grennan went out of her way to help the claimant find relevant documents on numerous occasions. It is clear in our own memories and – perhaps more importantly – our own notes, that Ms Grennan regularly pointed out page references in the bundle that the claimant was struggling to find. We have a note of a specific example of Ms Grennan intervening in relation to documents on the subject of the claimant's workload. In her oral evidence, the claimant said that she could evidence that she was given 60 cases. Before the next break, Ms Grennan reminded the tribunal about this evidence and asked whether the claimant would be able during the break to identify a particular document that would support her assertion. She was seeking to elicit, not suppress, documentary evidence that might be capable of supporting the claimant's assertion about her workload.

<u>Ground 9 – lack of legal representation</u>

45. The next point made by the claimant is that her lack of legal representation meant that she could not cross-examine witnesses effectively. It is important to be clear about what the claimant was asking us to do. She did not ask us to adjourn the reconsideration application so as to enable her to obtain legal representation. Nor did she suggest that there was any reasonable prospect of her obtaining legal representation in the future. Rather it appears to us that she was asking us to speculate as to what the respondent's witnesses would have said had they been cross-examined by a barrister.

46. We do not think that is a permissible exercise. To do what the claimant asks would require the tribunal to descend into the arena. We would first have to place ourselves the role of an advocate for the claimant and imagine what questions we might have asked. Then we would have had to speculate on what

the answers would have been. The respondent could legitimately complain that we were biased.

47. In any case, this ground of reconsideration appears only to be very thinly connected to the claimant's surviving grounds of appeal. It is therefore relevant to consider the claimant's delay of over a year in bringing the application. The importance of finality in litigation points firmly in favour of this reconsideration ground being dismissed.

Ground 10 – second opportunity for cross-examination

48. The claimant has asked us to give her the opportunity of cross-examining the respondent's witnesses again. She argues that she is now capable of representing herself in a way that was not possible for her in 2017. Her case is that she has learnt from the experience of the hearing and from the appeal and is now in a better position to cross-examine the witnesses. If we are correct in our understanding of the claimant's argument here, we do not think it is a ground for reconsideration. It would not be appropriate to hear from witnesses all over again. It would result in a further multi-day hearing which would not take place until many months from now. It would lead to unjustifiable delay. Moreover, this is another reconsideration ground that bears little relation to the application that HHJ Richardson envisaged. The delay in bringing the reconsideration application is therefore an additional weighty factor in favour of rejecting this point.

Ground 11 – respondent's vested interest

49. During the course of the hearing in 2017, the claimant argued forcefully that the respondent had a vested interest in securing her departure from the organisation. We took that point into account. Reminding us of it will not cause us to change the Judgement. Again, because of the tenuous connection between this reconsideration ground and surviving grounds of appeal, we would also dismiss it because of the claimant's delay.

Ground 12 – National Audit Office report

50. The claimant gave evidence at the hearing that, in 2014-2015, there was a 34% increase in violent and sexual offending from offenders subject to Merseyside probation orders compared to the equivalent figures from 2013-2014. We did not mention this fact in the Reasons. It was one piece of evidence amongst many. To remind us of it now does not cause us to change the Judgment. The claimant's argument based on this evidence is straying beyond the remit of the surviving grounds of appeal. We would also therefore reject this ground because of the delay in bringing the application.

Ground 13 – Reasons for resigning

51. In her reconsideration application the claimant took issue with one of our findings about the claimant's reasons for resigning. This has little, if anything, to do with the Caseload Document or the surviving grounds of appeal. The claimant has left it too late to raise the argument as a ground for reconsideration. We considered evidence from a number of sources before making our findings about why the claimant resigned. It would be very difficult for us to try and revisit those findings now.

Impact of the Caseload Document on the Judgment

Discussion of the evidence

52. We are left with the Caseload Document. We considered it carefully and reminded ourselves of the other relevant evidence in order to decide whether it would cause us to vary the relevant parts of the Judgment.

53. We started by examining the document itself and asking ourselves what it could tell us about the claimant's workload:

    53.1. It is clear from the Caseload Document that, at some point after 17 February 2014, the claimant was responsible for 34 cases.

    53.2. The breakdown of risk categories was as follows: 5 cases in Tier 4, one case in Tier 1, two cases in Tier 2 and the remainder in Tier 3.

    53.3. Applying our limited knowledge of the criminal justice system, it appeared to us that, of the 34 offenders on the list, seven individuals might possibly have been - and probably were - in custody at the time the Caseload Document was generated. This fact was potentially relevant because Mrs Churchill's oral evidence to us was that where an offender was in custody, there was less work to do. Accordingly, we were confident that there was a substantial amount of work for the claimant to do.

    53.4. We could fairly reliably find that the Caseload Document was generated before 5 March 2014, when the claimant's support worker started. This is because the claimant repeatedly told us during the original hearing that she had a number of cases without a support worker. During the course of the claimant's evidence, that number varied between 30 and 38. The number of cases in the Caseload Document – 34 – lay in the middle of that range. We thought the most likely explanation was that the claimant had the Caseload Document in mind during her oral evidence and was reaching for the correct number.

    53.5. The Caseload Document was therefore generated at a time when the claimant was not only without a support worker, but also completing her phased return to work. This meant that she would have fewer hours in the week to deal with her allocated cases than she would have had if she was working full-time.

    53.6. The Caseload Document was merely a snapshot. It was common ground that cases were being allocated to probation officers and then taken away from them in batches. For all we know, the day after the Caseload Document was generated, the claimant's case allocation could have been significantly higher or lower.

    53.7. There is nothing in the Caseload Document to suggest how the claimant's case load compared with that of any of her colleagues.

54. We then reminded ourselves of Miss Monteith's evidence. Her witness statement said that the normal caseload was 60 cases. Her contemporaneous e-mails show that, on 4 April 2014, the claimant was at risk of having over 70 cases although it is unclear what number she actually had. On 22 April 2014, she had 40 cases and Ms Monteith asked that the claimant should not be allocated any more. She later e-mailed to say that the claimant's case allocation had always been around 50.

55. The claimant gave oral evidence about being allocated 60 cases over 11 weeks. She also gave the example of 19 cases being allocated to her, 10 being removed, and 19 more being given back to her. We were still of the view that, because of the inconsistency of her evidence about numbers, we had to treat the claimant's oral evidence about precise numbers with caution.

56. The claimant needed a support worker for carrying out prison visits and report writing. She did not need assistance with accessing information, as, by this time, she had been fully trained on how to use OASysR and nDelius with her own assistive technology. It is likely that, during the early stages of being responsible for cases, she would have had more reading to do and less in the way of report-writing. We would expect the absence of a support worker prior to 5 March 2014 to have made the claimant's work more difficult, but not as difficult as it would have been had the support worker started at a later date.

Impact on the adjustments complaint (PCP6)

57. Having reminded ourselves of the evidence and taken into account the Caseload Document, we made a further attempt to determine the issues in relation to the adjustments complaint (PCP6). Here are our conclusions:

    57.1. In our view, we are still not a position to make a reliable finding as to whether the level of work prior to 5 March 2014 was such as to put the claimant in danger of aggravating her symptoms of colitis. We know that the workload was substantial, but was it more than she could cope with at that time? It is still hard to tell.

    57.2. We know that the claimant was struggling with her workload in April 2014 and are able to find positively that, at that time, she was at least at risk of suffering an exacerbation of her colitis.

    57.3. There is still very little evidence about what the claimant's workload was like during March 2014 after her support worker started. We have asked ourselves whether we can draw inferences, or adopt some other device, to bridge the gap in the evidence between 5 March 2014 and 4 April 2014. Could we find that the claimant was struggling with her workload during that time to the point that it risked aggravating her colitis? We decided that we could not make a positive finding about that. The reason is that we know that the claimant's general state of health, and her colitis in particular, was variable from week to week or even day to day. We do not know how her symptoms progressed during the period February to April 2014. Her health may have deteriorated. Just because something was a struggle for her in April 2014 does not necessarily mean that the same level of work would have been a struggle for her in February or March that year.

    57.4. We are also still left guessing as to when the respondent was in a position where it could reasonably be expected to know that the claimant's workload risked aggravating her colitis. Again we are in a position to make a positive finding of fact that that state of affairs must have occurred by 4 April 2014. Based on Miss Monteith's evidence to us at the original hearing, we find that, if she had been given a proper handover, she could have been reasonably expected to know that, if the claimant was overworked, she might suffer symptoms of colitis. She was also in a position where she could reasonably be expected to know that the claimant was on a phased return

and therefore had fewer hours in which to complete her work. What we still do not know, however, is when Ms Monteith was in a position where she could reasonably have been expected to know that the claimant was overworked. We have taken account that had Ms Monteith been given a proper handover she might have made proactive enquiries of the claimant and asked her how she was coping with the workload. At that point the claimant might have reported problems that she would not have volunteered in the absence of proactive questioning. Even taking that possibility into account, however, we do not think we can reliably find when it was that the claimant first started to feel overworked to the point where her health would be affected.

57.5. Unless we can make a finding about when the respondent first had constructive knowledge of the disadvantage, it is difficult for us to reach a conclusion about whether it breached the duty to make adjustments. If the duty was only triggered in April 2014, we would find that the duty was not breached. Ms Monteith acted expeditiously to try and get the claimant's workload reduced. She made an appeal for additional resources to Ms Goodwin and 12 days later when she met with the claimant she told the claimant that she was not going to be allocated any new cases (see Reasons paragraph 164). If the duty was triggered in February or March 2014, we would be more likely to find that the duty was breached, but because of the difficulties in finding the facts, we cannot say whether or not the duty arose at that time.

58. We therefore remain of the view that it is not just and equitable to extend the time limit in relation to the PCP6 complaint of failure to make adjustments.

Impact on harassment complaint

59. We have also looked again at our findings in relation to harassment. Does the Caseload Document, taken together with everything else, cause us to vary our findings that are relevant to the complaint of harassment, in particular the overallocation of cases to the claimant in 2014 by Ms Kuyateh? We still, in our view, cannot reliably make findings about how Ms Kuyateh distributed work to the claimant compared to how she distributed it to others. We have taken into account, as we did at the previous hearing, that we have not heard from Ms Kuyateh or from Mr Kayani. Without those two important witnesses the picture is incomplete. One significant factor in their absence is the delay in bringing the claim. We remain of the view that it is not just and equitable to extend the time limit.

Impact on constructive dismissal

60. We found (Reasons paragraph 368) that, aside from the delay in providing the outcome to the claimant's grievance, nothing happened after January 2014 to damage the relationship of trust and confidence.

61. Even with the benefit of the Caseload Document, we were not able to make a positive finding that the claimant was overworked to the point where her health was at risk until April 2014, when the respondent promptly tried to address the problem. Our finding at Reasons paragraph 368 therefore remains the same.

62. If we are wrong in our analysis of the Caseload Document, and it shows that the claimant was being overworked, it may be that we would have to revisit that finding. In that event, however, we would still conclude that the claimant was not constructively dismissed. We made findings about the claimant's reasons for resigning and listed them at Reasons paragraph 225. They did not include her workload between February and April 2014. Even when the claimant was told she would not be allocated new cases, she went on sick leave and never returned. If the respondent breached the implied term of trust and confidence by giving her too much work in early 2014, the claimant did not resign in response to the breach. We also found that the claimant affirmed the contract after January 2014 by remaining at work until 23 April 2014 and thereafter remaining employed on sick leave until 3 March 2014.

Impact on protected disclosure detriment complaint

63. The Caseload Document does not cause us in any way to change our conclusion on the whistleblowing detriment allegations. We still consider that the various detriments of which the claimant complained were not on the ground that the claimant raised her grievance in 2014. They were not done because of the protected disclosure, and the Caseload Document does not help us to a conclusion that they were. We do not accept that the Caseload Document, or the circumstances of its non-disclosure, show us that the respondent was so intent upon masking the difficulties with workload that it would subject her to the alleged detriments in order to silence her.

Impact on remedy

64. Strictly speaking, we do not need to give any further consideration to the claimant's remedy, since the Judgment remains the same. We are conscious, however, that there has already been considerable delay in this case and, if the appeal were to be allowed, there may be further delay in relisting any further hearing in the employment tribunal. It may therefore be of assistance to the parties, and possibly to the EAT, for us to indicate our provisional view as to how the issues at stake in the appeal might affect the claimant's remedy. In particular, we have anticipated the possibility that the EAT might look at the Caseload Document together with our findings of fact set out in the Reasons, and conclude that the tribunal ought to have upheld the complaint of failure to make adjustments (PCP6). If that is the basis upon which the appeal is allowed, it may be of assistance for us to record our provisional findings that, had the respondent complied with the duty to make adjustments:

    64.1. the claimant would still have taken sick leave in April 2014;

    64.2. the claimant would still have resigned;

    64.3. the claimant still have had extremely hurt feelings as a result of a number of factors, including her alignment to the CRC, her perception that she had been bullied by Ms Kuyateh, and the matters for which have already ordered substantial compensation;

    64.4. the claimant would have avoided the additional misery and stress and impact on her colitis of being overworked;

    64.5. accordingly, her compensation for injury to feelings would be increased;

64.6. it is unlikely that such additional compensation would exceed £1,000.

65. If the case were remitted to us, we would, of course, be open to argument on these matters.

Disposal

66. The Judgment is therefore confirmed.

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Employment Judge Horne

14 March 2019

REASONS SENT TO THE PARTIES ON

14 March 2019

FOR THE TRIBUNAL OFFICE