



EMPLOYMENT TRIBUNALS

Claimant: Ms J E Horrobin

Respondent: Leicestershire Partnership NHS Trust

Heard at: Leicester

Heard On: 29, 30 and 31 October, 1 November 2018
28 February 2019 (in chambers)

Before: Employment Judge Ahmed

Members: Mrs J M Morrish
Ms R Wills

Representation

Claimant: Mr Mario Anastasiades, Solicitor
Respondent: Mr Richard Powell of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The complaints of disability discrimination are dismissed.
2. The Claimant was constructively and unfairly dismissed.
3. The issue of remedy as to unfair dismissal is adjourned.

REASONS

1. By a claim form presented to the Tribunal on 27 October 2017 Ms Julie Elizabeth Horrobin brings complaints of disability discrimination, being complaints of discrimination arising from disability and failure to make reasonable adjustments, and of constructive unfair dismissal. The disability relied on in these proceedings is the Claimant's anxiety and depression as well as fibromyalgia/chronic fatigue syndrome. Anxiety and depression are accepted as disabilities for these proceedings but not fibromyalgia/chronic fatigue syndrome.

2. The Respondent is a Mental Health Trust. The Claimant was employed as a Support Secretary from 31 March 2014 to 14 July 2017. She worked part time, 22.5 hours a week, and she was categorised as a 'Grade 3 Secretary'. Her main

duties were to audio type clinic letters to GP's, deal with medical referrals from Consultants employed by this NHS Trust, answer the telephone, deal with patient enquiries and make patient appointments. The Claimant was part of the Administration team for Charnwood Community Mental Health Team (CMHT) and North West Leicestershire Community Mental Health.

3. In coming to our decision we have taken into consideration the oral evidence of the witnesses, the contents of their witness statements and the documents in the rather voluminous (and it has to be said unnecessarily excessive) bundle of documents. Oral evidence on the Claimant's behalf was given by the Claimant herself, Ms Trudy Hunt who is employed in the same Ward team as did the Claimant and Ms Stella MacMillan a Team Secretary who has now left the Trust. On behalf of the Respondent we heard evidence from Ms Rosinder Klair (at the time the Administration and Outpatient Services Manager), Ms Lainy Brotherhood (Administration Manager for the CMHT and the Claimant's direct line manager) and Mrs Julie Warner (Medical Secretary in the Adult Mental Health Team). We also take into account the very detailed written submissions by representatives on both sides which by were, by consent, in the form of written submissions and replies. We are grateful to them both. This decision represents the views of all three members of the Tribunal.

4. The Claimant was part of a small team of Secretaries which included herself, Mrs Julie Warner and Ms Tricia Scott. The Claimant had a difficult and challenging relationship with both Ms Scott and Mrs Warner. Ms Scott was the same grade as the Claimant but worked full time. Mrs Warner was also full time but a grade higher. There was some dispute as to Mrs Warner's supervisory responsibilities over the Claimant. We are satisfied that Mrs Warner had no official or formal managerial authority over the Claimant. All three shared the same office or broadly the same working environment. Ms Warner and Ms Scott were according to the Claimant good friends and in her words 'ganged up' on the Claimant to bully and harass her.

5. There is a long history of poor relationships between the three mentioned parties going back to the time the Claimant began her employment. The Claimant believes that Mrs Warner and Ms Scott would speak in unfavourable terms about her when she was not present, criticising her performance and referring to her in uncomplimentary terms. Based on information from colleagues she was friendly Ms Horrobin was told that Mrs Warner and Ms Scott had referred to her as 'Coco The Clown' and that they believed she had mental health issues. It is alleged that they made various comments such as the Claimant was "crap at her job" and comments about the Claimant such as "She's just crap", "She can't cope" and "if she wasn't crap at her job we wouldn't have to tell her what to do". The Claimant says that she was often ignored and isolated by both Mrs Warner and Ms Scott and management failed to do anything about it over a sustained period.

6. In September 2015 the Claimant sent an e-mail to Ms Klair to say that the behaviour of her two colleagues was beginning to 'verge on bullying'.

7. In December 2015 the Claimant wrote to Ms Brotherhood saying:

"I don't think I can take much more of being treated so badly. I have enough to deal with my stress and depression and this is just making things worse for me."

8. The Claimant gave evidence as to how individual appraisals of one employee were frequently used as a way of criticising others, and in particular of herself. In one of these appraisals Mrs Warner criticised the Claimant for not

doing her job properly. In January 2016 the situation became such that the Claimant contacted an internal bullying and advice helpline to seek assistance. As such references are confidential we accept that the Respondent would be unaware of it. It is relevant that the Claimant felt the need to contact them for help.

9. On 7 March 2016 Ms Horrobin sent an e-mail to Ms Brotherhood explaining that she was going home because she was not feeling well which she felt was at least in part due to the unpleasant atmosphere in the office caused by those bullying her.

10. In May 2016 Ms Horrobin complained to management of the hostile atmosphere in the office and the "bitchy comments" which were being made about her.

11. On 12 May 2016, in an effort to resolve the difficulties an informal meeting was held between the Claimant Ms Brotherhood and Ms Klair at which Ms Horrobin agreed for an attempt at mediation. Unfortunately, the mediation did not take place and thus the situation remained unresolved.

12. Ms Warner for her part felt that she was frequently and unfairly the subject of complaints by Ms Horrobin. She in turn complained to Ms Brotherhood of the Claimant 'snapping at her', failing to provide appropriate assistance in the work and generally undermining her. She wrote in one of her e-mails that she had been raising concerns about Ms Horrobin for over a year and that her stress levels were "going through the roof".

13. In an informal meeting on 12 May 2016 Ms Scott explained that she and Ms Horrobin had not spoken to each other (despite the fact that they were in the same team) since December 2015 and there was continuing hostility between the two of them. Ms Scott said that the Claimant deliberately ignored others which had caused her to become angry. She said that she felt unsupported and believed that the Claimant was a "trouble causer".

14. On 25 July 2016 there was a meeting between the Claimant and Ms Brotherhood in an effort to resolve the ongoing conflict. That meeting was followed by an e-mail from Ms Horrobin headed "*Help needed please*". In it the Claimant wrote :

"I am on the verge of walking out. Relationships with a colleague have today deteriorated to such a degree that I cannot take any more... She called me a liar over something... I said if we had had mediation we may have sorted it out... I now plan to go home at lunch and not return."

15. The Claimant did return to work but on 8 August 2016 matters deteriorated to a point where the Claimant felt compelled to write to Ms Klair in an e-mail which she headed "Please Help". In the fairly lengthy, which it is unnecessary to set out in full, the Claimant explained the way in which she felt she had been unfairly treated by Ms Scott and Mrs Warner. In the email she wrote:

"I left work tonight and before I could drive home, I sat in my car and sobbed. I got home and have cried a few more times since."

16. On 2 September 2016 the Claimant sent an e-mail to Ms Brotherhood in which she complained that she had been subjected to silent treatment by her colleagues.

17. In October 2016 both the Claimant and Mrs Warner agreed to attend

mediation and reached what became known as the 'Facilitation Agreement'. The terms of the agreement were that both parties would keep conversations in the office limited to work-related discussions only. It was also agreed that if Mrs Warner was away from her desk, Mrs Horrobin would attempt to deal with any queries rather than pass them on to Mrs Warner. Mrs Horrobin agreed not to read anything negative in to Mrs Warner's manner of speaking or tone of voice, something that she felt was used as a form of ill-treatment, that if there were any issues, these would be raised immediately with Ms Brotherhood. Both parties agreed to take a few minutes to evaluate the situation before responding to each other aggressively.

18. Following a period of relative peace between October and early February 2017, matters once again flared up and as a result the Claimant went on long term sickness absence on 3 February. She returned to work eventually on 5 May. There were then no incidents of any significance until the events of 16 June 2017 which ultimately led to the Claimant's resignation. Although the resignation occurred on 16 June the events to which it relates occurred the day before. On 15 June, the Claimant was asked by one of the Consultants if she knew of the present whereabouts of Mrs Warner as they wished to speak to her. The Claimant said that she thought that Mrs Warner had gone home. She also added as an aside that the two of them did not talk. The following day when the Consultant was with Mrs Warner he asked why that was the case. Mrs Warner was very surprised to learn that Ms Horrobin had said this. She also discovered (from Ms Scott) that the Claimant had said that Mrs Warner had gone home when that was not the case.

19. Mrs Warner's discovery of these facts caused her to go and see the Claimant. Mrs Warner asked the Claimant why she had told the Consultant that she had gone home when she was in fact on her lunch break at the time and why she had said that they didn't talk. Mrs Warner felt that the Claimant was undermining her to one of the Consultants she worked for. It is now accepted that Ms Warner accused the Claimant of 'bad mouthing' her. Following the face to face discussion, Mrs Warner sent an e-mail to Ms Brotherhood on the same day in which she wrote:

"Hi Lainy

I had a discussion with JH [the Claimant] when she came in today regarding comments she made to Dr Siram yesterday.

I asked JH why she had told Dr Siram I had gone home for the day when I had actually gone for lunch? She stated Trish had mentioned I had gone home. I also asked JH why she was moaning to Dr Siram that I didn't talk to her and she responded "well you don't". I told her that I didn't appreciate being spoken about especially in a negative way to the doctors and told her that I thought this was very unprofessional of her. Julie then went on to say "great working environment" and I told her that if she looked over our mediation agreement she would see that I don't have to talk to her on a personal level as long as I communicate with regard to work.

Trish has advised me that she did not say anything to JH about lunch. You may wish to discuss this with wee Helen as I believe she witnessed the whole event."

20. Ms Horrobin was not copied in on this email and does not appear to have seen it until these proceedings. However, the Claimant was so upset at the confrontation with Mrs Warner that she decided to resign on the same day. She submitted a fairly lengthy letter sending it to the Chief Executive and a further letter of resignation to Ms Brotherhood. In the letter the Claimant made reference to the history of the matter and also the face to face discussion with Mrs Warner that day.

THE LAW

Disability discrimination – the statutory provisions

Section 15 Equality Act 2010 (“EA 2010”) - Discrimination arising from disability

- “(1) 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.”

Section 20 EA 2010 - Duty to make adjustments

- “(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.”

Section 21 EA 2010 - Failure to comply with duty

- “(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.”

Section 123 EA 2010 - Time limits

- “(1) Proceedings on a complaint within section 120 may not be brought after the end of
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.”

Constructive dismissal – the relevant statutory provision

Section 95 (1) Employment Rights Act 1996 (“ERA 1996”)

“For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection (2) and Section 96, only if)-

- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
- (b) he is employed under a contract for a fixed term and term expires without being renewed under the same contract, or

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

21. Section 95(1)(c) ERA 1996 above describes a situation which is commonly called constructive dismissal, that is where the employee resigns but is treated as dismissal by the employer.

22. In accordance with the principles established in **Western Excavating v Sharp** [1978] IRLR 27, for an employee to succeed in demonstrating that he or she has been constructively dismissed, the Tribunal must be satisfied that the employer has either broken a principal term or terms of the contract or has evinced an intention to be no longer bound by one or more of those terms. The breach must be of such seriousness as to strike at the very root of the contract. The employee must resign in response to a breach. The breach must not be one that is affirmed or 'waived'.

23. For her constructive dismissal complaint, the claimant does not rely on a breach of any express term. Instead, she relies on a breach of the implied term of trust and confidence. In **Malik v BCCI** [1997] ICR 606, Lord Steyn in the House of Lords (at page 621) set out the definition of that term, which is that the employer must not:-

"without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust between employer and employee"

24. In **Baldwin v Brighton and Hove City Council** [2007] ICR 680, the EAT took the view that the word 'and' used by Lord Steyn was in fact an error and that the relevant test is satisfied if either of the requirements is met, that is it should be "calculated *or* likely".

25. The claimant also relies upon the 'last straw' doctrine. In **Lewis v Motorworld Garages Ltd** [1986] ICR 157 this doctrine was explained to mean that:

"... the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"

26. In **Omilaju v Waltham Forest London Borough Council** [2005] IRLR 35, the Court of Appeal made it clear that whilst the final act in a series of other acts may not in itself be blameworthy or unreasonable, it had to contribute something to the breach even if relatively insignificant so long as it was not utterly trivial. The test of whether the employee's trust and confidence has been undermined is ultimately an objective test.

27. It is enough that the repudiatory breach was an effective cause of the employee's resignation rather than being the effective cause – see **Wright v North Ayrshire Council** [2014] ICR 77.

28. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978 the Court of Appeal has given valuable guidance in dealing with last straw cases. In that case Underhill LJ gave the leading judgment. The Court of Appeal expressly approved a number of passages from **Omilaju**. The following paragraphs from his judgment are of particular relevance:

"44. The particular issue in **Omilaju** was, as Dyson LJ formulated it at paragraph 19 (p. 488 F-G), 'what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract?'. He answered that question as follows (pp. 488-9):

"19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term..... The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

*21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. **Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. [emphasis supplied]"***

55. I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)
- (5) Did the employee resign in response (or partly in response) to that breach?"

THE ISSUES

29. The relevant issues in this case (distilled from a much longer list but abbreviated for present purposes) are as follows:-

29.1 Is the disability discrimination complaint out of time and if so, is it just and equitable to extend time?

29.2 Was the Claimant discriminated against because of something arising in consequence of her disability and if so was the treatment justified?

29.3 Did the Respondent apply a provision, criterion or practice for the purposes of the failure to make reasonable adjustments complaint? If so, did it put the Claimant at a substantial disadvantage such that it was reasonable to

remove that disadvantage?

29.4 Was the Claimant entitled to resign by reason of a breach of the implied term of trust and confidence to treat herself as constructively dismissed?

CONCLUSIONS

Out of time issue

30. As a preliminary point we should say that no evidence has been led as to the fibromyalgia or chronic fatigue syndrome conditions and as such we do not find that the Claimant was a disabled person in relation to them. Disability in relation to anxiety and depression is conceded. We propose to deal with the first substantive issue as to whether the complaints of disability discrimination are brought out of time. The Claimant relies upon a number of incidents. They are not in our judgment a single act extending over a period and therefore there is no 'continuing act', a phrase no longer in the legislation but still commonly used. All of the alleged acts of discrimination have in our view, with the exception of the act of dismissal which is in time, been brought outside the normal three month time limit. The Claimant therefore requires the exercise of 'just and equitable' discretion for the Tribunal to consider them.

31. We do consider that it is just and equitable to extend time. The extent to which the cogency of the evidence is affected is slight if at all. The Respondents have not been prejudiced by reason of the delay. There is no question of fading memories. Most of the instances of bullying behaviour are documented in emails as are the replies and responses. The witnesses the Respondent needed to call are still employed and have attended to give evidence with the exception of Ms Scott whose absence is not explained. The Court of Appeal has recently made it clear that the Tribunal has "the widest possible discretion" in extending time.¹ We consider it appropriate to exercise that discretion in favour of the Claimant for the reasons given.

Disability discrimination

32. The unfavourable treatment relied upon for the purposes of the section 15 EA 2010 complaint (discrimination arising from disability) is the imposition of the first warning on 16 May 2016 and possibly (though not entirely clear) the events relating to the Claimant's dismissal.

33. The imposition of the written warning had nothing to do with the Claimant's disability because disability-related absences were excluded from the Respondent's calculation of absences. The Claimant was not therefore penalised for them and she suffered no detriment.

34. Insofar as there was discrimination arising from disability in relation to the dismissal (constructively) the resignation had nothing to do whatsoever with the Claimant's disability. There is no link or chain of links to show a prima facie case that dismissal was 'something arising in consequence of disability'. That complaint is therefore dismissed

35. In relation to the failure to comply with the duty to make adjustments, the Claimant of course needs to establish one or more PCPs before that complaint can get off the ground. The relevant alleged PCP's as set out at paragraph 49 of the ET1 and are said to be to "continue to expect the Claimant to work in a

¹ **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 per Bean LJ at paragraph 18.

hostile environment and to be punctual.”

36. There are two limbs to the alleged PCP. The first is expecting the Claimant to work in a hostile environment. That is not a valid PCP. No such condition was imposed. It might have been a by-product of the state of affairs but it was not something created by the Respondent. Clearly those involved attempted to alleviate the stressful situation but it cannot be said that the hostile environment was something introduced by the Respondent. This is not therefore a valid PCP.

37. The second limb of the PCP is an expectation to be punctual. It is accepted that this can amount to a PCP. However, punctuality or sometimes a failure of the Claimant to be punctual in arriving to work had nothing to do with the Claimant's disabilities. If the Claimant was late it was largely because of her caring responsibilities. That was nothing to do with her own disabilities and at best only those of her mother. This is not a case of so-called associative discrimination. The Claimant was late on three occasions because she was waiting for her mother's carer to arrive but that had nothing to do with her own disabilities. On other occasions the reasons for lateness were not connected to her disabilities or her mother.

38. In respect of the proposed adjustments the allegations are as follows:-

38.1 The Respondent failing to adhere to the Claimant's request to be moved away from working with Mrs Warner and Ms Scott and;

38.2 The reasonable adjustment of not criticising the Claimant in her informal improvement plan for her late attendances at work.

39 Both of these allegations are without substance. Ms Horrobin did not request to be moved. In fact she was very keen to stay where she was because it was a convenient work location for her caring responsibilities. On the occasions that the Claimant was late she was not put to any substantial disadvantage by reason of her disability. The Respondent considered adopting different start and finish times for the Claimant, altering her pattern of the working week and allowed flexibility for caring responsibilities. None of those improved the situation. We are satisfied it did all it reasonably could in terms of getting the Claimant to attend work on time. The Claimant's lateness had nothing to do with her disability.

40. The allegation at 38.2 is not a valid reasonable adjustment issue. It is more of a grievance for being criticised at being late. The complaints of disability discrimination are therefore dismissed in their entirety.

Constructive dismissal

41. In coming to our decision on the constructive unfair dismissal complaint we remind ourselves, and in doing so remind the parties, that this case is not about the treatment afforded to Mrs Warner by the Claimant but the treatment of the Claimant by Mrs Warner and others. It may well be that Mrs Warner has justifiable grievances of her own against the Claimant but this case is not about that. Our focus is on what treatment was meted out to the Claimant and whether that treatment, individually and/or cumulatively, amounted to a breach of the implied term of trust and confidence.

42. In these proceedings no evidence has been offered by the Respondent from Ms Scott. Clearly, she was a highly relevant and material witness as to the allegations of bullying as is Mrs Warner. No witness statement has been served

which might at least have been considered, subject to weight if Ms Scott was unavailable for any reason. Of course it is a matter for the Respondent whom it calls. We have been reluctant to probe as to the reason given that there may be matters of legal privilege involved. We are satisfied though that where there is a conflict between the evidence of the Claimant and the potential account of Ms Scott (through internal documentation) we prefer the evidence of the Claimant who has been subjected to careful and extensive cross-examination as opposed to Ms Scott who has offered no evidence whatsoever. Ms Horrobin has given sworn evidence. We regard her as a reliable and credible witness.

43. There was a factual dispute as to name calling and unfavourable comments which is denied. Whilst we appreciate that the Claimant may not directly and personally heard some of the comments made about her, and some of them might have been made after she had left and could not therefore affected her decision to leave, we are satisfied that they were made. It matters not whether all of the alleged comments were made (we do not propose to laboriously go through each as was the case at the hearing) but we are satisfied that there were a number of them which were made. We accept the evidence of Ms Hunt that Ms Scott said the Claimant was 'crap' and that 'if she [the Claimant] wasn't crap at her job we wouldn't have to tell her what to do'. Mrs Warner accepts that she uses the word 'crap' in normal speech. We are satisfied that she is likely to used that word about the Claimant such as she was 'crap at her work' or words to that effect. They are indicative of the mindset of both Mrs Warner and Ms Scott. Such comments were clearly inappropriate even if they were an honestly held belief. There cannot be any reasonable or proper cause to make such comments which (to adopt the definition of bullying in discrimination legislation) would clearly create an intimidating, hostile, degrading, humiliating and offensive environment.

44. We also find that Mrs Warner made inappropriate comments such as the Claimant had 'mental health issues'. Given the environment in which they worked, that is a Mental Health Trust, to allege that a colleague had mental health issues was clearly inappropriate. Mrs Warner does not deny that she said that the Claimant had mental health issues but says that this was about the Claimant's anxiety or depressive state. We do not find that to be a convincing explanation. Mrs Warner herself suffers from anxiety and depressive issues and at no point has she described herself as having mental health issues. It was clearly a term that was intended to be taken in a negative way and would reasonably have been perceived as such.

85. It is also clear from the numerous internal e-mails (we have only referred to a short sample, the bundle runs into almost 800 pages and is replete with complaint and counter-complaint) that Mrs Warner regarded the Claimant variously as 'incompetent', 'slow', 'intellectually unable to do the job' and 'shirking her work responsibilities'. It is inconceivable that with those views Mrs Warner would not have behaved to at least some if not a considerable extent in the manner alleged. It is not denied that Mrs Warner, on explaining something to the Claimant that she said "it was not rocket science" which would reasonably have been seen as demeaning when the Claimant had either not either been trained properly or had simply not understood what to do. Mrs Warner complained of the Claimant asking frequently about basics, that she was distracting her from her work and at the point she was asking for help that she should have picked up the job by then. Mrs Warner accepts in her witness statement that she found the situation with the Claimant difficult. All of that suggests that Mrs Warner was irritated by the Claimant's perceived shortcomings and that the allegations of cold-shouldering, isolation and unpleasant remarks are likely to be based on

reality rather than mere perception.

86. We make no value judgment as to who was responsible for the unpleasant state of affairs in the office between the Claimant on the one hand and Mrs Warner and Ms Scott on the other. But the fact remains that the Claimant was subjected to behaviour which could reasonably be construed as bullying. As in the nature of bullying many of these acts on their own may seem trivial but must be considered in terms of their cumulative effect over a period of time.

87. There is a substantial dispute as to the allegations of bullying. We find the conduct of Mrs Warner and Ms Scott did indeed amount to bullying. In coming to our decision not only do we prefer the evidence of the Claimant over Ms Hunt but also that of Mrs Warner. Some of the alleged acts have been supported in evidence by independent witnesses such as Ms Hunt and Ms MacMillan. Ms Hunt gave evidence that she had witnessed spitefulness 'from day one' of the Claimant's employment from those accused. She gave compelling evidence that the Claimant was snapped at when asked for help and that when the Claimant went off sick she was the subject of adverse comments in the office.

88. Ms MacMillan gave evidence that after the Claimant had handed in her notice Ms Scott said, "it has taken us three years to get rid of her". Although the Claimant was not aware of this remark being made, and it is made after resignation, it is again indicative of the state of mind of those who were engaged in bullying behaviour.

89. Mr Powell for the Respondent criticises Ms MacMillan's evidence as unreliable because he argues that Ms MacMillan was not present when the majority of the alleged comments were made. However, on the occasion referred to in the preceding paragraph Ms MacMillan was present and directly overheard Ms Scott making the remark on the telephone.

90. Mr Powell criticises Ms Hunt's evidence as adversely affected by a grievance which several colleagues had raised against her. We do not find that this affects the quality of her evidence. The fact that there was a grievance in this particular workplace was not unusual. There were several grievances and counter-grievances involving a number of staff in the relevant section. Even if Ms Hunt had raised a grievance against Ms Scott, there is no evidence of a grievance against Mrs Warner who is also accused of behaving inappropriately towards the Claimant by Ms Hunt.

91. It is clear from the documentary evidence that the Claimant repeatedly complained over a period of time of bullying behaviour. This is documented from 2015 through 2016 and leading to the Claimant's sickness absence for stress. There are several emails where the Claimant has desperately sought help which she felt had not been forthcoming. We do not accept insofar as it is suggested that these were complaints were manufactured or engineered to create the intended result. We accept that the Claimant genuinely and reasonably felt she was being bullied and harassed. The tone towards her was hostile. There was a perception, frequently expressed by Mrs Warner, that she was incompetent, slow and prone to absences from work. Comments such as 'how can you be depressed for a week?' which we accept were made, have no place at work, not least in a Mental Health Trust. Such comments clearly undermine trust and confidence.

92. We are also satisfied that the Claimant did not receive the necessary support from management. The clear impression one gains unfortunately is of a rather dysfunctional workplace where a hostile and unpleasant environment is

allowed to fester. The role of managers has largely been to be reactive rather than proactive, hoping discontentment would sort itself out rather than stamping down on inappropriate behaviour from whoever was seen as responsible. There were a number of occasions when the Claimant has asked for help from the Respondent which was not forthcoming. The Respondent failed to instigate a proper investigation seemingly waiting for a formal grievance before it would do so. The fact that the Claimant did not raise a formal grievance is irrelevant and should not have prevented a proper investigation.

93. We are satisfied that the acts alleged constituted bullying. We do not accept that the Claimant affirmed them. If she did in the sense that she carried on working but did not resign we are satisfied that alone did not constitute affirmation. Alternatively, she was entitled to revive them in the light of **Kaur**. We are satisfied that these acts cumulatively amounted to a repudiatory breach.

94. We are also satisfied that there was a series of events which culminated in a valid last straw on 16 June 2017. We find that Mrs Warner confronted the Claimant on that day. She did so because she felt she had been personally embarrassed before one of the Consultants for whom she worked. The Claimant, who subsequently apologised, had made the remark based on a misunderstanding. She had asked Ms Scott where Mrs Warner was and based on the information she received she inferred that Mrs Warner had gone home for the day. It was a simple error. We consider it highly unlikely that there was any deliberate attempt to portray Mrs Warner in a bad light. The Claimant had only just returned from a period of stress-related absence. It is highly unlikely she would have been deliberately seeking to provoke a situation. The fact that she and Mrs Warner were not talking was true and so that part of her comment was factually correct. Not only was that part of the facilitation agreement but Mrs Warner's own e-mail makes it clear that communications between the two were to be limited to work purposes only.

95. There was no justification whatsoever for Mrs Warner to confront the Claimant on 16 June as she did. She must have known that the Claimant would have been in a relatively fragile state having only just returned from a period of long term absence due to stress. If Mrs Warner had a legitimate complaint she should have raised it with her line manager as she had done on numerous occasions in the past and as indeed she did later in the day.

96. The quality of the conduct which constitutes the last straw, as is clear from **Kaur** (approving **Omilaju**), is that it need not be unreasonable or blameworthy conduct. As it is, we are satisfied that the conduct of Mrs Warner on 16 June was indeed unreasonable and blameworthy conduct though for the Claimant to succeed it need not be. She initiated a hostile confrontation. The Claimant described the incident in her letter to the Chief Executive on the same day as "extremely hostile".

97. We are satisfied the last straw was ultimately the effective cause of the resignation. The Claimant would not have given up a job which she not only valued but was at a very convenient location and ideal for her caring responsibilities. She had tolerated a great deal of unpleasantness in the past but this was in a very real sense the last straw. She justifiably and reasonably decided that she could not tolerate it any longer. In those circumstances the treatment of the Claimant by the Respondent's employees certainly crossed the line and amounted to a last straw entitling the Claimant to leave and claim constructive dismissal. The fact that she later sought to retract her resignation is irrelevant.

98. Whilst it is technically possible for a constructive dismissal to be fair, no potentially fair reason has been advanced, and realistically so. Accordingly, the complaint of constructive unfair dismissal succeeds.

99. The issue of remedy is adjourned.

Employment Judge Ahmed

Date: 29 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE