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EMPLOYMENT TRIBUNALS

Claimant: **Miss J Mahnaz**

Respondent: **The Essex Community Rehabilitation Co Ltd**

Heard at: **East London Hearing Centre**

On: **16-20 December 2019**

Before: **Employment Judge Ross**

Members: **Mr T Burrows**
Mr D Ross

Representation

Claimant: In person

Respondent: Mr J Platts-Mills (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. The following complaints are dismissed:

1.1 Disability discrimination under sections 15, 20-21 and 26 Equality Act 2010;

1.2 Unfair dismissal.

2. The Claim is dismissed.

REASONS

1. The Claimant was employed by the Respondent between 28 May 2012 and 30 March 2018. By a Claim presented on 21 August 2018, after a period of Early Conciliation between 21 June and 21 July 2018, the Claimant brought the following complaints:

1.1. Constructive unfair dismissal;
1.2. Breach of the duty to make reasonable adjustments (ss20-21 EA 2010);
1.3. Disability discrimination under s15 EA 2010;
1.4. Disability related harassment under s26 EA 2010.

2. The Claim was initially listed for a full merits hearing on 29 July 2019. It was postponed and re-listed to determine liability.

Issues

3. The parties agreed a List of Issues, which is set out from p69 of the bundle. There was no application to amend this list.

Evidence

4. There was a bundle of documents, pp1-479, which, although it contained most of the relevant documents and was marked as "Joint", was not an agreed bundle. This was marked "R1". Page references in this set of reasons refer to pages in that bundle, save where stated.

5. The Claimant produced an indexed bundle on the first morning, which is marked "C1".

6. Later on the first day, the Claimant produced further documents. These were copied and marked as "C2".

7. Certain documents in C1 and C2 were better copies of documents within R1.

8. In respect of the witness statement of the Claimant, the Respondent applied to have large parts of it excised on the grounds of relevance, because it was alleged to go beyond the issues in the case or consist of remedy matters (this hearing was listed for liability only) and because it contained submissions. With the agreement of the Claimant, the following paragraphs of her statement were excluded: 6-9, 16c, 20, 32, 37, 20, 60-62, all of Section 3 and the passage concerning an Updated Schedule of Loss.

9. In respect of the remaining paragraphs, the Tribunal ordered that paras 26-31 be excluded for reasons given at the time. We made no order in respect of the other paragraphs which the Respondent applied to exclude for reasons given at the time. We were aware that some of the remaining paragraphs appeared to be of marginal, if any, relevance to the issues; but given that this is a discrimination case, and that such cases are notoriously fact-sensitive, we decided that it would further the overriding objective to let the evidence be heard and for the Tribunal to assess the weight and relevance of those paragraphs after all the evidence was considered.

10. The Tribunal heard oral evidence from the Claimant. In addition, the Tribunal read email statements from two witnesses for the Claimant, Darren Kiggins (a trade union representative) and Lesley Summerhayes (a colleague who is a Responsible

Officer). These witnesses did not give oral evidence. We attached such weight to those two statements as we thought fit.

11. The Tribunal read witness statements and heard oral evidence from the following witnesses for the Respondent:

11.1. Alex Osler, Director;

11.2. Katie Castle, Head of Quality and Investigations;

11.3. Chris Lunn, Treatment Manager;

11.4. Carolyn Butler, Service Delivery Manager.

The Facts

12. The Claimant was employed initially by the Probation Service as a Programme Tutor for 37 hours per week. The hours were averaged over a 4 week period. The Claimant's work included delivering accredited programmes over a period of months to groups of service users and writing reports. She was initially based at Thurrock LDC but also delivered sessions at Colchester and Southend.

13. The Claimant's base was transferred to Southend on 2 January 2013. This transfer was not connected to the Claimant's disability.

14. Following privatisation of the Probation Service, from 1 May 2014, the Respondent has provided probation services in Essex to low and medium risk service users on community sentences, suspended sentences, or on licence. The interventions include delivering programmes accredited by the Government.

Whether there was an express term that the Claimant would deliver only accredited programmes?

15. The Claimant's Job Description is at pp94-99. Her terms of employment are at p.100-110. These do not contain an express term which states that she will only deliver accredited programmes; we heard no evidence that such an express term existed. In fact, the Claimant's Job Description (p96, paragraph 14) states that she will carry out any relevant and appropriate additional duties when requested to do so.

16. When the Claimant joined the Probation Service, only accredited programmes were delivered. Before such courses can be delivered, a Programme Tutor must pass a Core Skills Course and then must be trained in each Programme.

17. Part of the reforms in 2014 allowed Community Rehabilitation Companies ("CRCs") to innovate and develop non-accredited programmes. Unaccredited programmes included in respect of rehabilitation activity requirements ("RARs"). The Respondent had more accredited programmes than other places in the country by the time of the Claimant's resignation. The Respondent retained five accredited programmes, which was more than in other parts of the country (where only between one and three accredited programmes were retained in each area).

18. The Tribunal found that delivering non-accredited programmes to service users was a relevant and appropriate additional duty given the other duties of the Claimant as a Programme Tutor.

19. The Claimant complained in her witness statement (but not in her Claim) that being asked to deliver non-accredited courses was a demotion; but we found that all the Programme Tutors would be requested to deliver them and that this was no demotion.

20. In oral evidence, the Claimant stated that she was not alleging demotion, but that other staff had stated to her that "*any old shit*" would do when delivering a non-accredited course, and that she should do them because there were no reports to do after the group sessions.

21. The non-accredited programmes were not imposed on the Claimant at all. In fact, we found that the Claimant did not deliver any non-accredited programmes prior to her resignation. Although the Claimant had two RARs placed on her rota for the period immediately after her resignation, we found that the Claimant did not work them, but nor did she complain about them being on her rota, nor ask for their removal from her rota before her resignation. The Claimant resigned without mentioning that these had been placed on her rota, and without complaining that she was expected to do non-accredited Programmes.

22. There was no specific training necessary or required for Programme Tutors to deliver non-accredited programmes. They could be delivered by any Programme Tutor or Responsible Officer who knew the course content. Tutors were sufficiently experienced to deliver such programmes because of their training in accredited programmes and because of their Core Skills training.

Times and pattern of work for Programme Tutors with the Respondent

23. Programme Schedules are prepared by managers in the tier above Service Delivery Managers ("SDM"). They are shared with SDMs and Programme Tutors online. Although two tutors are assigned on the schedule to deliver each session, depending on the number and type of service user, the sessions would be delivered by one or two Programme Tutors. Ideally, the sessions would be delivered by one, with the other tutor helping in preparation or potentially catch-up.

24. The Programme Tutor's working day is divided into three sessions. The programmes are delivered in either a morning session or an evening session. In order to provide the probation services required, the Respondent has to hold evening sessions because some service users are in work. The Programme Tutors were paid an unsocial hours allowance for the hours of 7-9pm when working the evening sessions.

25. During the Claimant's employment, morning sessions began at 11.00 until 13.30 at the latest. Often, there was a catch up session with service users who had missed a previous session from 10.15 to 11.00 am.

26. The evening sessions ran from 18.30 to about 20.30. The Tribunal found that, after an evening session, after completing her duties, the Claimant would usually leave the office somewhere between 20.30 and 21.00, although the precise time would vary on what needed doing after the session ended.

27. The Tribunal found that the schedules and rotas referred to by the parties did not accurately reflect the sessions actually delivered. This was because two Programme Tutors would be allocated to each session and then it would usually be the case that they would decide between themselves which one would present the session.

28. The letter of appointment (p.99 – which formed part of her contract of employment) stated that the expectation was that the Claimant would work a minimum each week of 4 periods of unsocial hours, usually 3 evenings and a Saturday. The Claimant did not work on a Saturday at Southend LDC over the material times. Moreover, because of the pattern of working, the Claimant completed her 37 hours working time over Monday to Thursday, and, like the other Programme Tutors, she did not work on Fridays.

Ill-health procedure and related matters

29. Carolyn Butlin became the Claimant's line manager from about November or December 2016 until the end of the Claimant's employment.

30. In respect of Ms. Butlin's evidence, we found her to be a straightforward and credible witness, who maintained her composure despite robust cross-examination.

31. From Ms. Butlin's perspective, the Claimant and herself had a good working relationship up to and including the end of the Claimant's employment. This is evidenced by Ms. Butlin's oral evidence corroborated by documentary evidence such as the texts at p.137 and her comments in the appraisal of 27 December 2017. Prior to her resignation, the Claimant made no complaint about Ms. Butlin, nor brought any grievance against her. We found that the resignation did surprise Ms. Butlin.

32. The Claimant had various periods of sickness absence from January 2014 until her resignation in February 2018. From the evidence, the first reference to sepsis by the Respondent is on a Sickness Absence Review form of 18 March 2014 (where other impairments are also referred to).

33. On 27 February 2017, the Claimant was assessed as not fit for work due to post-sepsis exhaustion (p157). The Claimant was absent until 17 March 2017.

34. Given the degree of sickness absence, on 21 March 2017, Ms. Butlin completed a referral to the Occupational Health ("OH") provider (p171-173), on the online form of the third party OH provider. This included a narrative account of the background to the referral, which included that there had been some mental health concerns in the past, that the Claimant had said she is suffering from sepsis, and that the medical certificates for the most recent absence "*suggest Post-Infective fatigue*". In addition, the referral states that the Claimant appears low in mood and quite paranoid about the

Respondent organisation. Ms. Butlin stated that she needed to know what adjustments she needed to make in the workplace.

35. Ms. Butlin drafted the referral as she did because she was genuinely concerned about the Claimant. She knew from the Claimant's former line manager, Mr. Childs, that there had been concerns about the Claimant's mental health. The referral did not state that the Claimant had, in fact, any mental health condition. The Tribunal found that this referral was made for proper reasons and that it was an entirely reasonable piece of management by a concerned manager.

36. There was no evidence that the contents of this form were shared by Ms. Butlin with any colleague of the Claimant. We accepted Ms. Butlin's evidence that at no time did she discuss the Claimant's health with any member of staff. The fact was that colleagues of the Claimant were likely to know that she had sepsis and post-sepsis symptoms, such as the employee who accompanied her to an OH appointment in August 2017 or other colleagues within the Programme Team with whom she was on friendly terms.

37. The Claimant was absent sick from 10 April to 21 April 2017. The fit note specified "*post sepsis/recurrent falls/hand injury*" (C1 p16).

38. On 14 April 2017, Ms. Butlin sent an email (p401) to the Claimant which explained that it was important for the Claimant to attend an appointment arranged with OH, because Ms Butlin needed some guidance as to what adjustments may need to be put in place for the Claimant. This email refers to the possibility of a taxi being arranged to take the Claimant to the appointment. In fact, an arrangement was made where Mr. Kiggins, her trade union representative (who was an employee of the Respondent), went by taxi to collect the Claimant to take her to the appointment on 20 April 2017. This was arranged and paid for by the Respondent. The Tribunal found that this adjustment was all part of the picture that we formed of a concerned manager trying to get advice on how best to accommodate the Claimant.

39. On 2 May 2017, an OH report was produced and provided to the Respondent. This explained that the Claimant had developed an infection in 2012, which developed into sepsis, and that she had a diagnosis of post-sepsis syndrome. In terms of adjustments, the report stated (p.169):

> "*While she is considered fit to continue in her work role it would be helpful for management of fatigue if you could consider allowing her to work from the Southend office, as this is the most convenient office not to feature numerous stairs. It would be helpful if she could work fixed regular hours in the typical 9-to-5 or similar daytime pattern. This would ensure she was not working late shifts and can develop a regular sleep pattern to help manage her symptoms. She is also unlikely to be suitable for any heavy manual handling activities in work.*
>
> *Her condition is likely to continue long term but not necessarily permanently so these considerations are likely to be required in the longer term.*"

40. The report advised that that Claimant was likely to be a disabled person within the Equality Act 2010 and that she had been referred to a neurologist for further investigation.

41. The Claimant was subject to the Respondent's absence management procedure. On 13 June 2017, Ms. Butlin submitted an ill-health capability report raising potential adjustments (p177-180) and including the OH report. Under section 3, "Factors to be Considered", the report stated:

> "*Ongoing symptoms following an infection in 2012 which led to Sepsis, and has left Janet with fatigue, recurrent episodes of a rash, joint swelling, nosebleeds etc. She has been referred to a neurologist in London following her fall for further investigation, but she states that she has suffered ongoing issues with her balance since the infection."*

42. The report stated that some adjustment had already been made because of her symptoms, by trying to ensure that she worked predominantly from Southend (where there were less stairs).

43. In the report, Ms. Butlin explained (at 3.6) the effect of the Claimant's absence on her colleagues, which is that they were required to cover group sessions, and one to one meetings with service users. Other colleagues in the Programme Team had health issues, and the Claimant was unable to cover for them, which meant the remaining colleagues had a heavy workload.

44. The report recorded that the Claimant managed her workload by basing herself in Southend and trying to ensure that the Programme Schedule did not have her work a late evening and an early group; and she rested at weekends and used her annual leave to build in some resilience.

45. The report explained that the Claimant's condition was likely to continue long term, but not necessarily permanently; but the adjustment considerations were likely to be required in the longer term.

46. An ill-health capability hearing took place on 28 June 2017.

47. On 3 July 2017, the hearing manager, Hayley James-Mangan confirmed by letter the outcome of the hearing to the Claimant (p182). The following adjustments were to be implemented:

47.1. Where practicable, the Claimant would start work after 10am;

47.2. Where practicable, the Claimant would work from Southend, but would attend meetings as required.

The letter stated that there would be no other changes to her working pattern.

48. The hearing was adjourned to a further review on 10 August 2017. A further OH report was to be arranged, to which the Claimant had agreed to take all relevant documentary evidence about her current and previous health, after she had seen a neurologist. The purpose of this review was to put the Respondent in a position where

it could assess what other reasonable adjustments for the longer term could be made and to consider whether the Claimant could continue in her existing role; if she could not do so, part of the review process would have involved considering whether there were other options for the Claimant such as redeployment or part-time work.

49. The above adjustments were put into place. In addition, after this capability meeting, we accepted Ms. Butlin's evidence that, despite the statement in the outcome letter, the Respondent did limit the number of programme sessions allocated to the Claimant to less group sessions than other Tutors.

50. However, we found that due to the lack of resources, specifically trained employees who could deliver the accredited programmes, and the workload on other colleagues referred to by Ms. Butlin created by vacancies and various forms of leave, by about November 2017, the Claimant was doing the same amount of programme sessions as the other full-time Programme Tutors, including evening sessions. In circumstances where Tutor resources were limited, it was impracticable to make adjustments for other than a very short period so that the Claimant worked only mornings from Monday to Thursday (because the sessions were not delivered on Fridays nor at Southend on a Saturday) because this would put a greater burden on other Tutors to cover the sessions in unsocial, evening, hours. The general position was that Tutors preferred not to do evening sessions.

51. Further, after the meeting, an adjustment was made by allowing the Claimant to finish early, between 20.30 and 21.00, if she need to get her train home at an earlier time.

52. The Tribunal accepted the evidence of Ms. Butlin and Mr. Lunn that it was not feasible for a Programme Tutor within the Respondent organisation to work from 9am to 5pm. The nature of the service required the role-holder to be able to work flexible hours. It was clear that the structure of morning and evening Programme sessions was essential to service provision, because some service users were at work during the day and some programmes lasted for several months. For this reason, the adjustment was made to permit the Claimant to start work at 10am; the one-to-one catch up sessions ahead of the group sessions began at 10.15am (for service users who had missed the previous session).

53. In the months leading up to her resignation, there were vacancies for Programme Tutors within the service provided by the Respondent, and absences caused by sickness or annual leave, which meant that there was pressure for all those who could deliver sessions to be used where possible. The existing Tutors were already stretched.

54. The recruitment of sessional staff, who effectively were contractors employed to deliver sessions, was not practicable, because such staff had to be trained, particularly in the accredited programmes, before they could deliver the sessions and they had to be supported to deliver the programmes.

55. In cross-examination of Mr. Lunn, the Claimant alleged that he had not worked evenings during a phased return to work. We accepted Mr. Lunn's evidence that this arrangement had only continued for a short period of less than one month.

56. Ms. Butlin referred the Claimant to OH again in September 2017, asking further questions (p.193). Ms. Butlin sent this referral because she had received no further medical evidence or information from the Claimant and she genuinely did not know what the effect of Sepsis or post-sepsis was; the Fit notes seen by Ms. Butlin referred only to post-infective fatigue. The Claimant had not provided any medical opinion from the neurologist whom she had been referred to. Moreover, the Claimant had stated to Ms. Butlin that she was anticipating being seen by an Infections Specialist. This is why a question in the referral asked whether a referral to an Infections Specialist would assist; we did not accept the Claimant's evidence that the first mention of this type of specialist came from Ms. Butlin, preferring Ms. Butlin's evidence.

57. One of her concerns when the referral was made was whether the Claimant's Sepsis or post-sepsis syndrome could have any effect on the Claimant's mental health. The questions within this referral were reasonable questions from management, sent by a line manager without any medical knowledge and who was concerned about accommodating the Claimant's needs.

58. Ms. Butlin was seeking the further OH report largely because she wanted the Respondent to be in a position where any reasonable adjustments for the longer term could be made at the ill-health capability review, which was re-arranged to take place in October 2017. The Respondent would have considered redeployment or part-time working at the review, depending on the further evidence.

59. A consultation took place with the Claimant, after which Dr. Finn sent a letter dated 6 October 2017 to Ms. Butlin. This included that the problem remained fatigue and a tendency to develop Sepsis. It highlighted the potential length of the working day, and the impact that this had in terms of fatigue and symptoms, and noted that the adjustment to 9am-5pm pattern had not been implemented. Dr. Finn recommended that the Claimant's GP provide a report to address the questions of Ms. Butlin. Dr. Finn wrote to the Claimant's GP.

60. On 25 October 2017, the Claimant was informed that the ill-health capability hearing was postponed because the OH report had advised a report should be obtained from the GP. A Consent form was sent to the Claimant to obtain such a report.

61. On 14 December 2017, Ms. Butlin emailed CTA Team 1 (part of the third party OH provider) because she was concerned that the Claimant's case should not be closed, and because the Claimant had not returned the Consent form, and that she had asked what information was sought. This email refers to the information requested from the GP being in respect of "*her alleged diagnosis of sepsis, and what this might mean for her, and others with whom she comes into contact*" (p.198).

62. The Claimant failed to provide a completed Consent form before her resignation. The Claimant believed that requesting all her medical records from her GP was intrusive; in cross-examination, she accepted that this was her perception and that Ms. Butlin and Ms. James-Mangan may have a different perception. Moreover, the Tribunal found that the Claimant was incorrect in stating in her oral evidence that all her medical records were being sought; from the evidence, the Consent was sought to

allow her GP to respond to the questions posed by Dr. Finn in her letter to the GP, which we inferred would have included the questions to OH by Ms. Butlin at p.193. The Claimant's evidence on this issue was an example of how her misplaced belief in a plan or campaign against her adversely affected her perception of events.

63. The Claimant's decision not to complete the Consent form led to no further ill-health capability hearing being arranged. The Claimant stated in cross-examination that she could not recall being asked for the Consent form. We rejected that evidence. The email at p.198 demonstrated that Ms. Butlin must have discussed with the Claimant more than once why she had not completed the Consent form (which is the inference we draw from the word "*again*"), and that email shows that the Claimant contacted the OH provider to query what information was being sought.

64. Prior to her dismissal, the Claimant did not complain to Ms. Butlin that she could not manage her work, nor that she was delivering more sessions than other Programme Tutors. The Tribunal found that during the months leading up to her dismissal she was doing about the same amount of programme group sessions and the same amount of evening session work as other Programme Tutors.

65. On 27 December 2017, the Claimant's appraisal was carried out by Ms. Butlin. In the "Assessment of Contribution" section (p.209-211), the comments provided by Ms. Butlin are positive. We found that these comments were genuinely made and reflected her real beliefs about the Claimant's performance. The appraisal corroborates the evidence of Ms. Butlin; it records that information is awaited from the Claimant's GP "*to inform the Ill Health process in terms of any adaptations/adjustments which may be required to [the Claimant's] working arrangements*". The appraisal also refers to the Claimant's current co-tutors being very supportive.

Events in January 2018: Issues 5.1 – 5.3

66. The Tribunal accepted Ms. Butlin's evidence that she did not spread rumours as alleged in Issue 5.1. We found that she did not discuss the Claimant's heath condition with colleagues of the Claimant. This was an example of the Claimant forming a perception of events, some time after the event, where there were no factual grounds to support the perception. We have found it unnecessary to decide whether the comments were made, because the Claimant made no complaint about them in January or February 2018; but if they were made, we found that the two colleagues named could have obtained information that the Claimant had Sepsis or post-sepsis symptoms from another source, because other colleagues knew either from the Claimant directly or, in one case, from accompanying the Claimant to a consultation.

67. In respect of issue 5.2, there was no evidence that Ms. Butlin made the suggestion alleged to a psychiatrist, nor that she discussed the Claimant with a psychiatrist at all. We accepted the evidence of Ms. Butlin that these events did not happen. Again, this allegation appeared based entirely on the Claimant's perception of events which was unsupported by facts.

68. The Tribunal found that neither Ms. Butlin, nor any other manager, asked the Claimant whether she was infectious, and nor did Ms. Butlin or any other manager discuss this with colleagues of the Claimant.

69. In respect of issue 5.3, the Claimant received a response to a Data Protection Act request in January 2018. The documents provided to her included the referrals to the third party OH provider. As we have explained above, by those referrals, Ms. Butlin was trying to obtain medical evidence to explain the Claimant's impairments and their effects, so that reasonable adjustments could be made. Ms. Butlin did not state that the Claimant had "*mental health problems*". The first referral in March 2017 (p.173) set out that there was a background where there had been concerns about her mental health in the past, that her mood appeared low and quite paranoid about the Respondent. We found that Ms. Butlin had a genuine belief that these statements were all true and that there were reasonable grounds for making them. The second referral in September 2017 asked a series of reasonable and appropriate questions by a manager trying to make reasonable adjustments. We found that Ms. Butlin was entitled to ask whether the Claimant's impairments could have any impact on her "*general/emotional well-being i.e. Mental health*".

70. There was nothing in those referrals to OH, nor in any of the actions of Ms. Butlin, which were intended to, or likely to, destroy or seriously damage the relationship of trust and confidence. We found that, in many ways, Ms. Butlin acted to promote and cement the necessary trust and confidence in the employment relationship.

February 2018: issues 5.4 to 5.8

71. The Tribunal found that Mr. Lunn was an honest witness who gave candid and reliable evidence, which we had no difficulty in accepting.

72. Mr. Lunn did sometimes use humour to lighten the mood amongst colleagues. We accepted that he did this because their work could be serious and emotionally demanding. We found that the most likely explanation for the allegation at issue 5.4 is that, at some point in her employment, the Claimant heard Mr. Lunn tell the joke that he refers to in his witness statement at paragraph 6. The Claimant, retrospectively, perceived that this joke was aimed at her, because of her perception that there was bullying designed to force her to leave the organisation. We noted that no complaint was made about it in February 2018 nor at any other time. We found that there was no factual basis for her perception and that this joke was neither made to, nor aimed at, the Claimant.

73. Part of Mr. Lunn's role was to assess the Programme Tutors via video monitoring and by reviewing their reports.

74. In respect of issue 5.5, Mr. Lunn did not use the words alleged in the supervision meeting of 6 February 2018. The reality was very different. We found as follows:

74.1. RESOLVE is an accredited programme, which means that it must be run in accordance with set guidelines and a Programme Tutor must have passed specific accredited training before being able to deliver it.

74.2. The Claimant took the initial training for the RESOLVE programme from 23 to 27 January 2017. The trainers determined that she was "*not ready*"

to progress to the specific facilitator training which would enable her to deliver the RESOLVE programme.

74.3. There was a failure by the Respondent to inform the Claimant of her results; Ms. Butlin assumed that she had passed. The Claimant chased her results with Mr. Lunn, who followed up and obtained the learner final feedback report (pp153-156).

74.4. Mr. Lunn explained why the Claimant did not progress at paragraph 8 of his witness statement.

74.5. On 6 February 2018, Mr. Lunn held a supervision meeting with the Claimant. This was held in the back room in Southend, and it was not recorded; the busier rooms were those with CCTV which is why meetings were often held in the back room.

74.6. The learner feedback reports did not, as a matter of course, mention any medical conditions. Mr. Lunn did not mention that Sepsis was not recorded in the report. Mr. Lunn did not say to the Claimant that she would have failed anyway.

75. In respect of issue 5.6, at the supervision meeting on 6 February 2018, Mr. Lunn provided the Claimant with individual feedback from a programme session that he had observed. As Mr. Lunn explained in evidence, the feedback set out both strengths and the Claimant's observed performance development points.

76. A copy of the notes taken by Mr. Lunn when observing the Claimant are at pp224-229. These corroborate his oral evidence about his comments at the supervision meeting. For example, at p.224, the Claimant is given positive feedback about getting a person to use assertive communication on the spot.

77. The Tribunal found that Mr. Lunn did not allege that the Claimant had performed poorly at all; he made fair comments to the Claimant based on his observations and experience raising points for her development. The Tribunal's experience is that most proper feedback sessions would require some such constructive criticism to make them worthwhile.

78. In respect of issue 5.7, having seen Mr. Lunn give evidence, the Tribunal found that he did not shout at the Claimant on 8 February 2018, nor at any other time, and did not state that she did not do many evening sessions (or "night shifts" as referred to in the List of Issues). All Programme tutors complained about long days and working in the evening. Mr. Lunn did not shout or be aggressive to staff; in cross-examination of him, the Claimant said that it was not in Mr. Lunn's nature to shout, but that he had been instructed to do it, to force her to leave. He denied this and we accepted his evidence, not least because this allegation from the Claimant had not been made before.

79. The statement from Mr. Kiggins did not corroborate the Claimant's allegation at issue 5.7; he referred to an incident on 6 February 2018, and did not mention shouting.

80. The Tribunal found that it is likely that Mr. Lunn did ask the Claimant to work on a Friday, because this was a day when no sessions were booked to take place. It was a convenient day for meetings or for outstanding work to be done, given that the Claimant did not take her laptop home. We found that the Claimant's perception of this conversation, after the event, was based on her suspicions about her employer, not on any facts. We found that this was a normal, reasonable, management instruction, which was neither intended nor likely to seriously damage the relationship of trust and confidence; and that this request was made for good reason.

81. We found that Mr. Lunn probably did suggest on that occasion that the Claimant take a laptop home; but this was done to be supportive of her.

82. However, as Ms. Butlin explained, the Claimant did not go into work on Fridays and was not generally asked to work on a Friday. Although the Claimant was asked to go into work on one occasion on a Friday, this work was subsequently covered by another employee. The Claimant was not required to attend meetings or supervisions on a Friday.

83. In respect of issue 5.8, the Claimant contended that the envelope contained the CD which held the recording of her ill-health meeting, from over 6 months ago. The Claimant stated that she picked the envelope off a desk in the office and took it home, where she took the photograph referred to in her evidence. The Tribunal found this account was not credible for several reasons:

83.1. The envelope (photograph at p.453) is stamped and addressed, and appears to be sent by registered post or recorded delivery, judging by the label on it. The Tribunal could not understand why the Respondent would take it to the Post Office, have those labels added, then return with the envelope to the office, and leave it on the desk. It would have been the normal course to post it at the Post Office.

83.2. The Tribunal found it made no sense for a recording of the meeting in June 2017 to be sent out on 19 February 2018. There was no explanation for the delay.

83.3. The Claimant said that the photograph was taken at home. The Tribunal found this to be inconsistent with the complaint that there was a data protection breach by leaving it on the desk; if there was such a breach, a photograph of the envelope on the desk would have been evidence of it.

84. On 21 February 2018, the Claimant resigned. Her letter (p230) stated that she had received advice to resign from her "*legal team*" and doctors. She gave three reasons for the resignation:

84.1. Her grievance not being dealt with despite numerous reminders;

84.2. The incident that had caused her to become septic not being prosecuted despite a promise from the CEO;

84.3. Constant bullying and harassment by the Programmes Team starting soon after that incident.

85. The Claimant's last day in service was 30 March 2018.

86. The Claimant's resignation was received without any warning. She had not requested that Ms. Butlin make any specific adjustment to her duties, nor had she complained that she was doing any more sessions than any other Programme Tutor.

87. In oral evidence, in cross-examination, the Claimant alleged that the last straw was that she had been threatened with disciplinary action if she did not go on a counselling course. When she was recalled to have an opportunity to address two further emails disclosed by the Respondent (p480-481), she stated that this was a warning given orally by Beth Lunn (Programme Manager) in a huddle meeting to herself and other Programme Tutors.

88. The counselling for Programme Tutors was part of the accreditation process for the delivery of the BBRP programme. It was a requirement for those who delivered the programme, due to the intensity of the course and matters that may be raised on it. This is apparent from the email of Mr. Childs of 9 August 2016. The Claimant alleged that it was not mandatory, because no enforcement step was taken against her for not having attended any counselling course. However, we found that there was a distinction between what was required and what was enforced; and we can understand why this organisation, with the pressure of its resources described by Ms. Butlin, did not enforce this requirement.

89. The Claimant did not allege, and we saw no evidence to indicate, that she was subjected to any formal warning or disciplinary or other action for not attending the counselling course.

90. The Claimant alleged that up to her resignation she was doing more sessions than any other Programme Tutor. In support of her case, she relied on rotas that she produced within C1; in support of their case, the Respondent relied upon work schedules for May and October 2017 (p53-61). The Tribunal found that these were all unsatisfactory tools for determining this issue. Primarily, the schedules were only snapshots; the schedules did not reflect what was actually agreed between the Programme Tutors. For example, two tutors would be scheduled for each group session, but often only one would be required to deliver it. Secondly, the schedules were live documents; they could be updated and changed, and the sample available was too small to identify a trend over time. For example, p.32 of C1 suggested that, for the week after resignation, the Claimant had 8 sessions, which appeared to be more than anyone else; but if this was the case, it was unlikely that she would deliver all the sessions and it was unlikely that this number of sessions would continue over a period of weeks. As for the rotas produced by the Claimant, these carried no more weight; they appeared to show that the Claimant and her co-tutors were trying to balance work between themselves.

91. Having considered all this documentary evidence, we preferred the oral evidence of Ms Butlin as to the regular length of the Claimant's working day. We found that after the ill-Health Capability hearing, the Claimant's working hours were regularly

7 hours 30 minutes or less. We found that she did not work any 12 hour days, save in exceptional circumstances. The Claimant's allegation that she was working 12 hour days constantly was not supported by any evidence. Indeed, from the time-sheets that we saw for two short periods in September (p187-188), the Claimant worked one day each week which was 11 hours 30 minutes long. The pay-slips produced by the Claimant C1 pp 27-31 did not indicate that she was working overtime above the 37 hours contractual working time.

92. The Tribunal found that the Claimant was not teaching any more sessions than other Programme Tutors in the months leading up to her resignation; we found that she was doing the same number of sessions and the same amount of unsocial hours as other Programme Tutors, when averaged over a period of weeks. From the pay-slips, we find that this was approximately 20 hours per month; the figure for 41.5 hours of unsocial hours in the final pay-slip was likely to be time built up, but not claimed, over a number of months. From these documents, the Tribunal found that the Claimant probably worked up to three evenings per week from about November 2017. However, the number of unsocial hours was of little use in assessing the length of the working day, because the fact the Claimant was paid for unsocial hours did not mean that she had begun work at 09.00 on the day that she worked unsocial hours, as demonstrated by the sample of time sheets.

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93. As part of the course of conduct which the Claimant alleged entitled her to resign, she relied upon an incident where she received information on 28 March 2018. It is obvious that this incident, described at issue 5.9, can have had no effect on her decision to resign on 21 February 2018.

94. For the avoidance of doubt, we found that on 28 March 2018, the Claimant perceived the information received by her meant that she had been criticised in a disciplinary meeting involving another employee, who had had to deal with an incident involving a service user at reception. In fact, the information received appears to be third hand hearsay and the accuracy of the information provided was not verified by the Claimant. In any event, according to Mr. Kiggins, the information provided to the Claimant was not that she had been criticised by management, but by a member of staff: see paragraph 4 of his witness statement. Moreover, we accepted Ms. Butlin's evidence that the Claimant had come to see her after the event, because someone in the team had suggested that she was responsible for not taking action; Ms. Butlin had told the Claimant that she had done the appropriate thing in leaving the office and not getting involved.

95. The only evidence that the Claimant had mentioned to Ms. Butlin or any other management that she had suffered any bullying or harassment was expressed in oblique terms during a meeting held in respect of Mr. Kiggins, where the Claimant was in attendance to support him. Ms. Butlin asked the Claimant for details. The Claimant replied that she did not wish to pursue it.

96. Although the statement from Ms. Summerhayes states that she witnessed the Claimant being treated unfairly, there is no description of the treatment, nor any dates, nor does she identify the alleged perpetrators. Ms. Summerhayes alleges that this

treatment was alleged to have come from programme staff, and she makes no specific allegation against Ms. Butlin or Mr. Lunn. Reading this, with the oral evidence of Ms. Butlin, it is more likely that any alleged unfair treatment came from staff members not Ms. Butlin or other managers.

97. The statement of Mr. Kiggins was not subject to cross-examination. In any event, we attached very limited weight to it because he does not refer to bullying or harassment and mentions only three incidents, which we have dealt with above. In respect of the incident alleged on 6 February 2018 involving Mr. Lunn, this is not an incident referred to in the List of Issues; moreover, Mr. Kiggins does not state that he witnessed shouting by Mr. Lunn, and there is no evidence he made any complaint about the alleged conduct by Mr. Lunn.

98. The Tribunal found that Ms. Butlin did not orchestrate any form of campaign against the Claimant, to force her to leave the Respondent's employment. On the contrary, we found that all the actions of Ms. Butlin were reasonable and supportive management action. Moreover, we found that the Claimant made no mention of any bullying or harassment by Ms. Butlin prior to her resignation, nor during the grievance process in 2018. The first allegation of Ms. Butlin being responsible for a plan of action against the Claimant was made in these proceedings, which we found to be inconsistent with the Claimant's case.

Grievance process: Issue 5.10

99. In respect of the grievance process, we heard evidence from Ms. Castle and Ms. Osler. We accepted their straightforward evidence on this issue, finding it to be credible and reliable.

100. On 7 July 2015, the Claimant submitted a grievance about the Respondent's response to an alleged assault by a colleague in February 2013. The Claimant considered the response inadequate. The background to the grievance is set out in the grievance report prepared by Katie Castle, p.252ff, at p255.

101. The chronology set out at section 2 of that grievance report was not challenged in evidence by the Claimant. It recorded that the alleged perpetrator was subjected to a disciplinary investigation in 2013; but the recommendation was that the allegations could not be substantiated so no further action should be taken. At about that time, the Claimant was informed that no further action would be taken against the alleged perpetrator.

102. At a subsequent ill-health capability meeting in June 2015, a manager agreed to extend the 6 month period to bring a grievance to allow the Claimant to present one. After this, the Respondent wrote to encourage the Claimant to present a grievance.

103. On 4 November 2015, the Respondent received a letter from solicitors instructed by the Claimant, in relation to a proposed personal injury claim arising from the incident in February 2013.

104. We found that because of the proposed personal injury proceedings, on 15 January 2016, Mary Archer, then Chief Executive, decided to put the grievance on

hold "*until further notice*". Although we heard no oral evidence from the decision-maker, we find that this is the proper inference to be drawn from the letter of 15 January 2016; we could not see any reason why Ms. Archer otherwise would reach this decision; she did not work with the Claimant and no allegation was made against her by the Claimant. Moreover, the Respondent's evidence showed that management had encouraged the Claimant to present a grievance; and it would make little sense if the Respondent then stopped dealing with it for no reason. In addition, there was no evidence from the Claimant to suggest that she responded to Ms. Archer, to question her reasons for putting the grievance on hold.

105. We heard no evidence to explain why the same letter from Mary Archer is in the bundle but dated 30 April 2018 (p261). We inferred that this must be the date when it was printed off, and that the date was added automatically, because the Claimant did not suggest that she received such a letter on that date and, from all the evidence, there would have been no reason for such a letter to have been written on 30 April 2018. By that date, the Respondent was considering why the 2015 grievance had not proceeded, so there would have been no need nor any point to such a letter being sent.

106. The Respondent treated the Claimant's resignation letter as a fresh grievance, with three parts to it (see p.255 of the investigation report). The grievance was investigated by Ms. Castle, who was independent of the Claimant's line management.

107. It is alleged by the Claimant that in her interview with Ms. Castle, on 16 April 2018, the Claimant was asked "*how much*" she wanted to leave the organisation. The Tribunal accepted Ms. Castle's evidence that she did not raise the question of whether any termination offer would be made. Ms. Castle's evidence is corroborated by the notes of the meeting, particularly at p.243.

108. The Claimant relied on a letter (p.132) from her solicitors during the grievance hearing before Ms. Osler on 19 June 2018. This letter, dated 19 October 2015, showed that the Claimant was advised by her solicitors that they would not continue to represent her because there was insufficient evidence to prove the Respondent was liable for the alleged acts of the colleague in 2013. They advised that, if she wished to pursue matters, the Claimant should instruct other solicitors.

109. The Tribunal found that the Respondent did not know of this advice, until after the Claimant had resigned and after she revealed this during the grievance process. It was not until Ms. Osler saw this letter that the Respondent had knowledge that the Claimant may not be pursuing a personal injury claim.

110. Ms. Osler concluded that there was a proper reason for putting the grievance on hold in January 2016. The Claimant had never informed the Respondent that she was not pursuing a personal injury claim.

111. Ms. Osler explained the chronology to the Claimant in the grievance, evidenced by the notes (from p.272, especially p.285). The Claimant's grievance was not upheld.

112. Moreover, the Claimant had not pursued her grievance after the letter from Mary Archer in January 2016. She had not complained to the Respondent that the grievance should proceed until she raised it in her resignation letter.

113. In those circumstances, the Tribunal found that the failure to resolve the grievance of 2015 until 2018 happened for good reason. The Tribunal found that the delay relied upon was not capable of forming part of a course of conduct which seriously damaged the relationship of trust and confidence between the Claimant and Respondent. Indeed, as soon as the issue of the 2015 grievance was raised by the Claimant, the Respondent investigated it.

The Law

Disability Discrimination

114. Mr. Platts-Mills relied on *Newcastle City Council v Spires* [2010] UKEAT/0334, which applied *Tarbuck v Sainsburys* [2006] IRLR 664. In *Tarbuck*, the EAT applied the following passage from *Chapman v Simon [1994] IRLR 124* per Peter Gibson LJ (para 42):

> "*Under s.54 of the 1976 Act, the complainant is entitled to complain to the Tribunal that a person has committed an unlawful act of discrimination, but it is the act of which complaint is made and no other that the Tribunal must consider and rule upon. If it finds that the complaint is well founded, the remedies which it can give the complainant under s.56(1) of the 1976 Act are specifically directed to the act to which the complaint relates. If the act of which complaint is made is found to be not proven, it is not for the Tribunal to find another act of racial discrimination of which complaint has not been made to give a remedy in respect of that other act*."

115. In *Tarbuck*, the EAT continued as follows:

> *"59. These observations were made in the context of the Race Relations Act but we have no doubt that the same principles apply here also.*
>
> *60. Mr Jones submits there was therefore a plain breach of that principle here. The Tribunal found a breach of the Disability Discrimination Act by focusing on a failure to provide a reasonable adjustment which had never been identified as an issue in the case. Mr Jones says that the Cross-appellants were plainly prejudiced as a result of not having the opportunity to make observations on that alleged breach".*

Duty to make reasonable adjustments

116. We have considered the carefully drawn statutory duty to make reasonable adjustments set out in sections 20-21 EA 2010.

117. Paragraph 20 of Schedule 8 EA 2010 provides a limitation on the duty where the Respondent lacks the requisite knowledge:

"20. Lack of knowledge of disability, etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

118. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission 2011 ("The Code"). The Courts are obliged to take it into consideration whenever relevant. Chapter 6 is concerned with the duty to make reasonable adjustments, and emphasises that the duty is one requiring an employer to take positive steps to ensure disabled people can progress in employment. The Code includes:

118.1. The phrase "provision, criterion or practice" (which is not defined in the EA 2010) should be construed widely so as to include any formal or informal policies, rules, practices, arrangements, conditions, prerequisites, qualifications or provisions. It may include one-off decisions and actions (paragraphs 4.5 and 6.10).

118.2. Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps".

118.3. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage.

119. The protective nature of the legislation meant a liberal rather than an overly technical approach should be adopted to the meaning of "provision criterion or practice": *Carrera v United First Partners Research*.

120. An Employment Tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

120.1. the relevant provision, criterion or practice made by the employer; and/or

120.2. the relevant physical features of the premises occupied by the employer and/or the auxiliary aid required;

120.3. the identity of non-disabled comparators (where appropriate); and

120.4. the nature and extent of the substantial disadvantage suffered by the Claimant.

The above steps follow the guidance provided in *Environment Agency v Rowan* [2008] IRLR 20 at paragraph 27.

121. Substantial disadvantage is such disadvantage as is more than minor or trivial. The Code (at paragraph 6.16) emphasises that the purpose of the comparison is to determine whether the disadvantage arises in consequence of the disability and that, unlike direct or indirect discrimination, there is "*no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same*" as those of the disabled person.

Reversal of the burden of proof

122. In *Project Management v Latif* [2007] IRLR 579, the EAT explained how the reversal of the burden of proof applied in cases where breach of the duty to make reasonable adjustments was alleged:

> *"54. In our opinion the paragraph in the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made."*

<u>Discrimination arising from disability</u>

123. Section 15 EA provides:

> "*(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.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*"

124. The Equality and Human Rights Commission's Code of Practice on Employment states that the consequence of a disability "*includes anything which is the result, effect or outcome of a disabled person's disability*": see para 5.9.

Constructive Dismissal

125. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct.

126. The Claimant's contract contained the implied term of trust and confidence. For there to be a breach of the implied term of trust and confidence, the ET must be satisfied that, viewed objectively:

126.1. the employer has conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

126.2. that there was no reasonable or proper cause for the conduct.

Malik v BCCI [1998] AC20 34h-35d and 45c-46e.

127. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

127.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp* [1978] IRLR 27.

127.2. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a.

127.3. The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied upon as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in his employer.

127.4. A breach occurs when the proscribed conduct takes place: see *Malik*.

128. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR, the Court of Appeal approved the guidance given in *Waltham Forest LBC v Omilaju* (at paragraph 15-16) on the "last straw" doctrine. Reading those authorities, the following comprehensive guidance is given on the "last straw" doctrine:

128.1. The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: *Lewis v Motorworld Garages Ltd* [1986] ICR 157, per Neill LJ (p 167C).

128.2. In particular, in such a case 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? (Glidewell LJ at p 169F).

128.3. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application.

128.4. 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.

128.5. The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

128.6. 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 referred to.

128.7. 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.

128.8. If 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, soldiers on and affirms the contract, she cannot subsequently rely on these acts to justify a constructive dismissal unless she can point to a later act which enables her to do so. If the later act on which she 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.

128.9. The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

> 128.10. Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

Submissions

129. The Tribunal heard oral submissions from the Respondent and the Claimant. In addition, Mr. Platts-Mills relied on an extract from Harvey on Employment Law and a copy of *Newcastle City Council v Spires*.

130. Counsel for the Respondent broke the complaints down into three parts: the complaints against Ms. Butler and Mr. Lunn; the handling of the 2015 grievance; and the duty to make reasonable adjustments. The main themes of his submissions were as follows: the Claimant had a complex medical condition (viewed from the position of a manager rather than a medic); the Respondent's evidence showed that the managers that the Claimant complained of had genuinely wanted to support the Claimant, and did support her where possible; the Claimant misperceived statements and observations of events; and the Claimant failed to re-evaluate matters despite presentation of contradictory evidence.

131. The Claimant considered that she had proved her case beyond reasonable doubt – not just on the balance of probabilities. She elaborated on this, providing her interpretation of various pieces of evidence, including complaining about the environment in which she worked and that her 2015 grievance had not been dealt with deliberately. In the course of her submissions, the Claimant stated that she had been unable to rest. The Tribunal pointed out that she had not mentioned this to Ms. Butler before her resignation; the Claimant did not argue otherwise, stating that she would rather contest matters in court.

132. The Tribunal took into account each and every submission made, even though we have not considered it necessary or proportionate to deal with each argument specifically in our conclusions.

Conclusions

133. Applying the facts found and the law set out above to the List of Issues, the Tribunal reached the following conclusions.

Issues 1 – 4: Repudiatory breach of an express term?

134. It was not an express term of the Claimant's contract that she would deliver only accredited programmes.

135. Further, the Tribunal did not find it necessary to imply a term in the express terms of the contract in order to give the contract business efficacy. The Claimant's Job Description envisaged Programme Tutors carrying out work other than accredited programmes; and within the statement of terms and appointment letter, there was no evidence of a prohibition on the delivery of non-accredited programmes.

136. The Claimant had training in order to provide accredited programmes, including a Core Skills course. The Programme Tutors did not require any further training in order to deliver the non-accredited programmes.

137. Although the Claimant's schedule for the week of her resignation did include non-accredited programmes, this was not in breach of contract.

138. In any event, the Claimant did not object to providing those sessions, nor claim that her contract did not provide for non-accredited programme delivery, but simply resigned on 21 February 2018. In those circumstances, had there been such an express term as that relied upon, we would not have found any repudiatory breach of contract.

Issue 5: Breach of the implied term of trust and confidence?

139. We concluded that there was no breach of the implied term of trust and confidence. The Respondent did not act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence; and, in any event, there was reasonable and proper cause for the acts of the managers complained of by the Claimant.

140. We have explained in the findings of fact why we did not accept the Claimant's case that the matters in Issue 5 formed part of a course of conduct which amounted to breach of the implied term of trust and confidence. For the avoidance of doubt, our reasons are set out in the following paragraphs:

140.1 Issue 5.1: Despite the Claimant's beliefs, Ms. Butler did not spread the rumours alleged, nor did the Claimant complain to Ms. Butler about what other staff were alleged to have said to her. We repeat paragraphs 30-36 above.

140.2 Issue 5.2: There was no evidence to support this allegation. We repeat paragraph 66 above.

140.3 Issue 5.3: We repeat paragraphs 34-35, 56-57 and 68-69 above. Ms Butler did not ask whether the Claimant was infectious or required isolation. Ms. Butler acted with reasonable and proper cause, trying to support the Claimant.

140.4 Issues 5.4 – 5.7: We repeat paragraphs 71-81. Mr. Lunn did not commit the acts alleged, save that, at some point, he made the joke that he referred to in evidence, which was not directed at the Claimant, was not intended to cause any offence and did not cause any offence to the Claimant at the time; indeed, it was an attempt to be jovial and lift the mood of the office.

140.5 Issue 5.8: The incident alleged to be a breach of the Claimant's data protection rights did not occur. We repeat our findings at paragraph 83 above.

140.6 Issue 5.9: The alleged incident was not capable of being a breach of the implied term, nor forming part of a course of conduct amount to such a breach. We repeat our findings at paragraphs 94 – 95. The Claimant perceived that she was criticised by management; but the evidence that she produced from Mr. Kiggins did not indicate that this was the case.

140.7 Issue 5.10: The Respondent failed to resolve the Claimant's 2015 grievance for the reasons set out at paragraphs 99 – 113 above. In any event, the Claimant did not complain that her grievance had not been resolved, nor did she pursue it after she had been told that it was to be put on hold due to her proposed personal injury claim. The Tribunal found that the actions of the Respondent were not capable of forming part of a course of conduct amounting to breach of the implied term.

140.8 Issue 5.11: As we have explained in our findings of fact and our conclusions below, the Respondent did not commit any act of disability discrimination.

141. Furthermore, as we have explained at paragraphs 87-89, the Claimant has failed to prove the "last straw" relied upon was something that was more than a trivial matter. For this reason, if no other, this complaint based on breach of the implied term of trust and confidence must fail.

Issue 6-8: Constructive dismissal

142. For all the above reasons, the Claimant was not constructively dismissed.

143. Accordingly, there is no need to decide issues 9-11, which deal with the question of whether any dismissal was unfair.

Issues 17-21: Whether there was a breach of the duty to make reasonable adjustments

144. *Issue 17: Knowledge of disability*

145. At all material times, the Respondent could reasonably be expected to know that the Claimant was a disabled person within section 6 EA. At the latest, the Respondent had notice that the Claimant was likely to be a disabled person on receipt of the OH report of 2 May 2017.

Issue 18: What is the PCP?

146. The List of Issues asks whether the Respondent expected the Claimant to work long hours beyond 9am – 5pm and to work evenings, and whether it provided the Claimant with an excessive workload.

147. The Claimant was not provided with an "*excessive workload*". The Claimant worked 37 hours per week, and no more unsocial hours than colleagues in the period from November 2017 until her resignation; she delivered less group sessions between about June and November 2017.

148. We concluded that the relevant PCP was as follows: the requirement that the Claimant work 37 hours per week in accordance with her scheduled programme sessions, which included the requirement to work up to three evening sessions up to 9pm each week.

149. For the avoidance of doubt, we found that the number of morning and evening sessions to be delivered by the Claimant each week would fluctuate over time. Therefore, the Claimant could be on a rota to work three evening sessions in one week; but this did not mean that she would be due to deliver morning sessions on each of those days. The above PCP meant that she would regularly work one long day each week, of about 11 hours 30 minutes, and that this could sometimes increase up to two days per week of more than 11 hours, depending on the scheduling for a particular week.

Issue 19: Whether the PCP placed the Claimant at a substantial disadvantage

150. As we have set out in our findings of fact, the Claimant failed to establish the facts necessary to prove that on a balance of probability that any of the substantial disadvantages alleged in paragraphs 19.1 to 19.6 of the List of Issues existed.

151. In addition to the above facts, there was no evidence and no allegation made in cross-examination that Ms. Butlin wrote to the Human Resources function of the Respondent to state only that the Claimant had mental health issues, whilst not mentioning Sepsis. This event did not occur. The facts at issue 19.3 were never alleged or put in cross-examination.

152. However, the first of the alleged reasonable adjustments in the List of Issues (issue 21.1) is that the shift pattern should have been adjusted so that the Claimant would work from 9.00am to 5.00pm.

153. The disadvantage that this relates to is the fatigue experienced by the Claimant when working longer days. This disadvantage of fatigue is alleged in the Claim Form.

154. From the evidence heard by the Tribunal, which was not contested, the degree of fatigue experienced by the Claimant caused her more than minor disadvantage. Accordingly, the Claimant was placed at a substantial disadvantage by the PCP.

Issue 20: Knowledge of substantial disadvantage

155. At the latest, by the date of the OH report of 2 May 2017, the Respondent knew or could reasonably be expected to know that the Claimant was likely to be placed at that disadvantage of fatigue by the PCP. This is apparent from the OH report which advises that a typical 9-5pm pattern would ensure that she was not working late shifts and allow development of a regular sleep pattern so that she could manage her symptoms. It is apparent from the report compiled for the ill-health capability hearing that Ms. Butlin was aware of fatigue affecting the Claimant's day to day activities in more than a trivial or minor way so as to amount to substantial disadvantage.

Issue 21: Did the Respondent make reasonable adjustments?

156. The Tribunal concluded that the Respondent discharged the duty to make reasonable adjustments by making the following adjustments:

156.1 Between about May 2017 and November 2017, the Claimant was allocated a reduced number of group sessions each week;

156.2 Where practicable, the Claimant would work at the Southend Centre (from about May 2017);

156.3 Where practicable, the Claimant would start work after 10am (from 28 June 2017 onwards);

156.4 The Respondent allowed the Claimant to leave work early, between 20.30 and 21.00, if she needed to catch a particular train home.

157. In respect of the alleged reasonable adjustment of adjusting the Claimant's pattern of work so that she worked 9am to 5pm, the Tribunal concluded that it was not reasonable or practicable to adjust the Claimant's working pattern in this way. In particular:

157.1 The sessions that the Claimant delivered were part of programmes for service users. The Respondent's service had to provide group sessions delivered in the morning and the evening. This formed the framework for the schedules of work and rotas of the tutors. It would not be reasonable for the service of this pattern of group sessions in mornings and evenings to be altered.

157.2 It was only possible for a Programme Tutor not to work in evenings on a very short-term basis. This was because evening sessions would have to be covered by other tutors, who were already required to work evening sessions. Generally, Tutors did not like or want to work evening sessions.

157.3 There was a lack of resources in terms of Tutors available to fill in for the Claimant if she did not work evenings. There were unfilled vacancies. It made it unreasonable and difficult if the Claimant were not to work evenings, given annual leave, sickness or other reasons for absence.

157.4 The Claimant did not work 11-12 hours per day "*constantly*" as she alleged. On the contrary, we concluded that she did not work that length of day frequently, because her contractual hours in total were 37 hours per week, and we found that she usually worked four days per week, with occasionally some work on a Friday. Given this fact, and given the limited amount of the tutor resources that the Respondent had at its disposal at the relevant times, it was not reasonable or practicable to put a greater burden of working unsocial hours on the other Tutors on a longer-term basis, particularly where they were already stretched and covering work, due to vacancies and absences.

157.5 At the conclusion of the ill-health capability hearing, the Respondent wanted to obtain further medical evidence so that it could better understand the Claimant's impairment and its effects, so that it could make reasonable adjustments in the longer term. Given all the above, it was not reasonable to make a long-term adjustment to the Claimant's hours to 9am to 5pm working given the heavy impact that this would have on the other Tutors, given the lack of Tutors due to the number of vacancies and absences. Subject to the further medical evidence, at the proposed ill-health review meeting (which had been due to take place in August 2017), the Respondent could have considered other longer term adjustments, which would have included redeployment or part-time working. This review never took place because the Claimant refused to consent to her GP providing the evidence requested.

158. In respect of the other adjustments alleged to be reasonable, the Tribunal concluded:

158.1 The Claimant gave no evidence that she was not able to have a proper lunch-break. We accepted Ms. Butlin's evidence; it would be very rare for the Claimant to have three sessions in one day.

158.2 It was not feasible for the Claimant to work "regular hours" given the nature of the service to be delivered in the form of structured and usually accredited programmes. The Programme Tutor role required the Tutors to be flexible, given the range of service users, programmes and locations, and the need to cover vacancies or absences.

158.3 The Claimant was not asked if she was infectious; but this adjustment would not address the substantial disadvantage of fatigue.

158.4 The adjustment alleged at issue 21.6 is not relevant to the substantial disadvantage identified above; but, in any event, the Claimant was not told this by the Respondent's managers.

Issue 13 – 16: Discrimination arising from disability

159. The Respondent did not treat the Claimant unfavourably as alleged in issue 14.1. The Tribunal repeat the findings of fact at paragraphs 94-95.

Issue 22: Harassment

160. The Tribunal concluded that the Respondent did not engage in the conduct alleged at issue 22.1; managers did not tell another employee that the Claimant was at fault for not intervening when an offender at reception was causing difficulty. We repeat paragraphs 94-95.

161. The Tribunal concluded that the Respondent did not engage in the conduct alleged at issue 22.2. Our reasons are set out in paragraph 83 of the findings of fact.

Summary

162. Before us, the Claimant ably and eloquently presented her case. However, as we have explained in the findings of fact, we found the Claimant to be a less reliable witness than any of the Respondent's witnesses. This was principally because of her misperception of events, and because her beliefs about the cause of certain events being connected to an orchestrated plan to harass her and force her to leave the Respondent company, were so strongly held that she was unable to perceive or accept any alternative explanation of events.

163. We have concluded that all the complaints fail. The Claim must be dismissed.

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Employment Judge Ross
Date: 28 January 2020