

Introduction

1. The Claimant was employed as an Information Advice and Assistance Worker by the Respondent in its Abergavenny office until 7th December 2017. She was employed continuously from 23rd February 2016, although prior to taking up her role as an Information, Advice and Assistance Worker she was on a fixed term contract as a Community Outreach Worker. She resigned from her employment by way of a letter dated 1st December 2017. She presented a claim to the tribunal on 12th March 2018 for unfair dismissal, disability discrimination and whistleblowing (public interest disclosure detriment and dismissal), which were resisted in their entirety by the Respondent. On 17th July 2018 EJ Beard held a preliminary hearing with the parties and set out the issues to be determined in detail. These are at page 28 of the hearing bundle.

The Hearing

2. We went through the List of Issues with the parties at the start of the hearing. The Claimant brings a claim for automatically unfair dismissal (public interest disclosure) on a constructive dismissal basis. She claims that the Respondent breached the implied term of trust and confidence. At paragraph 3.5 of the Case Management Order the conduct relied on is set out. We clarified with the Claimant whether there was a last straw and if so, what it was. She stated that it was the outcome of the appeal and grievance as outlined in the List but she stated that the enquiry by Chris Bowie as to whether she was working elsewhere ultimately influenced her decision to resign. Mr Maratos for the Respondent indicated that he was able to deal with that issue accordingly.
3. The Claimant's disability is Complex PTSD. It was clarified by Mr Maratos that knowledge of disability was not an issue and paragraphs 7.1 and 7.4 of the list of issues were struck through. It was clarified that for the reasonable adjustments claim at paragraph 7.5.4 the adjustments that were relied on as reasonable were the recommendations in the OH report which were to include removal from the work environment and/or a change of role. The Respondent raises limitation in respect of the mimicking incident at paragraph 8 and indeed in relation to any alleged acts or omissions that fall before 14th November 2017. The Respondent added that in the event that liability were established for unfair dismissal, the Tribunal ought to find that the relationship between the parties would have broken down and the Claimant would have been fairly dismissed for SOSR. Therefore, any award ought to be reduced on a 'Polkey' basis. It was agreed that any service users or the reference to any condition which might lead to the identification of a service user would be anonymised. Mr Maratos had applied for an Order to anonymise the Respondent's name but we found that this was not proportionate. Our reasons were that it was in the public interest to know about how a charitable organisation had managed equality and employment issues and that there was insufficient evidence to support the argument that the publication of the name would affect service users. We also found that the press had an interest in reporting the matter.

4. We heard evidence from the following witnesses for the Claimant: the Claimant and Sophie Amor. For the Respondent we heard evidence from Christine Bowie; Stephanie Thomas; Karen Peploe and David Bland. Two of the Claimant's witnesses were unable to attend owing to the Corona situation so we took their witness statements as read.
5. The case was listed for six days. However, during the week of the hearing we were alert to the possibility of the progression of the case being affected by individuals (to include witnesses and indeed the panel) taking self-isolating measures in the wake of the unfolding Corona virus pandemic. By Wednesday, following guidance in respect of social distancing, we determined that it would be necessary and proportionate to hear the remainder of the evidence that day and invite written submissions. We would then hold a remote chambers meeting to consider the evidence and submissions and reach our findings. The parties agreed to this course of action. We are grateful to them for assisting the Tribunal to follow the overriding objective of dealing with a case fairly in such exceptional and unforeseen circumstances. We directed the Respondent to file submissions first and the Claimant then to respond.

Written Submissions

6. On behalf of the Respondent it was submitted that there was a break in continuity of employment which would affect the Tribunal's jurisdiction to hear anything relating to the matters complained of prior to the Claimant's renewed engagement from December 2016. The Claimant re-applied for a position at the Respondent thus affirming any breach and breaking any act extending over a period. The Claimant changed the last straw that she was relying on at the start of the hearing. The outcome of the appeal was 9th November and early conciliation did not commence until the following January. The Claimant's attempt to vary the last straw goes to her credibility and in any event, it is difficult to see how Chris Bowie's enquiry could amount to a last straw. The acts complained of regarding the grievance and appeal are out of time. The appeal process was thorough and remedied any defects in the original grievance. In terms of any continuing act of bad language, Stephanie Thomas stated that if she had heard any poor language she would not have condoned it. In any event, the use of bad language was a letting off steam for the staff who worked in a difficult environment and was never used in front of service users. In any event, the Claimant did not resign in response to this or resign promptly. The mimicking event was dated and there were not subsequent similar events. The Claimant was not being ignored because of this event. Any changes in working relationships were to do with personality differences to include incompatible temperaments rather than being connected to matters that had been raised previously. The Claimant made a historic disclosure but this was an internal matter and was not in the public interest. On the basis that it was not repeated the Respondent had complied with its legal obligations. The break in continuity and the Claimant returning is inconsistent with any conduct being consequential upon the disclosure. There was no evidence that she was ostracised. The

Respondent acted reasonably in requesting the Claimant to submit a grievance. There was a right to balance the Claimant's interests with the right for other staff not to have their reputations blemished. Until the OH report arrived the Respondent could not reasonably know that the Claimant would be put at any disadvantage. The Claimant was on sick leave and therefore would not know whether any measures had been taken to alleviate any disadvantage. There is little, if any, evidence to show that the Respondent failed to apply policies. It would be difficult to assert that the conduct in terms of mimicking a disabled person was not in breach of s.26 but it was a one-off and therefore it would not be just and equitable to extend time. There was no evidence to support the assertion that the Claimant was isolated for raising an issue. The grievance and appeal procedures were conducted in good faith and not because the Claimant was disabled. Even if there was unfavourable treatment in terms of the Respondent asking the Claimant to raise a grievance, it was justified given the serious nature of the allegations and the balance needed to ensure fairness to those being accused. As for the reasonable adjustments claim, the Claimant was not fit to return to work and the OH recommended that she did not do so until the matters of concern were resolved. The duty to adjust arose as at the date of the capability meeting on 18th July 2017 and as such it would not be just and equitable to extend time. Pursuing the matter was fair and just to all employees. Matters had been dealt with informally before. The Respondent was unable to carry out any duty in relation to the environment as the Claimant was on sick leave. The Respondent was seeking to resolve the work environment issue so it cannot be argued that it was not following the report. The Claimant resigned before the Respondent had an opportunity to adjust. The Claimant resigned because she knew that the Respondent had found out that she had volunteered to assist a competitor. The Claimant did not resign promptly in respect of any alleged breaches and instead affirmed the contract.

7. The Claimant submitted that she blew the whistle on an incident in August/September 2016, which was admitted by the management involved in it. Despite this it was not escalated. She was suffering from some health and personal difficulties at the time and so did not push the matter but was of the view that management ought to have done something about the situation. The management swept the matter under the carpet to save their own involvement in it. In so doing they failed to consider their duty of care to her. The lack of management or escalation led to a situation where the Claimant was ostracised and the behaviour within the office was not kept in check. The Claimant requested to return to a safe environment. The Claimant requested unpaid leave to go to Kenya but instead found that she had been issued with a P45 and had to reapply for another post within another project. The organisation subsequently amended their records to provide for continuity of service. The Claimant was then sent to Coventry within the office. Her line manager imposed the requirement for her to raise a formal grievance and this may have been because she had hoped the Claimant would not do so and expose her actions. There was never going to be a positive outcome for the Claimant exposing the behaviour of management by way of a formal process. The Respondent's witnesses accepted that they did not take into account her condition or the

effects on the working environment on the Claimant's health. They did not take on board the effects the grievance process would have on her wellbeing. The Respondent did not make adjustments by changing the work environment/accommodation, changing the role from office based to peripatetic or redeploying the Claimant. The Respondent did not resolve the grievance appropriately. It failed to uphold the complaint about the workplace culture. There was no consideration of the effects on the Claimant as a person. The Respondent had sought to discredit her by alleging that she worked for a competitor. She had sought to raise this with her line manager in 2017. She was not told that volunteering would be in breach of contract. She volunteered in January and February 2018 in order to achieve her training licence as a MHFA trainer in Wales. In conclusion, the Claimant was treated poorly by the Respondent who sought to pass responsibility onto her. To conclude; the CEO Chris Bowie, violated her rights to privacy. She contacted the CEO of an organisation of which the Claimant was a service user to obtain information about the Claimant on the basis of hearsay.

The Law

Constructive Dismissal

8. Under s.95(1)(c) of the Employment Rights Act 1996 there is a dismissal when an employee terminates the contract of employment, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. In order to successfully claim constructive dismissal an employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
9. The House of Lords set out the definition of the implied term of trust and confidence in the leading case of **Malik v BCCI SA [1998] AC 20 (HL)** which was that 'an employer will not without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.
10. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a last straw incident even though the last straw does not by itself amount to a breach of contract. In **Omilaju v Waltham Forest London Borough Council [2005] ICR 481** the Court of Appeal held that the act constituting the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct. It must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a last straw. This must be judged objectively. This rationale was upheld in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**.

Protected Disclosure

11. The Claimant claims that she made a protected disclosure. Under s.47B of the Employment Rights Act 1996 a worker has the right not to be subjected to any detriment by any act, deliberate failure to act by his employer on the ground that the worker has made a protected disclosure. The right not to be dismissed is contained in s.103A Employment Rights Act 1996.

Discrimination arising from disability

12. The Claimant is or was a person with a disability. Under s.15 Equality Act 2010 an employer discriminates against a disabled person if it treats the employee unfavourably because of something arising in consequence of the employee's disability and it cannot show that the treatment is a proportionate means of achieving a legitimate aim.

The duty to make reasonable adjustments

13. The duty to make reasonable adjustments is contained in s.20 Equality Act 2010. Under s.20(3) the duty arises where a provision, criterion or practice of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Under s.21 a failure to comply with the duty amounts to discrimination.

Harassment related to disability

14. Under s.26 Equality Act a person harasses another if a person (A) engages in conduct relevant to a protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Under s.26(4) in deciding whether conduct has that prohibited purpose or effect each of the following must be taken into account: the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation

15. Under s.27 Equality Act 2010 person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act. The Claimant seeks to rely on s.27(d) in that she made an allegation that A or another person had contravened the Act.

Limitation

16. There are issues raised as to whether the Claimant has brought her disability discrimination and harassment claims in time and within the three months' time limit and whether any conduct that she complains of is properly considered to

be conduct extending over a period further to s.123 Equality Act 2010. If any of the Claimant's claims are out of time the Tribunal may consider whether it is just and equitable to extend the time limit for presentation. There is a requirement for her to have brought her whistleblowing detriment claims within the three months' time limit under s.48 Employment Rights Act 1996. This may raise questions as to whether there has been a series of similar acts or failures and whether the complaint has been brought within three months running from the last them. If any complaint is out of time the Tribunal may extend time only where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

Findings and Conclusions

17. The Claimant joined the Respondent's HiWay Team as a Community Outreach Worker on 23rd February 2016. Her contract for this position is at page 146 of the bundle. It was a fixed term until 30th September 2016. Her line manager was Mrs Steph Thomas who was the Project Co-ordinator. The Claimant's hours were 30 hours a week. From 22nd April 2016 the Claimant gained additional hours working as a Tenancy Support Worker for the Tenancy and Supported Living Team ('TASL'), which was managed by Jaime Devine. In turn, Mr Devine was managed by Bernadette Kelly, Operations Manager. The Claimant and other staff worked in an open plan hot desk environment in a Victorian building. It accommodated approximately twelve staff.
18. On 21st July 2016 Chris Bowie wrote to the Claimant informing her that it was unlikely that her position would be renewed and as such, she was being forewarned of the risk of redundancy. Up until this point, the Claimant had a reasonable working relationship with members of the teams. The Claimant complained that there were some bumps with members of staff leading up to the incident in August 2016 but in our finding there was nothing objective that we heard about in evidence, which indicated any serious problems.
19. We do find however that within the open plan office environment there was frequent bad language and banter which overstepped the boundaries of acceptability in terms of equality and diversity. We heard evidence from both the Claimant and Sophie Amor to this effect and we accepted it. There was reported to have been racially and sexually offensive language and comments made that were derogatory to people with mental and physical disabilities. The Respondent did not deny this but instead sought to explain that if there were members of staff who conducted themselves in this way it was a means of letting off steam in what could be challenging environment, given the nature of the service and some of the serious difficulties that they were assisting service users with. It was in effect a form of 'gallows humour'. We found that the use of such language was not only distracting in an open plan office environment but it was also offensive.
20. In August 2016 the Claimant overheard and saw Jaime and other members of staff imitating people with physical disabilities. There was laughter from

members of staff which the Claimant observed to include some participation by Bernadette, also a Manager. The Claimant was upset, shocked and offended. The Claimant contacted Bernadette on the phone to make her aware of what she had observed in the office. The Claimant returned to the office the following day but felt that she was ignored by Bernadette, Gail and Bethan. Mrs Thomas was not in the following day but when she was next in the office the Claimant informed her about what she had seen. Mrs Thomas invited Jaime into the meeting with the Claimant and he accepted what had happened but said that it was harmless banter. He apologised to the Claimant.

21. Mrs Thomas asked the Claimant what she wanted to do and whether she wanted to make a formal complaint. The Claimant chose not to. She said that she had had a past experience in the NHS where she had raised a grievance about misconduct and that the process had led to her being off on sick leave and had cost her her home. It is likely in our finding that the Claimant did not want to have a repeat of this experience. We also find that it is more likely than not that Mrs Thomas said that if she pursued the matter it would cost staff their jobs.
22. The incident was raised in the Housing Team meeting. The issue was further discussed at the Claimant's probationary one to one on 8th September 2016 and it was noted '*discussion re organisational issues regarding comments made in hot desk room which were discriminatory. Informal discussion with managers has been had and Steph to follow up again with BK/JD.*' The following day the Claimant sent an email to Mrs Thomas. In it she complained that the issue had not been acknowledged. She said that she had seen Bernadette several times but that she had not been offered any reassurance. She stated that she had noticed that the office had become quieter. She stated that she had made it plain to Jaime that she had felt that it needed to be dealt with as a serious matter but not to single any one person out. She stated that she felt awful about it.
23. We find that the Claimant remained unhappy about the incident and the management of it and that from her point of view, it was not resolved. We accept that Jaime raised it in the Housing Team as this was the evidence from Mrs Thomas, which we accept. However we had no evidence as to how this was delivered to staff. Jaime informed Mrs Thomas that Gail had offered to apologise to whomever had raised the issue. Mrs Thomas told the Claimant this. We consider that it is more likely than not that Jaime would not have treated the issue seriously particularly as he was one of those involved in the incident. He is likely to have given some informal advice to people just to keep it down a bit but nothing more than that, not least because the banter did not stop after this incident but continued, from the evidence that we heard. We find that it is more likely than not that he would have mentioned the Claimant's name. There was a culture of informality and management socialising with employees, including the Claimant on occasions.

24. We find that the Claimant did raise a protected disclosure in respect of this incident. We find that the conduct amounted to disability-related harassment under s.26 of the Equality Act 2010. This was conceded by the Respondent. The staff engaged in unwanted conduct relevant to the protected characteristic of disability which created a hostile and degrading environment for the Claimant. It was entirely reasonable for her to have felt offended and upset in the way that she did. We also find that it was the Claimant's reasonable belief that the staff involved were failing to comply with a legal obligation to which they were subject, namely to not discriminate. We find also that the Claimant reasonably believed that this was in the public interest as it affected the dignity of not just herself and those in the office but also the members of the public who were being served by the organisation. The Claimant makes it clear in her witness statement that she viewed this behaviour as unprofessional and felt offended by the fact that this happening in the context of staff who were serving vulnerable service users.
25. The Respondent has defended the case by putting the ball into the Claimant's court, so to speak, and has said that because the Claimant did not wish to raise the matter formally, nothing further was done. The Respondent has an Equal Opportunities Policy (page 123 of the bundle). At paragraph 8 of that policy it states 'staff, service users, volunteers and trustees will avoid and challenge the use of language which in any way belittles i) disabled groups or individuals with special needs'. We find that the matter was so serious and so in conflict with the apparent values of the organisation as a charity which catered for the needs of those with mental health disabilities, that the manager to whom the complaint was raised ought to have dealt with this robustly. We find that she did not. This was conduct that was tolerated and indeed encouraged in an open plan office by another manager and the Operations Manager, which may have made it hard for the Claimant's line manager to challenge. However, we find that there was no active challenge to the conduct. Those involved were not disciplined. There was a softened approach, quite possibly because this sort of language and banter was endemic in the office culture but that was in our view no excuse. The Respondent has a legal responsibility to ensure that this sort of conduct is not tolerated in a work environment. The email between Bernadette and the Claimant at page 182 suggests that the Claimant was taking matters all too personally. We find that the Claimant does have a sensitive disposition but we consider passing the buck back to the employee in this situation is a serious abdication of the sort of responsibility that senior management ought to be shouldering and indeed modelling for other staff in order to uphold the law and to protect them.
26. We find that it was more likely than not that the other staff in the office found out that the Claimant had raised the complaint and that this led to the atmosphere being different and the Claimant being ignored. The Claimant's evidence was that this was in particular by Gail and Bethan. Gail was the person who had done the mimicking actions. The Respondent contended that the Claimant was being ignored because of the way that she spoke to others in the office. There was an example that was highlighted as to the Claimant speaking

to two employees about their PIP clients when it was not her place to do so. However, that was a one-off incident and we do not consider that this would have led to a more sustained period of the Claimant feeling ignored and isolated. The raising of the complaint created a 'them and us' situation which proceeded to isolate the Claimant as the one who had made the disclosure. Had the Respondent set appropriate boundaries and managed this situation by treating the matter as serious and as a disciplinary issue, we find that any staff disgruntlement would not have been deflected back at her. The Respondent would have signalled by its action that it was the responsibility of all employees including management to observe the equal opportunities policy.

27. The Claimant went on sick leave on 13th September. She had crashed her car and was suffering from anxiety. The Respondent referred her to the Employee Assistance Program. Steph was supportive of her. On the Claimant's return to work she experienced further ostracising behaviour from Gail and Bethan.
28. The Claimant organised to go to Kenya at the end of her contract with the Respondent. In November the Claimant learnt that there was an upcoming vacancy with the Respondent. She applied for a post as an Information, Advice and Assistance Worker. The role was intended to commence on 1st December 2016. We note that the contract is signed on this date. We accept her evidence that she applied for the role because she did not have another job to go to and in effect, this was akin to a suitable alternative vacancy that had arisen. The Claimant was issued with a P45 but this was deemed to be an error by the Respondent and in response to the Claimant's later grievance, she was treated as continuously employed. We do not find that there was any break in her continuity. This was not raised an issue in the ET3.
29. The Claimant started her new post on 16th January 2017 after returning from Africa. She experienced not being engaged by her colleagues in conversation and felt ignored. We find that this was a continuation of the difficult environment which had arisen after she had made the complaint as the tensions started anew as soon as she started. She raised the matter with Mrs Thomas. She became increasingly anxious and as a result, ended up working harder in her new role as a way of trying to cope.
30. Jaime left the organisation and there was a leaving party at the end of January which the Claimant attended. During this evening the Claimant was informed by a colleague that one individual had said that she didn't like the Claimant and that she deserved all she got. The Claimant was also informed that the colleague was making fun of her while they were in the car going home. This upset the Claimant. The Claimant told Mrs Thomas about this and also Jaime in a text message conversation with him in March. Mrs Thomas's evidence was that she was aware of the Claimant's difficulties with other members of staff at this time but put it down to personality clashes and took the view that she did not get on with the majority of her colleagues. We find that nothing was addressed in terms of managing the situation.

31. In March 2017 the Claimant sought to train as a mental health first aider. She took some annual leave and went on a course. During this time she started to develop symptoms of dissociation and suicidal thoughts. On 31st March 2017 she informed Mrs Thomas of this and Mrs Thomas referred her for counselling. She presented to her local Mind service on 29th March. She presented to her GP on 5th April 2017 and her medical records indicate that she was diagnosed with recurrent depressive disorder. On 11th April she was prescribed antidepressant medication and diazepam. A fit note was issued on 5th April for depression and anxiety. The Claimant spoke to Mrs Thomas weekly during her period of sickness. She did not mention that she had been triggered by the working environment. She was assessed by the Community Psychiatric Nurse on 27th April 2020. She had mentioned her anxiety about her work environment to the nurse and was advised to have no contact with the organisation. To that end she emailed Mrs Thomas to advise that it was unwise for her to continue to talk to her. There was some email correspondence in May between the Claimant and Mrs Thomas and on 22nd May Mrs Thomas sent her a box of self care gifts, which the Claimant appreciated.
32. The Claimant was referred for an Occupational Health Assessment on 27th June 2017. The report is from Dr Atkinson and is at page 232 and is dated 27th June 2017. The diagnosis was anxiety and depression on top of a long-standing history of complex post-traumatic stress disorder. The Claimant reported that following her reporting of the mimicking incident in the summer of 2016 she felt that she was sent to Coventry by many of her colleagues. She reported to have felt even more ostracised on return to the new role. The physician recommended that the Claimant did not return to the same working environment as prior to her sickness absence. She suggested that the Claimant could meet with her line manager but not with other individuals as this could exacerbate her condition. She recommended mediation once the Claimant had recovered more fully. She envisaged that the Claimant could potentially return to her contracted role and her contracted work location once she had made a good recovery, providing the underlying perceived work stress factors had been addressed, particularly in relation to the issue of working environment/working relationships. It was recommended that consideration could be given to alternative work location or roles in the short or longer term if perceived work stress factors in the current work location could not be addressed. In addition, the physician recommended that she was managed 'sensitively and supportively' given the underlying nature of her sickness absence and health conditions. It was suggested that she might be given a mentor. It was recommended that the Respondent sought to conduct a risk assessment for work related stress and that consideration could be given to whether there was any funding for psychotherapy. She was not fit at this stage. The physician estimated that the Respondent sought a specialist report before she returned to the workplace.
33. The Respondent had actual knowledge of the Claimant's disability from the OH Report. The Claimant sought to establish that the Respondent had constructive knowledge prior to this because she had disclosed suffering from a mental

health condition in the past and had had conversations with her line manager. We find that she did not disclose any current mental health symptoms in her application which would have put the Respondent on notice to refer to Occupation Health. She complained of anxiety to her line manager and spoke of past issues but this was not enough for a referral at that stage. She was largely fit and able to carry out her work until the April of 2017.

34. On 7th July 2017 Ms Thomas wrote to the Claimant, inviting her to a capability meeting at the Abergavenny office. The Claimant attended on 18th July accompanied by Kathryn Scrivens. The meeting was held by Ms Thomas. Ms Saville took notes. The minutes are at page 252 of the bundle. In the meeting the Claimant was asked about the work environment and she stated that it could be loud and that the shared space was not always conducive to the types of calls that she had to make. She gave an example of talking a lady down from jumping in circumstances where there was raucous laughter and swearing in the background. As the discussion continued the Claimant stated that she felt that the environment had a profound effect on her wellbeing. The Claimant referred to the mimicking incident and stated that given that the two managers had been involved and their minimisation of the incident she had not been confident to raise a grievance. She was isolated within the office environment for raising it informally. She stated that she had wanted to avoid any conflict. Ms Thomas suggested that she raise a formal grievance. The Claimant complained that the responsibility should have been Management's to address the culture and that the onus was being put back on her to complain. The Claimant queried how she could go through the grievance procedure in her current state of ill health.
35. We had some sympathy for this point of view and found that the insistence on the Claimant raising a grievance was not reasonable. As we have indicated earlier, we found that in relation to the management incident in August 2016 the Respondent abdicated its responsibilities by failing to discipline those involved or do indeed to do anything to tackle the workplace culture. There was an admission by those involved and therefore no requirement to fact find in relation to this incident. The Occupational Health report had recommended that the Respondent should deal with the Claimant supportively and sensitively. We find that insisting on her raising a grievance about a historic event which was within the knowledge of the Respondent at a time when she was suffering from symptoms related to her C-PTSD was unreasonable. While there were clearly relationship issues within the team, the Respondent could have dealt with these by way of a mediated process or other informal resolution, as recommended by the OH Adviser. The Claimant stated in the meeting that emotionally a grievance would be difficult for her to proceed with. The Respondent was 'passing the buck' to the Claimant to grieve the problems relating to the culture of banter within the office when it was the Respondent's responsibility to tackle it and prevent a recurrence.
36. In response to the request to submit a grievance the Claimant did so on 28th July 2017. She added a grievance that she had not been given continuous

service when appointed to her role in January 2017 despite a verbal assurance given by the CEO. A grievance hearing took place on 22nd August 2017. It was chaired by John Matthews and Karen Peploe, Trustee Board Members. Karen Peploe had HR expertise. The Claimant was accompanied by Karen Scrivens. On 7th September 2017 meanwhile Sophie Amor's grievance was heard by Mr Matthews. She had resigned and raised a grievance about the inappropriate language and the negative office culture of banter. The Claimant emailed Ms Peploe to alert her to this grievance and she replied to say that Mr Matthews had informed her about it. In evidence we heard that the Claimant had not known Ms Amor before and had only learnt of her grievance and dissatisfaction around this time. We accept this. We found that Ms Amor was genuine in her dissatisfaction with the office environment and there was no evidence of collusion.

37. In our finding the grievance response did not address the Claimant's concern that the treatment of her by staff had affected her health. There was in our view an underplaying of the incident insofar as concerned the finding was that the employer had not failed in its duty of care. There was no outcome which specifically addressed the relationships between staff, which was why the Claimant was asked to raise the grievance in the first place in the context of the OH report. The grievance did not take the matter forwards for the Claimant in our view. It was acknowledged that the Claimant's time in Kenya was in effect unpaid leave and that her employment was continuous as between roles.
38. The Claimant appealed against the grievance on 29th September 2017 and this was directed to Mr Bland, CEO of Newport Mind. The Claimant raised concerns about his independence as he sat on the consortium panel Gwent. The Respondent assured her that he had independence away from the Monmouthshire Mind management team. The appeal hearing took place on 17th October 2017.
39. Mr Bland interviewed the staff as part of his investigation and his outcome letter was sent to the Claimant on 9th November 2017. Mr Bland's findings were that there was no evidence that the Claimant was bullied or harassed for raising a complaint about the incident in August 2016 and that all staff interviewed had said positive things about the culture. He did not find that staff broke the boundaries of acceptability save for the incident in summer 2016, which was dealt with. He found that some staff were behaving differently but this was because of issues of uncertainty surrounding the return of the TASL Project Lead from maternity leave. He found that some staff had modified their behaviour in response to the incident in the summer of 2016 but that this was an appropriate response to the issues raised. He did find that a grievance was a proper way to respond to the allegations that the Claimant had raised but that reasonable adjustments were not contingent on a formal grievance being raised. He recommended equality training to take place in December. He recommended that in future the Respondent give consideration to twin tracking grievances and capability for work meetings and that further meetings take

place between the Respondent and the Claimant to facilitate a return to work including mediation or restorative justice.

40. By operating its grievance procedure in this way the Claimant had to go through the trauma that she experienced at work in continuing to relay what happened either in documentation or in a hearing. We found this to be an unnecessary bar. We considered that as the grievance and appeal outcomes showed, the process led to the focus being lost. The Respondent's obligation having regard to the OH Report was to take steps to assist the Claimant to return to work. Over four months had passed since the OH Report had been made available and the Respondent had not moved the situation any further forwards. Instead of being supportive and sensitive towards the Claimant the Respondent had required her to relive her experiences via a grievance process and delay progress towards a return to work. We find that there was a culture of negative and inappropriate language which would reasonably have negatively affected someone with CPTSD. The appeal findings do not address the hostility of the environment and its impact on the Claimant.
41. There is no rationale as to why Mr Bland did not accept the Claimant's version of events, for example. Under cross-examination he stated that he found as he did because it was more likely than not that a wide range of people were consistent in telling the truth. However, this misses the point of the instigation of the grievance process in the first place. The grievance had been set in train because the Claimant had expressed to OH that the work environment had affected her. At no point did the Respondent ask itself about how to resolve the *perception* of the work stress factors (which included relationships) which was alluded to in the OH Report (page 235).
42. The grievance appeal appeared to us to be a positioning exercise by the Respondent which we did not consider was an entirely 'fresh look'. However, Mr Bland did indicate in his findings that reasonable adjustments were not contingent on a formal grievance being raised. Mediation was also suggested. It seems to us that the situation therefore came full circle back to the recommendation in the OH report, which again underlines that the grievance procedure was entirely superfluous and indeed detrimental to the Claimant.
43. We find that had the Respondent ought to have kept in view the recommendation from Occupational Health that they should deal with the Claimant supportively and sensitively. If there was an apparent reluctance on the part of the Claimant to engage in a grievance procedure (and we find that there was), as expressed by her in the capability meeting, the Respondent ought to have considered another option in terms of how to resolve the Claimant's concerns about returning to a workplace that she had hitherto found to be hostile. If necessary, the Respondent could have spoken to the occupational health advisor to find out what would have been the next best step and how to proceed in a way which did not affect the Claimant's recovery or trigger her. The utilisation of a grievance procedure only served to polarise her further when what was needed was a supportive and subjective approach

which focused on removing the work stressors, or perceived work stressors, in line with the Occupational Health report. The advisor recommended a specialist report, mediation, a stress risk assessment and a phased return with a mentor. The Respondent did not carry out any of these.

44. We find, having heard evidence from Chris Bowie, that there was a limitation on the physical office space that could be used. There was a room that was available in the building but this was required for service user meetings. The other building that the Respondent had was empty and we find that it was unlikely to be reasonable for the Claimant to have been isolated over there on her own in any event.
45. By the end of October the Claimant's health was improving to the extent that in November she asked Sarah Jones if she could sit in on her delivery of mental health first aid training on 7th and 8th December 2017 as she was interested in gaining her qualification. The Claimant had consulted her GP on 31st October 2017 and this records that she was feeling better and that her concentration was better.
46. Sheree Williams is the owner of Training in Mind, an organisation which provides mental health and wellbeing training. She has known the Claimant for twenty years on a personal level. In 2016 the Claimant had approached her to obtain details for a trainer training course so that she could become a mental health first aider. On the back of this she attended the course in Spring 2017 during her annual leave and as she was becoming unwell. On 30th November 2017 the Local Mind Director at Torfaen and Blenau Gwent Mind approached Sheree Williams to say that Chris Bowie had approached her to ask whether she had been working for Training in Mind or any other organisation. Chris Bowie did this because when she attended a business meeting on 27th November 2017 she was informed that the Claimant was undertaking a mental health training the trainer course with Training in Mind. Chris Bowie followed this up by making an enquiry of Training in Mind and decided not to take any further action against the Claimant when informed that she was volunteering.
47. We find that the Respondent ought reasonably to have spoken to the Claimant first to get her side of the story before drawing any conclusions about what she was doing and whether or not she was in breach of the sickness policy. In the event we find that going outside of the employment relationship to make enquiries with a third party outside of the employer in this way instead of speaking to her first was an act which was likely to endanger trust and confidence. The Claimant found out about it through Sheree Williams on 30th November 2017 who contacted her as she was concerned that the Respondent was enquiring with third parties about her movements. This affected her trust in the Respondent and she resigned. We accept that this was the last straw for her. We also find that this triggered an anxiety attack which is apparent from her medical records on 1st December 2017. The Claimant resigned on 1st December 2017. While this incident is not mentioned in the resignation letter we find that the chronology, medical records and chain of events indicates that

the last straw for the Claimant was that she learnt that Chris Bowie had been making enquiries of her movements with people outside the organisation. Since the Claimant was a client of Torfaen and Blenau Gwent Mind she felt vulnerable. Judged objectively the Respondent's actions added something to the way in which it had conducted itself before.

48. The Claimant was going to have a meeting with the Respondent in December 2017 to discuss next steps but owing to her resignation this did not take place.

Conclusions

49. Having found the above facts, our conclusions are these. The Claimant was dismissed by the Respondent on 1st December 2017. We find that the Respondent's treatment of her in failing to escalate the harassment incident in August 2016 to its disciplinary procedure left her in a situation where she was obliged to work in a work environment where there was frequent offensive banter and language. We find that it was likely that she was implicated in raising a complaint about the incident because Jaime, the manager, was himself part of it. We find that as a consequence, there was a difficult atmosphere in the office as regards the Claimant and her other colleagues and that this continued into 2017 when she returned from unpaid leave. It appeared to us that there was some indication from other employees that they felt that there was some difficulty with the Claimant but any difficulty with relationships within the office was not managed and the situation was left to continue. The Claimant then went off on sick leave because the isolating work environment triggered her to have an episode of poor mental health.
50. Instead of supporting the Claimant to return to work and following the recommendations in the Occupational Health Report, the Respondent requested the Claimant to put her concerns about the working environment into a formal grievance despite her explanation that she did not have the emotional resilience to do this. This was a further hurdle for the Claimant to face at a time when she was unwell. The grievance process did not move the matter forward at all. It caused a further delay and made the Claimant anxious. Meanwhile the Respondent did not make any steps towards trying to explore reasonable adjustments and get the Claimant back into work. The Respondent's conduct amounted to a breach of the implied term of trust and confidence culminating in the last straw of the CEO contacting an outside third party about her movements rather than speaking to her first. She resigned in response to the breach.
51. We now come to the issue of the reason for the dismissal. We find that the Claimant did make a protected disclosure under s.43B Employment Rights Act 1996 by informing her line manager that she had witnessed an incident where members of staff had mimicked a physically disabled person. We also find that this was a protected act for the purposes of s.27 of the Equality Act 2010 (victimisation). We find that the Claimant reasonably believed that her disclosure showed that one or more persons were failing to comply with a legal

obligation to which they were subject, namely the requirement to comply with equality law in the workplace. It is in the public interest for employees in any organisation to comply with equality law, but particularly in an organisation where they are interfacing with those who may have protected characteristics and be vulnerable. In our finding, there was an inextricable relationship between the disclosure and the subsequent conduct on the part of the Respondent. There was no cessation in the Claimant's employment because she took unpaid leave. The difficulties in staff relations remained when she returned. She was employed continuously. The principal reason was that the Claimant made the protected disclosure. The Respondent's actions in not managing the incident, not addressing staff relationship problems because of it and investigating it via a grievance procedure all arose because it refused to take full responsibility for the seriousness of the situation and the effect that it had on the Claimant. This is likely to be the case because two managers were involved. Therefore the Claimant succeeds in her claim for unfair dismissal under s.103A Employment Rights Act 1996. Our reasoning also applies to the victimisation claim under s.27 Equality Act 2010 and we uphold this claim.

52. As concerns the detriments, there was feedback from managers regarding what the result of the Claimant's disclosure was. The Respondent told the Claimant that Gail had apologised. Jaime apologised and the matter was raised in the housing team meeting. Therefore 4.3.1 on the List of Issues is not upheld. The Claimant, we find, was ignored. This must have ceased by the time that the Claimant went off on sick leave. Therefore, the claim is out of time. We did not hear any evidence that it was not reasonably practicable for the Claimant to put a claim in within the requisite three months' time limit. She did not do this. Therefore we find that the detriment claim at paragraph 4.3.2 is out of time.
53. The Claimant has a mental impairment, namely Complex Post Traumatic Stress Disorder. She has had this throughout her employment with the Respondent. We find however that the Respondent did not have actual knowledge of this until the OH Report. The Respondent concedes that the Claimant was a disabled person but only accepts that it had knowledge from this point onwards. We consider that this is reasonable. We find that there was nothing that the Claimant disclosed which would have alerted her line manager beforehand to refer her to occupational health. Further, if it was raised in the equal opportunities monitoring form this would have been for statistical purposes and would not reasonably have put the Respondent on notice to investigate further.
54. We find that requiring the Claimant to raise a grievance when she was suffering from CPTSD was unfavourable treatment. However we do not consider that the Respondent did so because of the things set out in paragraph 6.2; namely vulnerability to abuse triggers; exhaustion and dissociated state. The Respondent requested her to put in a grievance to make findings about her complaint that the workplace environment was difficult. Therefore the claim for unfavourable treatment under s.15 Equality Act 2010 is not upheld.

55. We now address the reasonable adjustments claim as set out in paragraph 7. We find that the Respondent operated a PCP of requiring the Claimant to work alongside the staff referred to as the housing team. The Claimant was in an open plan office and therefore this was an ongoing requirement. The existing work environment was strained and the Claimant felt isolated. Because of the Claimant's condition she was at risk of triggers to anxiety and a relapse in her mental health posed by either a working environment where employees used banter and offensive language or one where there were difficult staff relationships. The Respondent failed to carry out its duty by failing to carry out the recommendations in the Occupational Health report of exploring mediation and other restorative solutions. Instead the Respondent required the Claimant to undergo a grievance procedure. The Respondent ought to have looked into mediation, sought further advice and/or arranged a risk assessment which it did not. The Respondent did too little too late. The Respondent did not act and did not maintain reasonable communication in terms of keeping in touch with the Claimant to ask how she was and offer her any other support. It may have been that had the Respondent had this sort of communication with the Claimant the duty might have arisen earlier. However, we find that the Respondent ought to have acted on or around 31st October, which was when the Claimant reported to her doctor that she was starting to feel better. If the omission to act was around this time the Respondent might reasonably have made these adjustments between this date and 30th November, or at least, to have put the wheels in motion at this juncture. We appreciate that the Respondent was attempting to arrange a meeting with the Claimant prior to this but this was on the basis that it had exhausted the appeal procedure and no steps were actually made up until this point.
56. We find that even if the omission to make reasonable adjustments fell before 14th November and were out of time, we would have no hesitation in extending the time limit on a just and equitable basis. There was no prejudice to the Respondent that we heard of. The Claimant was going by the grievance procedure and waiting to see what the Respondent was going to do next. She resigned because of the last straw and before the Respondent had a chance to hold a meeting because it had fundamentally breached her contract of employment.
57. We were not apprised of any roles that were available and ready for the Claimant to slot into so we did not find that redeployment was reasonable. We also find that physical separation of the Claimant to another work environment was not practicable for the reasons given by the Respondent, namely that the office available was for service users and that the other building was not being used as a working environment and was not suitable. In any event we find that isolating the Claimant physically was not a reasonable step as it would have served to isolate her even more and kept team relations separate.
58. We find that the harassment claim under s.26 was well out of time. The incident occurred in August 2016 and the Claimant did not complain within the three months' time limit. If the ostracisation by colleagues were an act extending over

a period then this would have ended by the time the Claimant went on sick leave, which was 5th April 2017. We do not find that it was just and equitable to extend the time limit. The claim was some seven months out of time.

59. Since we found that the Respondent's conduct led to the Claimant's resignation and since the chain of events from August 2016 cumulatively amounted to a breach of the implied term of trust and confidence we do not find that had the Respondent acted reasonably it could fairly have dismissed the Claimant such that we make a Polkey reduction. There was no evidence that it could have fairly dismissed the Claimant for SOSR as it did not do anything to seek to repair the working relationships or follow the OH Report.
60. In conclusion, therefore, the Claimant's complaints of unfair dismissal, failure to make reasonable adjustments and victimisation are well founded and the case shall be listed for a telephone preliminary hearing so that directions for a remedies hearing can be set.

Employment Judge A Frazer

Dated: 7th May 2020

REASONS SENT TO THE PARTIES ON 7 May 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS