



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs A Baker

Respondent: Newcastle upon Tyne NHS Foundation Trust

Heard at: North Shields Hearing Centre **On** 25–29 November 2019

Deliberations in Chambers
11 December 2019

Before: Employment Judge Langridge

Members: Mr R Dobson
Mrs J Johnson

Representation:

Claimant Mr Richard Owen, CAB Adviser
Respondent Mr Dominic Bayne, Counsel

RESERVED JUDGMENT

1. The claimant was not dismissed by the respondent and her unfair dismissal claim therefore fails.
2. The claimant was not a disabled person within the meaning of section 6 Equality Act 2010 at the relevant time.
3. The claimant's claim for disability discrimination under section 15 Equality Act 2010 therefore fails.
4. The claimant's claim in respect of reasonable adjustments under section 20 Equality Act 2010 also fails.
5. All claims are dismissed.

REASONS

Introduction

1. The claimant brought claims for constructive unfair dismissal and disability discrimination arising from her employment with the respondent Trust. In her application to the Tribunal the claimant said she had had no problems with her work until October 2015 when she moved into a new department, after which she felt she was unjustifiably criticised, bullied by colleagues, and subjected to a formal capability procedure. In a lengthy document providing further information about the claim (the 'Further Information'), the claimant identified forty four separate allegations which she said cumulatively amounted to unreasonable conduct and a breach of trust and confidence. So far as the disability discrimination claims were concerned, the claimant asserted that she had a disability in the form of Generalised Anxiety Disorder (GAD) which led to certain treatment by her colleagues and managers. The claimant made claims under sections 15 and 20-21 Equality Act 2010, alleging discrimination arising from her disability and a failure to make reasonable adjustments. In her Further Information the claimant identified the provision, criterion or practice (PCP) relevant to the latter claim as being a requirement to "maintain an autonomous role within the team". Eight separate adjustments were identified, namely that the claimant should:
 - (i) Have access to senior support;
 - (ii) Have advice with regard to the consequences of the capability procedure;
 - (iii) Have time to complete assignments in respect of the capability procedure
 - (iv) Be given clarity over job security
 - (v) Receive advice in relation to seeking mentors
 - (vi) Be given specific career advice
 - (vii) Have the opportunity for a change of environment and change of team;
 - (viii) Be given use of time off in lieu to reduce hours.
2. In its response the respondent said it had had concerns about the claimant's performance which it raised from May 2016 onwards through various action plans. It also conducted stress risk assessments and followed a formal capability procedure with warnings. By stage 3 of that procedure the respondent made attempts to redeploy the claimant. In the latter part of the claimant's employment the respondent said it investigated a complaint she submitted about bullying and harassment at work. It accepted that on 1 May 2018 the claimant said she was a disabled person, in the context of requesting preferential treatment in the redeployment process. The respondent relied on the fact that there had been no indication from Occupational Health or the claimant that her health prevented her from carrying out her role.
3. The claimant resigned in July 2018 and went straight into a new job. Following her departure, the respondent forwarded to the claimant the report of the investigating officer who dealt with her bullying and harassment complaint.
4. The respondent took issue with all aspects of the claims, saying that the claimant was not dismissed, or alternatively that she did not resign in response to any

breach of contract on the respondent's part, and in any case the claimant affirmed the contract and she had she not left, she would have been dismissed. The respondent also asserted that it complied with all the recommendations made by Occupational Health.

5. In relation to the claim under section 15 Equality Act 2010, the respondent questioned whether any disability meant that the claimant suffered the effects that she claimed.
6. Following a Preliminary Hearing on 12 March 2019 the claimant provided a disability impact statement setting out the day-to-day activities she felt were adversely affected by her mental health impairment.
7. These claims were heard over five days. Five witnesses gave evidence, including the claimant. On the respondent's behalf evidence was given by the claimant's former line manager, Sarah-Leigh Nicholson, Laboratory Manager, and Hannah Marsland, Human Resources Officer. Evidence was also given by Graham King, Chief Information Officer, who as a director of the respondent dealt with the outcome of the grievance investigation and also with a stage 4 capability meeting. The final witness for the respondent was Matthew Weir, formerly employed as a Point of Care Testing Manager, who investigated the claimant's allegations about bullying in the workplace.
8. The documents comprised two substantial files containing approximately one thousand pages. For this reason the parties were directed to attend the Tribunal at 12 noon on 25 November to allow for some pre-reading in the morning. In the event, this time was insufficient for the Tribunal to complete its reading and a discussion took place with the parties late morning with a view to clarifying the issues and the timetable for the week.
9. During this discussion the Tribunal referred to the 44 allegations in the claimant's Further Information. These were worded in such a way as to suggest that the Tribunal was being invited to make findings of fact on each one. Given that these events dated back to October 2015, the Tribunal indicated that it considered it unnecessary and disproportionate to make findings of fact in relation to each of the 44 allegations. In response, Mr Owen conceded on behalf of the claimant that the relevant period began with a stress risk assessment and capability procedure from July 2017, such that the Tribunal could treat allegations (a) to (ee) in the Further Information as forming part of the background to the claims, rather than individual complaints relating to the unfair dismissal and disability discrimination claims.
10. There was then a discussion about the list of issues. For the respondent Mr Bayne identified the Further Information as falling into three types: some generalised allegations at the beginning of the document; specific allegations about negative comments from paragraph (h) to paragraph (ee), all of which fell into the background; and the operative part set out in paragraphs (ff) to (ll). Mr Owen agreed with this characterisation of the claims. There was some discussion about the jurisdiction point raised by the respondent, and which cause or causes of action this attached to. Mr Bayne clarified that there was no difficulty with the date when the unfair dismissal claim was brought, but the respondent would argue that

any act of discrimination predating 29 July 2018 was out of time. In response Mr Owen clarified that the claimant saw both elements of her disability discrimination claim as amounting to continuing acts and therefore brought in time.

11. Mr Bayne had produced to the Tribunal a chronology of events. Mr Owen was asked to comment on the respondent's note that on around 26 July 2018 the claimant was told that a colleague had made an allegation against her, and that this amounted to the last straw triggering her resignation. Mr Owen confirmed that this was correct. There was also a brief discussion about the date when the claimant resigned which Mr Owen said was 29 July 2018, although it appeared to the Tribunal that this may be in question as the evidence might show an earlier resignation which was simply confirmed on 29 July. The Tribunal pointed out that the precise chronology of the claimant's decision to leave her employment might be important, if the last straw event took place after she decided to leave. The respondent's position is that it would have dismissed the claimant in any event, relying on the grounds of capability by virtue of exhausting the capability process.
12. This preliminary discussion covered aspects of the claimant's disability claims. The Tribunal asked Mr Owen what evidence was being presented in relation to disability, given that the respondent was not conceding the point. Mr Owen said the claimant relied on an extract from her GP records and a post-employment letter from her GP dated 5 August 2019, as well as some Occupational Health reports, but no other medical evidence. The earliest reference to GAD in the medical records was in an Occupational Health report dated October 2016.
13. At this stage Mr Owen said he wished to modify the PCP previously identified for the purposes of the reasonable adjustments claim. He said it was the claimant being unable to carry out the role, and being put at a disadvantage, because of heightened anxiety, which in turn led to the capability procedure being followed.
14. In discussion about the section 15 claim Mr Bayne said that Mr Owen had identified to him the "something" necessary for the purposes of this section as being heightened anxiety. Mr Owen clarified that the claimant's case was being unable to carry out her role and meet standards, because the treatment she was receiving was causing heightened anxiety. The disadvantage to her was that the capability procedure was followed.
15. Following this discussion, it was agreed that the parties would revise and refine the list of issues overnight, for example to clarify the respondent's legitimate aim for the purposes of responding to any unfavourable treatment under section 15 Equality Act 2010. As a result, the respondent identified its legitimate aims as follows:
 - (i) To ensure that the respondent was able to discharge its responsibilities towards patients efficiently and effectively; to maintain a skilled and competent workforce; to identify and support employees that do not meet the standard expected of them; and/or where necessary to take fair action against them.

- (ii) Through its Management of Stress in the Workplace policy as applied to the claimant, to maintain and improve the physical and mental wellbeing of its employees; to encourage a healthy workforce; and/or to identify and reduce workplace stressors.
16. It was agreed that the hearing would be limited to liability issues only, with remedy being deferred to a later date if relevant. A timetable was then set for witnesses to give evidence for the remainder of the week, and the Tribunal acceded to a request from Mr Bayne not to sit on the morning of 28 November for personal reasons.
17. In the event it was possible to complete the evidence and submissions on 29 November. One point arose after Mr Owen had given his submissions on behalf of the claimant. Mr Bayne drew the Tribunal's attention to the fact that the claimant's allegation of being required to work in a demeaning environment on her return to work on 23 July 2017 was neither pleaded nor in the claimant's witness statement. He queried whether the claimant was in effect seeking to amend her claim. Mr Owen responded that he did wish to amend, arguing that being put into a demeaning environment was capable of being a final trigger even though he accepted that this had not been pleaded. He submitted that it was a more than innocuous event in the latter part of the claimant's employment. Mr Owen conceded that the claimant had accepted in evidence that the final trigger for her resignation took place after she resigned, when she spoke to HR about her interaction with a colleague in the corridor in early August 2017.
18. In reply Mr Bayne drew attention to paragraph 59 of the claimant's witness statement in which she said the trigger for her resignation was a meeting with the investigator, Mr Weir, on 26 July 2017, which was in complete contradiction to what was now being put forward. He referred to the clear evidence that the claimant had returned to work on a gentle phased basis and that she had agreed to this arrangement. The Tribunal considered the application to amend and the respondent's objection. We refused permission for the claimant to amend her claim so as to rely on being placed in a demeaning working environment from 23 July 2017 as the trigger for her resignation. Our reasons were that the application was made far too late, the point having emerged in the evidence only after the claimant's cross-examination and during questioning from the Tribunal. The point had not been pleaded and was not mentioned in the claimant's witness statement. Although the respondent had been able to give us some general evidence about the return to work arrangements, it had not come to the Tribunal prepared with detail to be able to respond to this as a specific complaint which triggered the claimant's resignation. We accepted the respondent's submission that the point was contrary to the case presented by the claimant throughout.

Issues and relevant law

19. The parties provided an agreed list of issues to the Tribunal, from which the following issues relevant to liability have been extracted:

Generally

19.1 Did the Respondent behave in the manner alleged by the Claimant at paragraphs 1(ff)–1(ll) of the ‘Further Information’?

Unfair dismissal

19.2 Taking into account the following has the claimant proved that the Respondent dismissed the claimant:

- (i) If any of the conduct alleged at paragraphs 1(ff) to 1(ll) of the ‘Further Information’ is found to be proven, did the respondent behave in a manner that was calculated or likely to destroy the implied term of mutual trust and confidence between it and the claimant when behaving in that way?
- (ii) If so, did the claimant:
 - accept the alleged breach;
 - waive the alleged breach; or
 - choose to affirm the contract and insist upon further performance?
- (iii) What was the reason for the claimant’s resignation on either 27 or 29 July 2018?
 - Did she resign in response to the alleged breach (or breaches) or resign for another reason including that she obtained new employment at Leica Biosystems with a start date of 6 August 2018?

19.3 If the claimant was dismissed, has the respondent shown that the dismissal was for a potentially fair statutory reason under s98 Employment Rights Act 1996? Was the sole or principal reason for the dismissal on account of the claimant’s capability or Some Other Substantial Reason?

19.4 If there was a dismissal and the respondent had a potentially fair reason for that dismissal, did the respondent act reasonably in all circumstances when dismissing the claimant?

Disability

19.5 Does the claimant suffer from a disability on account of Generalised Anxiety Disorder, and if so over which period did she suffer from that disability?

19.6 If so, at the material times prior to about 1st May 2018 did the respondent know, or ought the respondent to have reasonably known that the claimant was disabled?

Discrimination arising in consequence

Unfavourable treatment

19.7 If the answer to the questions at paragraphs 19.5 and 19.6 is yes, did the respondent subject the claimant to unfavourable treatment by behaving in the manner that is found to be proven at paragraphs 1(ff) to 1(mm) of the ‘Further Information’?

Arising in consequence

19.8 Did the claimant exhibit a characteristic of heightened anxiety arising in consequence of her alleged disability, manifesting itself in particular in:

- a lack of confidence
- a feeling of persecution or
- a need for reassurance and support?

19.9 If so, did the respondent subject the claimant to the treatment found to be unfavourable treatment at paragraph 19.7 because of that heightened anxiety?

Objective justification

19.10 If so, has the respondent proven that that the treatment was a proportionate means of achieving a legitimate aim? In particular:

- (i) Was it a legitimate aim of the respondent's Capability Procedure, as applied to the claimant, to ensure that the respondent was able to discharge its responsibilities towards patients efficiently and effectively; to maintain a skilled and competent workforce; to identify and support employees that do not meet the standard expected of them; and/or where necessary to take fair action against them?
- (ii) Was it a legitimate aim of the respondent's Management of Stress in the Workplace Policy, as applied to the claimant, to maintain and improve the physical and mental well-being of its employees; to encourage a healthy workforce; and/or to identify and reduce workplace stressors?
- (iii) If so, in either case, was the action taken by the respondent under those policies a proportionate means of achieving those objectives?

Reasonable adjustments

19.11 Did the respondent apply a Provision, Criterion or Practice of requiring the claimant to carry out the role of Biomedical Scientist?

19.12 If so, did this requirement place the claimant at a substantial disadvantage on account of her alleged disability when compared with those who do not suffer from that disability, namely the disadvantage of not being able to fulfil the role as well as she would like?

19.13 If so:

- (i) Would giving access to advice and support have alleviated that disadvantage?
- (ii) Further and/or in the alternative could the respondent have given any further advice on the respondent's capability procedure and would this have alleviated that disadvantage?
- (iii) Further and/or in the alternative would giving the claimant further time to complete assignments arising from the capability procedure have alleviated that disadvantage?

- (iv) Further and/or in the alternative did the respondent not give the claimant clarity over job security and if so would this have alleviated that disadvantage?
 - (v) Further and/or in the alternative would assigning a mentor to the claimant have alleviated that disadvantage?
 - (vi) Further and/or in the alternative would providing specific career advice have alleviated that disadvantage?
 - (vii) Further and in the alternative would changing the claimant's work environment have alleviated that disadvantage?
 - (viii) Further and/or in the alternative would giving the claimant time off in lieu have alleviated that disadvantage?
- 19.14 Were any of the adjustments contended for made by the respondent; and if not, would it have been reasonable for the respondent to have made them?

Jurisdiction

- 19.15 Did the alleged acts of discrimination contrary to section 15 of the Equality Act 2010 form part of a course of continuing conduct ending after 29 July 2018?
- 19.16 Did the alleged failures to make reasonable adjustments form part of a course of continuing conduct ending after 29 July 2018?
- 19.17 If not, in either case, would it be just and equitable for the tribunal to extend time to enable it to consider those claims?
- 20 Those were the issues identified in the list of issues. The applicable legal principles are summarised below.

Constructive unfair dismissal

- 21 It was for the claimant to show that she had been dismissed within the meaning of section 95(1)(c) Employment Rights Act 1996 (ERA), in that she was entitled to resign with or without notice by reason of her employer's conduct.
- 22 The Tribunal took into account the key authorities relating to constructive unfair dismissal cases, including the decision of the Court of Appeal in London Borough of Waltham Forest v Omilaju [2005] IRLR 35, which helpfully summarises the key authorities of Western Excavating v Sharp [1978] 1 QBD 761, Malik v BCCI [1998] AC 20 and Woods v WM Car Services [1981] ICR 666. In essence, an employer must 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. Conduct which is merely unreasonable does not meet the required threshold. The conduct has to be a fundamental breach of the contract going to the root of the relationship.
- 23 While it was necessary to examine the respondent's conduct leading up to the claimant's resignation, it was also appropriate for the Tribunal to consider the claimant's conduct. The test to be applied when considering the claimant's reaction to the conduct is an objective one; in other words, the question is whether it was

reasonable for the claimant to regard the respondent's actions as a fundamental breach of her contract.

- 24 A breach of the implied duty of trust and confidence will be regarded as a repudiatory breach going to the root of the employment relationship: Morrow v Safeway Stores [2002] IRLR 9. The claimant's claim relied on such a breach arising by virtue of allegations (ff) to (ll) of the pleaded case. The last straw was said to be the claimant's discovery on 26 July 2017 that a colleague had made allegations against her. Where a last straw is relied on, the act in question does not have to be of the same character as the earlier acts in the series, provided 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." – Omilaju. The Tribunal was also assisted by the Court of Appeal's reasoning in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 in relation to the analysis of the events leading to a resignation.
- 25 The Tribunal had also to consider whether the claimant resigned in response to the breach, or whether she resigned for another reason.
- 26 If the claimant persuaded the Tribunal that she was dismissed, it was then for the respondent to show the reason or principal reason for dismissal. The respondent relied on capability or alternatively some other substantial reason under s.98(1)(b) ERA as the underlying reason.
- 27 The next stage would be to consider whether that dismissal was fair or unfair in all the circumstances of the case, pursuant to section 98(4) ERA. In keeping with the guidance in Iceland Frozen Foods and other authorities, it was not for the Tribunal to substitute its own view of the case but rather to consider whether the dismissal fell within or outside a range of reasonable responses.

Disability status

- 28 Section 6 Equality Act 2010 (Equality Act) defines a disability as follows:
- (1) A person (P) has a disability if—*
- (a) P has a physical or mental impairment, and*
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
- 29 The word "substantial" is defined in section 212(1) as meaning "more than minor or trivial".
- 30 Schedule 1 of the Act provides additional guidance. Paragraph 2 provides that the effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to recur.
- 31 Paragraph 5 of Schedule 1 provides that medical treatment should be ignored when assessing the substantial adverse effect of an impairment:

An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

- 32 Guidance was issued in 2011 by the Secretary of State on matters to be taken into account in determining questions relating to the definition of disability. Section A of that guidance deals with the main elements of the definition of disability, and paragraph A4 provides:

*Whether a person is disabled for the purposes of the Act is generally determined by reference to the **effect** that an impairment has on that person's ability to carry out normal day-to-day activities.*

- 33 Paragraph D3 of the guidance deals with normal day-to-day activities:

In general day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day-to-day activities can include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern.

- 34 Paragraph D19 of the guidance states:

A person's impairment may adversely affect the ability to carry out normal day-to-day activities that involve aspects such as remembering to do things, organising their thoughts, planning a course of action and carrying it out, taking in new knowledge and understanding spoken or written information. This includes considering whether the person has cognitive difficulties or learns to do things significantly more slowly than a person who does not have an impairment.

- 35 The guidance also includes an appendix which sets out an illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect. Those factors include the following:

Difficulty understanding or following simple verbal instructions

Persistent and significant difficulty in reading or understanding written material ... for example, because of a mental impairment

Persistent distractibility or difficulty concentrating

- 36 There are also examples of factors where it would not be reasonable to regard them as having the required effect, including:

Inability to concentrate on a task requiring application over several hours

Reasonable adjustments

37 The duty to make reasonable adjustments arises from section 20 Equality Act, the relevant parts of which state:

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

38 Section 21 provides that a failure to comply with such a duty amounts to discrimination. In order for the claim to succeed, the claimant must show that she was subjected to a provision, criterion or practice (PCP) and that this put her as a disabled person at a disadvantage.

39 The PCP relied on by the claimant in this case was initially the requirement to maintain an autonomous role, later modified to her claimant being unable to carry out her role, and being disadvantaged, due to her heightened anxiety.

40 Factors going to reasonableness under section 20 include the size and resources of the employer, the practicability of the proposed step and the cost. Importantly, consideration must also be given to the question whether the proposed steps would be effective in removing the disadvantage, as well as any certainty or uncertainty about that question.

Section 15 claim

41 The final claim was that the claimant's dismissal was discriminatory by virtue of section 15 Equality Act, which protects against dismissals arising from disability unless they can be justified. Section 15 provides that:

- (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.*

42 The Equality Act requires claims to be brought within 3 months of the act complained of, and this can include the last in a series of acts. The respondent took issue with whether the claims under sections 15 and sections 20-21 were brought within time. The Tribunal considered this after hearing all the evidence as part of its general deliberation of the issues. We took account of the fact that we

had discretion to extend the time limit if the evidence persuaded us that it would be just and equitable to do so.

Findings of fact

- 43 The claimant began working for the respondent on 6 May 2008. From 1 October 2015 she began working as a specialist biomedical scientist in the Cellular Pathology department, based in the Royal Victoria Infirmary in Newcastle. The claimant was employed as a Band 6 manager with some supervisory responsibilities. Initially she worked with a new team in the research lab managed by Anna Long, who was happy to have the claimant in the team due to her experience. Several review meetings took place between 24 November 2015 and 21 January 2016 during which it emerged that there had been some issues between the claimant and some of her colleagues early on, and furthermore Ms Long felt that the claimant was not advancing her skills as hoped. The claimant herself expressed some concern about the mistakes she was making. She was, however, happy with her workload when this was reviewed in November 2015.
- 44 By the time of the next review on 7 December 2015 the claimant was feeling happier at work. There was a discussion about the fact that she often lost focus due to talking at work, and about moving the claimant into a different team, in Slide Production, to improve her skills.
- 45 On 21 January 2016 a formal three month probationary review was conducted by Ms Long, when there was discussion about the claimant's skills not yet meeting standards, although she was making progress. In some areas her work was satisfactory and in others it was not. The transfer to the new team was agreed and as a Band 6 manager the claimant was to lead the team in Slide Production. The claimant would be managed by a new Band 7 manager, Jean Vickers.
- 46 From early February 2016 onwards Ms Vickers conducted a regular series of review meetings with the claimant, which continued throughout the year. At this early meeting they discussed her lack of focus and being distracted by talking at work, and the need for the speed and quality of her work to improve. Ms Vickers also noted where improvements had been made, and feedback was given. There was some discussion at a meeting on 2 February about colleagues in other teams having fed back to Ms Vickers that there were issues about the claimant's technical skills. In her Further Information document the claimant alleged that Ms Long made negative comments to her on 13 April 2016 (allegation h), but there was no other evidence of this nor any evidence to support similar allegations of negative comments by Ms Vickers and other colleagues during 2016.
- 47 On 29 April 2016 the claimant was referred for the first time to Occupational Health, who reported that she had an underlying medical condition "likely to be covered" by the Equality Act, but that she was fit for work. The claimant had reported that recent work adjustments had been positive and helped increase her confidence. Two recommendations were made: that the claimant be given time to attend appointments and Occupational Health reviews; and that a stress risk assessment be carried out. Both recommendations were actioned.

- 48 On 6 May a capability action plan was put in place and a progress review meeting took place with Ms Vickers on 19 May. At a further review meeting on 3 June there was a discussion about one colleague not being happy to act as the claimant's mentor. Further progress reviews took place on a regular basis with Ms Vickers. By 15 July she felt able to sign off all the claimant's competencies and noted that she had made good progress.
- 49 On 25 July 2016 the claimant consulted her GP about her mental health for the first time. The GP noted that she had had a new episode of "mixed anxiety and depressive disorder". Also noted was that the claimant had reported she had seen a doctor at work "who has diagnosed her with GAD". This was a reference to the Occupational Health adviser seen by the claimant.
- 50 Other events which formed part of the background allegations in this case were said to have taken place in August 2016, but the claimant produced no evidence of these and the Tribunal makes no findings about them.
- 51 Ms Vickers continued to conduct progress reviews with the claimant. At a meeting on 23 September 2016 she noted that the claimant was experiencing reduced confidence, and there was some discussion about the claimant trying to build her confidence.
- 52 On 7 October Occupational Health reported again that the claimant had an underlying medical condition, the nature of which was such that it was "likely to be considered by the Equality Act." Having referred to the Equality Act on this occasion and in its previous report, Occupational Health made no further references to the Act in subsequent reports. It was confirmed that the claimant remained fit for work and recommendations were made for a stress risk assessment and time off to attend appointments. Both recommendations were again acted upon.
- 53 On 18 October the claimant's GP recorded that the mental health episode that she had experienced had ended, meaning that it had a duration of less than twelve weeks. The claimant accepted this interpretation in her oral evidence to the Tribunal.
- 54 The latter part of 2016 involved ongoing allegations about negative comments made by colleagues to the claimant. During this period, a stress reduction plan was put in place by the claimant's then line manager, David Evans, with support from Hannah Marsland, HR Adviser. The plan noted that the claimant was complaining of feeling belittled by a colleague. She was encouraged to keep a record of her concerns or to raise them under the respondent's Dignity and Respect at Work Policy. The claimant did not do so at that time.
- 55 A further progress review took place with Susan Wood, Training Manager, and Ms Vickers on 20 December 2016 when they noted that the claimant had shown an improvement in her confidence and team leading. She saw her difficulties as being with problem solving and working autonomously. The claimant requested specific

objectives so that she could understand what was expected of her as a Band 6 manager.

- 56 Early the following year the claimant was again seen by Occupational Health whose report dated 13 January 2017 recorded that she had experienced significant improvement and continued to enjoy her work. No recommendations were made, and the claimant was discharged for the time being from Occupational Health. A stress assessment review then took place on 26 January at which the claimant reported that she had had no problems with colleagues since the previous meeting.
- 57 Although aspects of the claimant's employment, particularly relating to relationships with colleagues, were improving by early 2017, line management remained concerned about failings in her performance. The claimant was invited to a stage 1 capability meeting on 14 February at which these concerns were discussed. The meeting was conducted by Mr Evans and the claimant was accompanied by her trade union representative (as she was at all subsequent meetings of this kind). The claimant was made aware that there had been considerable progress in her performance but that there was "a little way to go". Mr Evans' concern related not so much to the claimant's technical skills but her leadership abilities, which in turn had an impact on her relationship with colleagues who reported to her. After considering the position, Mr Evans decided to issue a verbal warning. He decided against a written warning as he recognised the improvements made by the claimant with her technical skills. However, he felt that a verbal warning was appropriate to ensure the claimant understood that further progress was required in relation to leadership skills. A three month action plan was put in place.
- 58 The stage 1 outcome letter was sent to the claimant on 27 February. The claimant was given a right to appeal but chose not to do so.
- 59 The claimant produced to the Tribunal a letter from her GP dated 5 August 2019, obtained for the purpose of these claims. It said that the claimant was initially seen at the extra care consultation hub at the beginning of May 2017, when she described work-related stress and also some family stresses. She was referred to Talking Therapies, who felt that it would be more appropriate to be seen by MIND. The GP referred to the claimant describing "increasing anxiety and also agoraphobia". She described feelings of low self-esteem and self-worth and felt very negative about everything. The letter noted that "These symptoms had an impact on her ability to function on a day to day basis".
- 60 On 11 May the claimant was referred for counselling by her GP. Her counsellor noted that the claimant was "unsure if she was getting bullied by her manager ... not sure if she is misunderstanding what people are telling her or if she is getting bullied". The following day, the claimant began a period of sickness absence for work stress, lasting a few weeks until she returned to work on 25 June. During her absence the claimant attended Occupational Health on 17 May and the report noted that a recent acute physical illness had impacted upon the claimant's ability to cope with the demands of the work. The report noted that the claimant was managing long-term symptoms in relation to a separate condition and had

experienced general improvement over the last few months. Occupational Health identified some workplace concerns and recommended that these be addressed. The concerns were identified as follows:

- Access to senior support
- Workload pressures
- Time to complete assignments for the capability process

61 The report noted that a prompt return to work was likely to be beneficial.

62 A further Occupational Health report dated 4 July followed up the recommendations with workplace concerns, adding to the three items above some additional concerns about job security. The report recommended considering giving the claimant advice regarding:

- The specific consequences of the capability process
- Clarity over job security
- Seeking a mentor
- Specific career advice

63 A stress assessment review then took place on 7 July, when the claimant reported that she had no concerns with colleagues and that there was “good team morale”. The period following the stress risk assessment on 7 July 2017 was the subject-matter of Allegation (ff), in which the claimant claimed she was “subjected unreasonably to a further action plan to be reviewed on 20 September 2017”.

64 The claimant was originally employed on a temporary fixed-term contract which was due to expire on 30 September 2017. By the middle of July that year she was becoming anxious about her job security, and conducted a redeployment skills audit with Hannah Marsland in case her position was not made permanent. The respondent was unable to confirm whether or not the position was secure until funding was obtained.

65 By the time the claimant saw her GP on 4 August she reported that work had improved considerably. She said that the “manager that she was having problems with [meaning Ms Vickers] appears to have changed her behaviour...now appears very supportive and understanding...”.

66 On 31 August the respondent moved forward to a stage 2 capability meeting in accordance with its capability procedure, as it remained concerned over aspects of the claimant’s clinical performance. The claimant was made aware that the respondent had had to move members of her team elsewhere because they had expressed concern about her capability. The claimant acknowledged that she had been making mistakes and said the meeting had been helpful because specific explanations were provided of where she had been failing. There was also some discussion about the raising of reports to flag up Corrective Action, Preventative Action, known by the respondent as CAPAs. The claimant said she was confident about raising such reports. The respondent operated the CAPA system in order to identify mistakes, which were to be self-reported or reported on behalf of others,

not as an exercise in taking punitive action but rather to identify areas of concern and take corrective action, or to spot patterns.

- 67 At this same meeting the claimant was informed that her post had now been made permanent following receipt of funding. Approval had been obtained to create a permanent position. The outcome of the stage 2 capability meeting was a final written warning, which was issued to the claimant along with an action plan for the future. The meeting, warning and action plan under Stage 2 were the subject of Allegation (gg) of the claimant's claim, where she said she was "unreasonably subjected" to these actions between August and October 2017.
- 68 The next referral to Occupational Health was on 15 September 2017 when it was noted that the claimant was feeling more comfortable and confident at work. No recommendations were made. A stress risk assessment review followed on 20 September, when the claimant reported that her relationships with colleagues had improved and that she was enjoying work. The stage 2 outcome letter was sent on 21 September, making the claimant aware that the final written warning would remain live for 24 months.
- 69 From October 2017 the claimant was working in a permanent post, as advised verbally a few weeks earlier. In Allegation (ii) of her claim, the claimant complained of "unreasonable delay" in giving her written confirmation, which took some months to provide.
- 70 On 5 October the claimant emailed the respondent to express her disagreement with the final written warning but saying she did not wish to appeal it because she felt she could not focus fully on her new action plan if she did that.
- 71 On 3 November the claimant informed her GP that her work situation had improved, and although she was on a 2 year final written warning, she felt she had coped well with this.
- 72 In December the claimant wrote a letter to the respondent in which she accepted she was "presently not confident to run slide production or a team".
- 73 Meetings continued to take place with the claimant from the early part of 2018. On 9 January she attended a stage 3 capability meeting at which the claimant reported that she was "really enjoying working with everyone now". The respondent's ongoing concerns about CAPAs and other issues were discussed. The meeting resumed on 18 January when the claimant was told she was not meeting performance standards, and the possibility of redeployment was discussed. By agreement, the claimant was added to the redeployment register on 31 January, for an initial 8 week period, and opportunities were then forwarded to her. In Allegation (hh), the claimant alleged that she was "unreasonably subjected" to these two meetings and processes. At the time she had no objection to them.
- 74 It was at around this time, in January 2018, that the claimant began looking for alternative work outside the Trust.

- 75 On 11 February 2018 Ms Marsland emailed the claimant to explain that she would need to go through a competitive exercise as part of any job applications in the redeployment process, and would not be given prior consideration because that was generally only applicable when the reason for redeployment was a health condition. The claimant did not reply to that email saying that she considered the prior consideration rules applied to her as a person with a disability.
- 76 On 22 February the claimant raised a grievance about alleged bullying by colleagues, and the next day she began a period of sickness absence citing work stress. An Occupational Health report dated 1 March noted that the claimant was experiencing increased anxiety, and the respondent was recommended to consider a change of environment, change of team, or use of TOIL to reduce her working hours. The respondent appointed Matthew Weir, then employed by the respondent as a Point of Care Testing Manager, to investigate the grievance. On 11 April he met the claimant at an initial grievance investigatory meeting. At the beginning of May the claimant requested that the respondent conclude her grievance before being considered for further redeployment opportunities.
- 77 A further Occupational Health report dated 8 May noted that the claimant felt unable to foresee a timely return to work, and the adjustments previously suggested were repeated. Neither the claimant nor the Occupational Health reports indicated to the respondent, on this or any other occasion, that any health condition prevented the claimant from carrying out her role.
- 78 By a letter dated 16 May 2018 the respondent finally confirmed to the claimant in writing that her post had been made permanent. This delay was the subject of Allegation (ii), in which the claimant said that: "At each stage [she] was advised that her temporary position was to be made permanent from October 2017 but there was unreasonable delay in giving confirmation in writing which was not received until May 2018".
- 79 Meanwhile the claimant's sickness absence continued and a review on 22 May noted that she was doing well, and was fit to attend the forthcoming stage 4 capability meeting on 4 June. At this review meeting, the possibility of a change of team was explored. The formal capability meeting was chaired by Graham King, Chief Information Officer and a director of the respondent. It took place after the respondent sent the claimant its statement of case, to which the claimant provided a written response. In Allegation (jj) of her claim the claimant said that the stage 4 meeting was "unfairly dealt with", alleging that her detailed written response was not given proper consideration, her character references were dismissed as inconsequential, and no notes of the meeting were provided. In fact, the meeting was not treated as concluded on this first occasion, but was left open in accordance with the claimant's request to adjourn it pending the conclusion of her dignity at work complaint.
- 80 While the outcome of both these procedures was awaited, the claimant attended a further sickness absence review under the respondent's long-term sickness absence management policy, on 2 July 2018. She reported that she felt well and wanted to return to work. There was discussion about a change of team to facilitate that, and possible mentors. The agreed outcome was that the claimant

would return to work in a different team, in Specimen Reception. Although the claimant did return to work on a phased basis in this team, on 23 July, other developments meant that this was short-lived.

- 81 On 6 July, while still on sick leave, the claimant emailed Ms Marsland to say she had been offered a senior scientist position external to the respondent Trust, which she was hoping to start on 6 August. She said she had spoken to her line manager, Sarah Leigh Nicholson, earlier that day to inform her. From here, the process of the claimant's resignation proceeded in several stages, and overlapped with ongoing email exchanges between her and Ms Marsland about redeployment opportunities. The claimant was torn about her decision to leave and retained some hope of staying with the respondent. On 16 July the claimant emailed Ms Marsland again, this time confirming her start date in the new job of 6 August, and saying she would hand in her resignation as soon as her references were accepted by her new employer. The claimant added that she remained interested in band 6 research positions under the redeployment scheme. The claimant also asked Ms Marsland if she could have sight of references that had been given on her behalf by the respondent.
- 82 On Monday 23 July the claimant returned to work in the Specimen Reception team, carrying out altered duties which she had agreed would be helpful in managing her phased return. A few days later, on 26 July, the claimant attended a final investigatory meeting with Mr Weir in relation to her grievance. This meeting, and a telephone conversation with HR at around the same time, were the subject of Allegation (II). She alleged that she was told in both conversations that a colleague had made an allegation against her, about aggressive behaviour in a corridor. This was the alleged last straw leading the claimant to her decision to resign. What Mr Weir in fact told the claimant at the meeting was that some of his questions "may seem as though there have been counter allegations made against you". He clarified that he was not investigating any "official allegations" against the claimant but did need to explore them during the interview. The claimant interpreted this to mean that an allegation, the substance of which she disputed, had been made against her, but this was not actually the case. In Allegation (II) the claimant also alleged that the respondent had failed to investigate this "false allegation".
- 83 In the period between meeting the claimant in April and July 2018 to discuss her complaint, Mr Weir had conducted a large number of interviews with many witnesses, as the allegations of bullying by colleagues were extensive. He encountered some difficulties with progress over the summer period, when staff were taking annual leave, and also had to accommodate his and witnesses' usual workloads. This timetable, and the delay in notifying an outcome (which came after the employment ended), were both the subject of Allegation (mm) in which the claimant complained of unreasonable delay. In her evidence the claimant also said she did not feel the investigation into her complaint would be fair, and felt it had been pre-decided.
- 84 On Friday 27 July the claimant spoke with Ms Nicholson and informed her verbally of her decision to resign with effect from 3 August 2018. The only reason she gave was that she had a new job, and she thanked Ms Nicholson for her support. They agreed that 3 August would be the claimant's last day of work. On 29 July the

claimant emailed both Ms Nicholson and Ms Marsland referring to that discussion and saying, "I am confirming in writing, my decision to resign, my final day agreed with you will be Friday August 3rd 2018." No reasons for the resignation were given.

- 85 On Monday 30 July the claimant emailed Ms Marsland again, saying, "Further to my resignation email. Although I am leaving because I have another position I want it in writing that I am leaving because I feel I have been treated unfairly while working in Cellular Pathology". This email was copied to her union representative.
- 86 After the claimant's employment ended on 3 August 2018, the respondent continued to see its internal procedures through to a conclusion. Mr Weir's investigation report into the claimant's complaint of bullying was finalised in September and a grievance outcome letter was sent to the claimant by Graham King, on 4 October. In a lengthy decision letter, Mr King reviewed the findings of the investigation, noting that there had been 27 allegations made against 8 individuals. He summarised the key facts and the conclusions from the investigation which indicated there was no evidence to support most of the complaints. He found that there was a case to answer in respect of two individuals, one of whom had been accused of being "generally rude and dismissive", and another who had caused the claimant distress by making a comment relating to her anxiety. Those aside, none of the other allegations were upheld and it was concluded that they were not substantiated by the evidence. Mr King acknowledged that some areas of learning had been identified through the investigation. As a result, he was recommending that training be offered to all staff in the laboratory to equip them with the skills to support colleagues who may be experiencing stress and anxiety.

Conclusions

- 87 The claimant relied on the events the subject of Allegations (ff) to (ll) in support of all her claims, both unfair dismissal and disability discrimination. She believed she had been subjected unreasonably to performance management steps from July 2017 onwards, including stress risk assessments, formal capability meetings (with a related final written warning) and action plans. At stage 3 of the capability procedure, the claimant was told she had the option of seeking redeployment or facing the uncertainty of a final stage 4 meeting. When the first part of this stage 4 meeting took place in June 2018 it was, the claimant said, conducted unfairly.
- 88 In addition to the performance issues, the claimant complained that there had been unreasonable delays. The first of these was the time it took to confirm in writing that her previously temporary post had been made permanent from October 2017. Although made aware of this verbally at a meeting on 31 August 2017, it took the respondent until May the following year to confirm the position in writing. In the meantime the claimant continued to work in her post. Another criticism about delay was about the time it took for Mr Weir to conclude his investigation, a three month time span at the time of the claimant's resignation. The claimant's Further Information included also the time elapsed after her departure from the respondent, before Mr King delivered an outcome on her complaint in October 2018. However, as that period occurred entirely after the employment ended, it

could not have informed the claimant's decision to resign or the alleged treatment relating to the discrimination allegations.

- 89 An important part of the claimant's case was the 'last straw' event on 26 July 2018 which she initially said triggered her resignation, namely that she found out that a colleague had made what she saw as a false allegation against her, which the respondent did not then investigate (Allegation (ll)). The claimant pursued this point throughout the case, up until Mr Owen's closing submissions, when he acknowledged that the event came after the decision to resign.
- 90 The final category of complaint relied on by the claimant was identified as Allegation (kk) in the following terms:
- "The claimant had been told on a number of previous occasions that colleagues had made complaints against her but she was never given any details although she subsequently understood references to these were noted on her personal file."
- 91 This last point was not pursued by the claimant and the Tribunal was provided with no evidence in support of it.
- 92 Accordingly, in reaching its conclusions the Tribunal focussed on the handling of the performance issues, the time scales followed by the respondent up until the claimant resigned, and the events of July 2018 which led to that.
- 93 Mr Bayne provided a comprehensive skeleton argument on behalf of the respondent. On the question whether the claimant was a disabled person under the Equality Act, he cited Morgan v Staffordshire University [2002] IRLR 190 as a reminder that the burden of proving disability lay with the claimant. He drew a distinction between having symptoms of low mood or anxiety as a possible reaction to adverse life events, and a mental illness. The former is not necessarily a mental impairment: J v DLA Piper UK LLP [2010] ICR 1052.
- 94 In essence, the respondent asserted that the claimant was not dismissed, that it had acted properly and with good cause throughout the capability procedure, and had been nothing other than supportive of the claimant. Having left the question of disability to the Tribunal, the respondent challenged the allegation that it had failed to meet any duty to make reasonable adjustments, relying not least on the fact that the respondent implemented all eight of the recommendations in the claimant's claim, and others besides. As for the claim under section 15 Equality Act, the evidence did not alert the respondent to any health causes behind the claimant's work standards, and even if the measures taken could be said to amount to unfavourable treatment, the respondent had objectively justifiable reasons for taking those measures.
- 95 For the claimant, Mr Owen submitted that she was capable of doing her job but was not supported by the respondent. He said her performance was adversely affected by work issues, meaning the historic problems in relationships which formed part of the background to this case. These caused anxiety and stress from shortly after the claimant started work in 2015. Mr Owen described the general thrust of his case as being that the respondent did not take into account the

claimant's mental health issues, especially considering how they impacted upon her performance. He acknowledged that in some respects the capability process was supportive but said the claimant's view was that the reverse was true and she was in the process for a long time.

- 96 As for Allegations (ff) to (ll), Mr Owen made a number of concessions in his summing up. He maintained that the claimant was unreasonably subjected to the performance management steps outlined in Allegations (ff) to (jj). These were not supportive measures, and it was unreasonable to take that course because of the claimant's mental health. When asked to clarify what it was about the respondent's conduct that went beyond the merely unreasonable, Mr Owen submitted that the events between July 2017 and July 2018 did destroy trust and confidence. It was a lengthy period and the respondent's actions were not supportive. The historical issues dating back to October 2015 were the root cause and the respondent was largely aware that they caused heightened anxiety. He said the respondent's behaviour was more than unreasonable because it was either aware (or should have been aware) of the adverse effect the procedures were having on the claimant. Cumulatively it was likely to destroy trust and confidence.
- 97 The Tribunal assessed the parties' submissions in light of the evidence as a whole. We noted that the claimant was inconsistent in her assertions about performance, stating at times that she met the standards expected of her, yet sensibly acknowledging that she did make a number of mistakes. In her evidence the claimant did not mount a serious challenge to the respondent's handling of the capability process. She felt that her mistakes had been taken out of context, or the full circumstances had not been taken into account, but there was nothing to support this contention. Throughout her cross-examination the claimant was unable to support any of her criticisms about the stress risk assessment process. When it came to her relationship with colleagues, the claimant did acknowledge that the issues she had with some people may have been about her perception. These issues were relevant to the capability procedure. Initially this had been concerned with the claimant's technical skills, but once these were resolved to a satisfactory level (though not completely), the later concerns were focussed more on the claimant's difficulties with leadership of her small team.
- 98 In her oral evidence the claimant made a number of other concessions. She accepted that the respondent's concerns about her performance were genuine, including the CAPAs, and that Sarah Leigh Nicholson was entitled to raise them at a meeting. She agreed that the respondent's action plans were supportive measures, and she had been able to contribute to the plans. The claimant also regularly reported to the respondent improvements in her working situation. For example, she said that the action plan dated 11 October 2017 and follow-up steps were helpful and positive, and that there had been improvements by then. At a review meeting on 22 December 2017 the claimant said she was "not confident to run slide production or a team", a note which she agreed during evidence was accurate. In January 2018 the claimant told the respondent that she was "really enjoying working with everyone now". On cross-examination she conceded that her then manager was supportive, but then asked, "What is support?" This reflected the vague and somewhat abstract nature of the claimant's criticisms of the respondent throughout the case. By the time the capability process reached

stage 4, the claimant said she could see why the respondent had concluded that she was not performing, but at the same time she felt that it had not taken everything into consideration. This was a common theme throughout the claimant's evidence. At one point, during cross-examination, the claimant asserted something she had never previously raised, which was that the respondent had an ulterior motive for taking performance management measures. She felt they wanted to show she was not competent, but was unable to point to any evidence which might support such a perception.

Unfair dismissal

- 99 Having reviewed the evidence as a whole, the Tribunal focussed on the last year of the claimant's employment. We noted that a great deal of the claimant's witness statement was concerned with events dating back to 2015, with a detailed recital of day to day interactions with colleagues, some of whom made comments which the claimant found hurtful. As far as we could see, those events were largely historic and the claimant's more recent line managers were not involved in those events.
- 100 The above findings of fact and these conclusions do not seek to rehearse every element of the evidence but to discuss the key events which took place over that period. The question for us was whether, looking at the case in the round, it could be said that the respondent conducted itself in such a way as was calculated or likely to destroy trust and confidence in the working relationship. The claimant was entitled to rely on the cumulative effect of various different events, and even if the last straw was not in itself a fundamental breach of trust and confidence, providing it was not innocuous it could support the claimant's decision to resign and treat herself as constructively dismissed.
- 101 An important principle underpinning the case law is that an employer should not conduct itself in this manner without reasonable and proper cause. On the facts of the present case, this meant taking into consideration what the respondent said in explanation for following its capability procedure through to Stage 4, the point at which it might have terminated the claimant's employment had she not left beforehand.
- 102 It was striking that during her own evidence the claimant consistently agreed that there were problems with her work, conceding that initially she was making mistakes of a technical nature and later that her leadership skills were lacking and this was having a negative impact on her relationship with her team. During detailed cross-examination by Mr Bayne, the claimant repeatedly accepted that such problems existed and that they were a matter of genuine concern to the respondent. As a clinical scientist, the claimant was very aware that the work done by her and others in her team had to be done efficiently and accurately, both to protect the best interests of patients and to ensure the respondent met the high standards required of it.
- 103 In her Further Information document the claimant repeatedly complained that she was "unreasonably subjected" to these performance management steps, but this was not borne out by the evidence – even the claimant's own evidence. In just the same way that the claimant acknowledged her mistakes and the respondent's

concerns, she conceded that she had been provided with a great deal of support to achieve the expected standards. The Tribunal is satisfied that the numerous stress risk assessments, discussions at formal meetings and resulting action plans were the acts of a supportive as well as a concerned employer.

- 104 For these reasons the Tribunal does not accept that the respondent acted without reasonable and proper cause when it followed its capability procedures with the claimant. In any event, we do not conclude that the respondent's actions were even unreasonable in the circumstances, still less amounting cumulatively to a breach of the implied duty of trust and confidence.
- 105 We do not doubt that the claimant found the performance management steps difficult, but even on her own contemporaneous evidence the claimant was reporting improvements at work and better relationships with colleagues. By the time of her resignation the claimant may, subjectively speaking, have reached the view that she had no future with the respondent, but such an interpretation was not supported objectively by the evidence. At the time she decided to leave, the stage 4 process was paused and the outcome of Mr Weir's investigation was not yet known. There was no recent act – or series of acts – which caused a repudiatory breach of contract, and no trigger for the resignation other than a general sense of unhappiness in the job.
- 106 It cannot therefore be said that the claimant resigned in the circumstances required by section 95(1)(c) Employment Rights Act 1996. She was not entitled to resign by reason of her employer's conduct, and treat herself as constructively dismissed. No dismissal occurred, and the claimant simply chose to start afresh elsewhere.
- 107 In reaching this conclusion the Tribunal has considered the claimant's evidence about her reasons for resigning. In her witness statement the claimant provided little explanation for her decision. She linked her decision to resign with the 26 July 2018 meeting with Mr Weir, and said she had not felt supported in her mental health. She said the capability procedures were used to bully and undermine her, but this was completely at odds with what the claimant was saying at the time. Although the witness statement referred to the claimant's returning to work from sick leave on 23 July, she made no mention at all of her new working environment. It was only when asked by the Tribunal what had happened in July 2018 to prompt her resignation that the claimant said she found the work in the new team demeaning. In previous cross-examination questions about this, the claimant made no mention of a demeaning environment, and indeed made no criticism whatsoever of these arrangements.
- 108 The only other factor identified by the claimant as a reason for her resignation was the delay in the investigation into her complaint of bullying. However, it must have been apparent to the claimant by the time of her meeting with Mr Weir on 26 July that he had concluded most of his work, and the claimant was clearly unwilling to await delivery of his report. She told the Tribunal that she had a general feeling it was going to be impossible to move forward with her employment in a positive way. While we accept that this is how the claimant felt at the time, we do not conclude that her reaction was objectively supported by the respondent's conduct.

- 109 It is worth adding that the Tribunal had some doubts about the particular trigger for the claimant's resignation. She had started looking for another job in January 2018 and was clearly unhappy with her working environment with the respondent. Waiting until she had another position to go to did not necessarily mean that the claimant was not constructively dismissed, but her explanation for taking this step in July 2018 was unsatisfactory. Firstly, the claimant told the respondent as early as 6 July that she intended to resign, and although she might have had a change of heart before confirming her decision, this could not have been a response to a 'last straw' event in the week commencing 23 July.
- 110 Furthermore, in her evidence to the Tribunal the claimant conceded that there was nothing wrong with Mr Weir raising the point that a colleague had said she behaved aggressively towards her. She said her upset was the fact that she did not consider the allegation to be true. The claimant said she felt that the truth was not going to come out, yet she gave the respondent no opportunity to look into the issue. The Tribunal heard no evidence to suggest that Mr Weir's investigation was in any way compromised or unreliable, nor did it accept the claimant's assertion that the time taken between April and July was an untoward delay. Nothing about the handling of that investigation contributed to a breach of trust and confidence.
- 111 The other allegation of delay related to the written confirmation that the claimant's temporary post had become permanent. The Tribunal noted that the respondent took many months to write to the claimant to confirm this, which (for no apparent reason) was not done until May 2018. However, the claimant had been advised at a face to face meeting on 31 August 2017 that her position was secure and went on to work on that understanding from October onwards. While the delay with the letter was undesirable, we do not conclude that it was such as to destroy the working relationship, even if taken cumulatively with the other events of the final year of employment.
- 112 In summary, the Tribunal does not find that the events set out in Allegations (ff) to (ll) took place in the manner alleged by the claimant, and concludes that the respondent was entitled to take the performance management steps it did. In its handling of this, and the investigation into the claimant's complaint, the respondent acted properly and did not conduct itself in such a way as to breach the duty of trust and confidence.

Disability status

- 113 The claimant's disability discrimination claims relied on her assertion that she was at the relevant time a disabled person as defined by section 6 Equality Act. The claimant's position was that the relevant period began in around April 2017 with the stress risk assessment and capability procedure, the period to which Allegations (ff) to (ll) relate. She said she had a mental impairment, namely Generalised Anxiety Disorder (GAD), that it was long term and that it had a substantial adverse impact on her ability to carry out day to day activities. The respondent did not concede disability and it was for the Tribunal to determine whether the claimant met the definition in section 6 after considering the relevant guidance, the claimant's evidence and any supporting medical evidence.

- 114 Given that it was for the claimant to persuade us that she was disabled, it was surprising that her witness statement contained no explanation at all for why she believed this to be the case. In reciting the detailed chronology of events at work, the claimant made no reference in her statement to seeing her GP in July and October 2016. At an earlier stage of the proceedings the claimant had produced a disability impact statement which outlined described problems with sleep patterns, social interactions, feelings of stress and low self-esteem, anxiety and feelings of isolation. In order to better understand the claimant's case, the Tribunal asked questions during oral evidence to clarify her points.
- 115 The claimant said she had had no formal diagnosis of GAD and this had first been referred to by an Occupational Health doctor in October 2016. She accepted that her GP's notes stated that her period of poor mental health had begun on 25 July 2016 and was over by 18 October 2016, the same month as this discussion with the Occupational Health doctor. The later letter from the claimant's GP dated 5 August 2019 referred to work-related stress but made no reference to GAD. The dates of the GP's entries suggested that the period in which she was suffering with impaired mental health was less than 12 weeks, an analysis with which the claimant agreed during her evidence.
- 116 When asked by the Tribunal when her condition became long term, the claimant replied, "I couldn't comment on that". She was unable to provide any evidence explaining why she considered her impairment to be long term, saying only that it was linked to work. She felt that the GAD had initially been triggered in October 2015 when she joined the cellular pathology department. The claimant said she took medication (an anti-depressant and anti-anxiety treatment) for a short time from around late June 2017 for a few months, but otherwise she preferred to avoid medication. She had access to counselling through her GP, but the counsellor did not make any reference to GAD either. When asked about how she managed her mental health, the claimant said she had strategies for making herself feel better, namely mindfulness and yoga, and said her daughter was her "main motivator".
- 117 The claimant stated her belief that she was disabled the whole time that she worked for the respondent, but on a fluctuating basis. She said she could feel well for days at a time or perhaps a month, but then her condition would deteriorate.
- 118 The Tribunal noted that in February 2018 the claimant did not reply to Ms Marsland's email, so as to assert her right to be given prior consideration in the redeployment process as a disabled person. This was surprising given the strength of feeling the claimant later expressed about the respondent's lack of support for her. When asked by the Tribunal why she had not raised this with Ms Marsland, the claimant said she had "given up a little bit" by then.
- 119 That summarises the extent of the evidence available to the Tribunal to determine the disability question. Although we had no reason to doubt that the claimant found her working environment difficult at times, especially in the context of sometimes poor relationships with colleagues, we were not at all persuaded that the claimant had a long term mental impairment which caused a substantial adverse impact on her normal activities.
- 120 The claimant saw her GP and an Occupational Health doctor on several occasions but had no diagnosis of GAD. She had the support of a counsellor who also made no reference to such a disorder. No specific treatment was provided for GAD, and the the claimant took medication for depression and anxiety for only a very short

time. The Tribunal did not feel there was enough substance in the claimant's disability impact statement to warrant a conclusion that any impairment she had was having a substantial adverse effect on her normal daily activities, and the lack of substance on this point was apparent from both the claimant's witness statement and her oral evidence.

- 121 In any event, there was no evidence to support the fact that any such effect was, or likely to be, long-term in nature. It seems that the claimant was experiencing some impairment in her mental health between July and October 2016, but the entries in her GP records about this suggest a short duration of less than 12 weeks. This did not meet the statutory requirement for any impairment to be long-term, lasting or expected to last 12 months or more. Putting together the evidence as a whole, the Tribunal was unable to conclude that the claimant was at any time during her employment a disabled person within the definition in section 6 Equality Act.
- 122 As we did not find the claimant to be a disabled person, it follows that her claims under the Equality Act must fail. However, it may be helpful for the Tribunal to summarise its views of the merits of those claims, had we determined that the claimant was disabled. In that case, we would not have upheld the claims of disability discrimination under sections 20-21 or section 15 of the Act.

Reasonable adjustments

- 123 Dealing first with the reasonable adjustments claim, the claimant relied on two versions of the provision, criterion or practice (PCP) which is a prerequisite before an employer is under a duty to make reasonable adjustments. The second version of this PCP was expressed as the claimant being unable to carry out her role, and being at a disadvantage, because of her heightened anxiety. We did not find this apt to be a PCP, as it simply described the difficulties the claimant said she was experiencing. We preferred the first version of the PCP identified in the claimant's Further Information, to the effect that she was required to maintain an autonomous role within her team, as this was expressed in more neutral terms.
- 124 In principle the Tribunal would be prepared to accept that the respondent had this requirement of the claimant, and that it could potentially have the effect of putting her claimant at a substantial disadvantage by comparison with colleagues who did not have such a mental impairment. However, the scant evidence about disability made it far from clear that the claimant was actually at such a disadvantage in meeting the requirements of her job.
- 125 Even if we had accepted that the claimant was subject to a PCP which put her at a substantial disadvantage, we are confident that her claim under sections 20-21 would have failed, in light of the extensive evidence we heard about the eight adjustments which the claimant contended for. All were Occupational Health recommendations and in each case the respondent asserted that it complied with them. During his cross-examination of the claimant Mr Bayne took her through each recommendation in turn, and in every case the claimant conceded that the respondent did in fact take steps to act upon them. When asked what more the respondent should have done, the claimant was unable to identify anything in particular.
- 126 On the question of access to senior support, the claimant agreed that support had been given, though she felt it was inadequate. She did not feel able to go to her

line managers for support, but when asked, she struggled to identify any other person from whom she could have had support. She acknowledged that she had informal support from a Band 7 colleague which had been helpful. She then conceded that it was not so much about support not being provided, as about the fact that she did not like the colleagues in question.

- 127 When asked about the need for advice with regard to the consequences of the capability procedure, the claimant conceded that she was made aware, through the respondent's capability policy and various outcome letters, what the potential consequences of the capability procedure were, including dismissal. She agreed there was nothing more the respondent could have done. Tellingly, when asked about having the support of a union representative in attendance with her at meetings, the claimant replied, "What is support?". She nevertheless maintained that she should have had clarity about job security even after making these concessions.
- 128 Similarly, the claimant said there was nothing more the respondent could have done to provide clarity over job security.
- 129 The claimant acknowledged that she was given extra time to deal with certain tasks in respect of the capability procedure, though said she was not encouraged to take it.
- 130 As for advice on seeking mentors, the claimant said the respondent could have offered more options for mentors, though she was unable to say who that should have been.
- 131 The claimant then accepted that the respondent did make the other three adjustments: providing specific career advice; an opportunity to change environment and team; and time off in lieu to reduce her working hours on returning to work.
- 132 The claimant's concessions combined with the extensive evidence from the respondent meant that the Tribunal was satisfied that there was no merit in the claim under section 20-21 Equality Act. Not only was every Occupational Health recommendation acted on, but it was also clear to us that there was no adjustment available which would have alleviated the problems the claimant was experiencing.

Section 15 claim

- 133 The final claim was made under section 15 Equality Act, which prohibits unfavourable treatment because of "something arising" in consequence of disability, subject to the possibility that the employer may provide objective justification for the treatment. The claimant said she was unable to carry out her role and meet the required standards, because the way she was treated was causing heightened anxiety. This heightened anxiety was said to be the "something" required by section 15. Like the reasonable adjustments claim, this relied on the same factual allegations as for the unfair dismissal claim. The claimant's evidence was that her lack of confidence and feelings of persecution were what led to the treatment.
- 134 In his summing up Mr Owen referred to the claimant as an experienced employee who had been making basic errors, which indicated to him that there were clearly other issues going on. This should have flagged up to the respondent that there

was a serious issue behind all of this but instead of being supportive they pursued a capability route. Not taking account of the claimant's mental health during the process was linked to disability.

- 135 The Tribunal was not persuaded by the evidence that the claimant was subjected to unfavourable treatment because of heightened anxiety arising from a disability. The performance management steps were not unwarranted, and nothing in the evidence available to the respondent at the time or to the Tribunal during this hearing suggested that the claimant's difficulties in meeting standards was caused by any mental impairment. Even if we had felt that this was the case, we would have been satisfied that the respondent could justify the treatment on the grounds that it was pursuing legitimate aims and did so in a proportionate manner. As an NHS Trust the respondent has responsibilities towards its patients, and these include ensuring that its staff meet the required standards of skill and competence. Allied to this is a responsibility to look after the welfare of its employees and protect their health and wellbeing. In both cases, it is not only legitimate but to be expected that the respondent will follow its policies and procedures in taking action to achieve those aims. It did so in this case in a wholly proportionate manner.
- 136 Finally, it was not necessary for us to decide whether the discrimination claims had been brought within the three month time limit, but had it been necessary to make such a determination, it is unlikely that we would have found for the claimant in respect of the events prior to 29 July 2018. Allegations (ff) to (ll) covered a time period beginning in July 2017, a full year before the claimant's employment ended. On one view of it, the following of the capability procedure was a single continuous act which continued until the claimant left, in the middle of stage 4. However, the last action taken by the respondent in this respect was the 4 June 2018 meeting. This hiatus was potentially enough to break the continuity of the sequence, meaning that this part of the claim was brought several weeks after the end of the limitation period. The other, more recent acts complained of relate to the 'last straw' meeting on 26 July 2018 and the time the investigation had taken between April 2018 and that date. Putting to one side the absence of any evidence to suggest that disability discrimination had any part to play in either of those issues, the Tribunal heard no evidence whatsoever from the claimant to suggest that it would be just and equitable to extend time for such claims under section 123 Equality Act.

EMPLOYMENT JUDGE LANGRIDGE

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

23 June 2020

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