



EMPLOYMENT TRIBUNALS

Claimant: Natalia Tomaszewska
Respondent: Humber Teaching NHS Foundation Trust

AT A HEARING

Heard at: Leeds On: 7th, 8th, 9th, 10th & 11th September and 18th November (reserved decision in private by CVP) 2020

Before: Employment Judge Lancaster

Members: Dr D Bright

Ms J Lancaster

Representation

Claimant: In person

Respondent: Ms L Gould, counsel

This has been a partially remote hearing which had been ordered after considering representations from the parties. The form of remote hearing was the Employment Judge and Ms Lancaster in person at the tribunal and everyone else joining by CVP video link (V): the reserved decision in chambers was intended to be in person, but was re-arranged to be by CVP due to the change in circumstances. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

It is the unanimous decision of the tribunal that:-

JUDGMENT

All claims are dismissed.

REASONS

The Issues

1. The issues in this case were clearly identified at an earlier attended case management hearing before Employment Judge Cox on 20th February 2020. These are now attached as an endnote to this judgment.ⁱ
2. At the start of the hearing it was raised by Ms Gould for the Respondent that the Claimant, in view of her witness statement (paragraph 7), may also now be seeking to add a complaint of “disability related discrimination” under section 15 Equality Act

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2010. It was agreed that any application to amend to add such an alternative claim would be deferred until such time as it in fact transpired on the evidence that it was a material consideration. It has not, in the event, been necessary to address this point.

3. As stated at the beginning of the hearing, the issues as identified by Employment Judge Cox therefore provide the template for our determination of this case. This list is further referenced in the conclusions section to this judgment.
4. The burden of proof in this case in the first instance falls on the Claimant. It is for her to show that she meets the definition of disability (section 6 Equality Act 2010). If she does it is then for her to establish facts from which the tribunal could, in the absence of any other explanation, decide that she has been subjected to unlawful discrimination, harassment or a failure to make reasonable adjustments in consequence of her having that protected characteristic: only if she does this does any burden of proof then shift to the Respondent (section 136 Equality Act 2010). It is also for her to prove that the Respondent committed a fundamental breach of contract as a result of which she was entitled to and did in fact resign without notice on 28th August 2019, so as to found a claim of constructive unfair dismissal (section 95 (3) Employment Rights Act 1996).

The facts

5. The essential facts of this case can most conveniently be set out within the framework of the agreed chronology (which is, however, not here reproduced in full).
6. The Claimant began work with the Respondent as a Community Psychiatric Nurse on 11th February 2013.
7. From the summer/autumn of 2017 the Claimant was under the management of Mr David Rainforth. He had started in post as team manager for the Bridlington and Driffield Mental Health Team on 1st May 2017. Because of the Claimant's sickness absence in 2017, followed by maternity leave and holiday starting on 1st January 2018, Mr Rainforth however only had limited direct contact with her before her return part-time on 1st October 2018. There is no history of any tension whatsoever between the two prior to January 2019.
8. On Wednesday 9th January 2019 the Claimant suffered a severe panic attack shortly before she was due to attend a training day at work. She texted Mr Rainforth, who was in fact commencing a period of leave that day, at 10 43 am. She explained that she was "unable to make any calls right now", that she planned to contact occupational health and to "take sick leave for the time being" and said, "I can only apologise for the inconvenience that this may cause and that I am unable to contact you directly." Mr Rainforth had, in fact, already been notified of the Claimant's non-attendance: he did not reply to the text but did ensure that HR made contact to acknowledge receipt of her sickness notification.
9. On Monday 14th January 2019, after his return from leave, Mr Rainforth left a voicemail message for the Claimant to contact him.
10. The Claimant contacted her sister to reply on her behalf, which she did speaking to Mr Rainforth on the telephone. It is common ground that she, the sister, explained that the Claimant was unable to speak personally to Mr Rainforth at that time.

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11. On Tuesday 15th January 2019 Mr Rainforth wrote to the Claimant acknowledging his conversation with her sister and quoting the absence management policy, applicable to all periods of sickness which envisages regular communication, the frequency of which was to be mutually agreed at the beginning of the absence period. The letter commences “I hope you are keeping yourself well” and concludes “Could you please contact me on receipt of this letter so that I can discuss and offer support throughout your absence in accordance with the managing absence policy”. The letter does say that Mr Rainforth would be managing the absence as “long term” even though there had not yet been a continuous period of absence of 28 days or longer: we are fully satisfied that the reason for this was so that he could thereby access an early referral to Occupational Health (OH), having been informed by her sister that the Claimant had not yet been able to refer herself, despite her stated intention to do so in her original text message.
12. On that same day, 15th January 2019, Mr Rainforth did make a referral to OH who arranged an appointment for 22nd January 2019. Unfortunately the Claimant did not receive the invitation letter and did not attend on the following Tuesday. Mr Rainforth was informed by OH on 24th January 2019 that the Claimant had apparently failed to keep her appointment.
13. The Claimant did not reply to the letter of 15th January. Nor did she provide a doctor’s not to cover the period from when her self-certification of sickness expired.
14. On balance we prefer the Respondent’s evidence that there were in fact no further attempts by the Claimant’s sister to make contact expressly on her behalf during the period 15th to 24th January. At most the sister sought to speak to the Respondent’s HR in general terms about what she believed their policies ought to be, but without making reference to the particular facts of this case. The sister’s evidence on this point of timings is wholly unclear, and in context it is entirely plausible that she would only have spoken directly to the Respondent again about the Claimant after 24th January – which best accords with the present recollections of both Mr Rainforth and Mr Alex Saxby from HR. That is that as at 24th January there had been no contact with, or on behalf of the Claimant for at least about a week, since 17th January.
15. On Thursday 24th January 2019, given the lack of contact, Mr Saxby in the presence of Mr Rainforth attempted to contact the Claimant, and left a voicemail message at 12.08 pm. There was no immediate reply and at 12.24 pm Mr Saxby made contact with the next-of kin recorded on the Claimant’s personnel file. Unfortunately this record had not be updated and the contact was still shown as the Claimant’s estranged husband, with whom she was engaged in acrimonious family court proceedings, and which was the immediate trigger for the Claimant’s current mental health problems.
16. On 25th January 2019 the Claimant emailed Ms Stephanie Fletcher, the Operational Service Manager for the East Riding and Mr Rainforth’s superior, copying in Mr Saxby. This has subsequently been described as the raising of an “informal grievance”. In this letter the Claimant expressed her concern about contact having been made with her husband, said that she felt unable to approach Mr Rainforth and alleged that he was being rigid about her contacting him only by a phone call. The email concluded by stating that she obviously intended to engage with OH and explore support available but did not think that she was able to do that “right now” and that she was asking for some time to address her anxiety. The Claimant was

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prepared to meet Ms Fletcher in person and this was agreed in principle for the following week.

17. On balance we conclude that the Claimant's sister also did make contact with Mr Rainforth on 25th January and also with Mr Saxby at about the same time forcefully to complain about the contact having been made with the estranged husband and to accuse Mr Rainforth of harassment. This was however the last contact that she sought to have with the Respondent on behalf of the Claimant.
18. On Friday 25th January 2019 Mr Rainforth wrote again. He reminded the Claimant that he did not appear to have received a sick note, which may have consequences in regard to receipt of pay, and that there still had not been any response to either the letter of 15th or the further attempted communication on 24th January. A full copy of the Attendance Management Policy was attached. The letter concluded "please do not hesitate to contact me on the above number and I will be happy to help and support you".
19. On Monday 28th January 2019 the Claimant did manage to speak on the telephone with Mr Rainforth. Although it is common round that the Claimant was upset and sobbing we accept Mr Rainforth's evidence that she nonetheless at that time agreed to engage with him in the future in managing the process, in particular that a further OH appointment would be made and that the prospective meeting with Ms Fletcher was no longer necessary. We do not accept the Claimant's recollection that she was expressly told that there would then be no further contact from Mr Rainforth for a further six weeks.
20. On that same day, 28th January Mr Rainforth did immediately arrange with OH for a further appointment on 1st February and texted the Claimant with that information. The Claimant did not keep that appointment.
21. The Claimant did not make any further contact with Ms Fletcher to confirm that she still expected a meeting to go ahead or to finalise the arrangements. Nor did Ms Fletcher make any contact to explain that she now understood -which we accept was indeed the case - that as contact had now been established with Mr Rainworth the projected meeting was no longer required.
22. On 12th February 2019 Mr Rainforth sent two separate letters. One was a further reminder that although a fit note had now been received for 30th January to 28th February, they should be submitted in time and that there may be consequences in processing pay if they were not. It expressly stated, however, that the Respondent was keen to ensure that it did not find itself in a position where it might stop the Claimant's pay because of "unauthorised absence". It again included. In what is clearly a standard form of words, a statement that if she had any questions regarding the letter "please do not hesitate to contact me on the above number and I will be happy to help and support you". The second letter was an invitation to a Long Term Sickness Absence Review Meeting to be held in a further ten days' time, on 22nd February 2019. In that letter the Claimant was told that if she had any queries she should contact Mr Rainforth, and she was asked to confirm her attendance by contacting him on the given phone number.

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23. On 13th February 2019 the Claimant did attend a rearranged OH appointment in person. The brief report dated 1st February 2019 confirmed that the Claimant was not yet fit to return to work, and of her own volition Ms Louise Rose, the OH adviser, arranged for a further appointment for a month's time (though this did not in fact take place until 4th April 2019).
24. On Monday 18th February 2019 the Claimant did attempt to telephone Mr Rainforth, but not apparently from a number which he would have recognised. She did not leave any message. The Claimant did not attend the meeting on Friday 22nd February 2019, and Mr Rainforth left a voice mail message to which the Claimant did not reply
25. On the same date, 22nd February 2019 a repeat invitation to a review meeting in thirteen days' time on 5th March 2019 was issued, commencing "I am sorry to see you did not attend the meeting on 22/2//19" but reasserting the importance of attendance and again concluding by saying that if she had any queries she should contact Mr Rainforth, and asking her to confirm her attendance by contacting him on the given phone number.
26. In a separate letter of the same date, 22nd February 2019, Mr Rainforth reminded the Claimant that her registration to practice was due to expire in a week's time and asking her to let him know if she had in fact revalidated.
27. On 1st March 2019 the Claimant's registration duly did lapse. She was therefore not permitted to work as a nurse and in order to allow to continue being paid she was re-banded to Health Care Assistant: although there was no substantive position at that grade Mr Rainforth was able to reallocate his budget in respect of the Claimant's nurse's salary to create a nominal post. This was confirmed to have been done in a letter dated 5th March 2019.
28. On 5th March 2019 the Claimant did not attend the scheduled review meeting, again having not made any further contact in the meantime.
29. On 6th March 2019 the Claimant was reissued with a further invitation in standard format to a Review Meeting in two weeks' time on 20th March 2019.
30. On 7th March 2019 the Claimant was sent a further letter. This highlighted her failure to engage, and pointing out the breaches of an employee's responsibilities under the absence management policy. The Claimant was advised to get in touch with Mr Rainforth by "close of play" on Thursday 14th March 2019, with a warning that failure to do so "may lead to more formal action being taken which may include disciplinary measures" It was; however, expressly stated that this was "not the route we wish to take". This letter also made reference to the most recent doctor's note in which it had been recorded that the Claimant was expressing anxiety at the letters being received from the Respondent. The Claimant was therefore invited to let Mr Rainforth know if she could identify a more appropriate way for the Respondent to communicate with her. The Claimant did not reply.
31. On 20th March 2019 the Claimant once again did not attend the scheduled meeting having made no contact.

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32. On 21st March 2019 the Claimant was invited to an “Informal Investigatory meeting” described as being held as part of an “informal Disciplinary Fact-Finding Stage”. This was to discuss allegations which were categorised as “Gross Disobedience. The deliberate and persistent refusal to carry out a legitimate instruction or refusal to comply with a significant term or condition of employment” and “Failure to Hold Current professional registration”. The meeting was scheduled for 1st April 2019. The contact details for Mr Rainforth on this occasion included not only his telephone number but also his email address.
33. The Claimant consulted with her trade union and her representative then made contact with Mr Saxby. Following this her representative emailed the Claimant on 25th March 2019, although apparently she did not in fact open the email at once, to inform her that there was no desire on the part of the Respondent to pursue anything formal but that it was very eager to establish a dialogue with her, and that if she wished the meeting could certainly be rearranged for a later date upon her contacting either Mr Rainforth or Ms Fletcher.
34. The Claimant did not attend on 1st April 2019, having made no contact, and in the event no further action was ever taken in respect of that potential disciplinary investigation.
35. On or about 4th April 2019 the Claimant again attended in person to meet with the OH adviser. Ms Rose’s report is dated 8th April 2019. The Claimant repeated her concerns at the volume of letters she had received and Ms Rose therefore recommended a moratorium on any communication for one month, which was honoured.
36. On or about 7th May 2019 the Claimant again attended in person to meet with the OH adviser. Ms Rose’s report is dated 10th May 2019. In this report it was recommended that a meeting take place with the Claimant and Mr Rainforth, effectively a form of “mediation” although it is not expressly referred to as such, with the Claimant’s union representative present and a member of the Respondent’s HR department other than Mr Saxby. The stated reason for not wishing Mr Saxby to be involved was because of his previous interaction with the Claimant’s sister. The Claimant did not ever arrange with her union representative to attend any “mediation” and in effect changed her mind about entering into such a process which is why she then raised a grievance.
37. On 14th May 2019 the Claimant was sent a letter from the Assistant Care Group Director, informing her because she was off work and would otherwise be unaware, of a Mutually Agreed Resignation Scheme (MARS) that was in place within the Trust generally from 1st to 17th May 2019. This was wholly unconnected with the individual management of the Claimant’s absence.
38. Nor did the Respondent ever seek to make any arrangement for a “mediation”; though the next issued invitation to a review meeting which was sent on 23rd May 2019 for a meeting on 3rd June 2019 was to be with a different HR representative present (Ms Jennifer Buckle), and as always the Claimant had the right to be represented at such a meeting by her union.

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39. On 3rd June 2019 the Claimant submitted a 19 page grievance against Mr Rainforth and Mr Saxby, addressed to Ms Buckle. She again did not attend the scheduled review meeting, having made no contact before submitting her grievance on the same day.
40. It was when the grievance was being processed and when the Claimant was encouraged to have the matter dealt with informally if possible that she first referred to the email to Ms Fletcher on 25th January 2019 as an “informal grievance” which she had already sought to raise unsuccessfully.
41. Ms Fran Ashton was appointed to hear the grievance. The Claimant was informed of her involvement on 13th June 2019, but due to leave commitments the investigation was not to commence until after 24th June 2019. An action plan was prepared, Ms Ashton contacted the Claimant on 25th June and an in person meeting was arranged for 11th July 2019.
42. On 24th June 2019 Ms Sue Wadsworth wrote to the Claimant to tell her that she had replaced Mr Rainsforth as the Claimant’s point of contact during her sickness absence. Ms Wadsworth subsequently invited the Claimant to a sickness absence review by letter dated 22nd July and she attended the meeting in person on 3rd July 2019.
43. Ms Ashton completed the grievance investigation and informed the Claimant in writing on 26th July 2019. That letter set out her conclusions and confirmed that no further actions would be taken. The main points of the grievance identified and addressed by Ms Ashton were:
- Tone and volume of communication from Dave Rainsforth whilst you were absent from work for reasons of sickness.
 - A breach of confidentiality regarding details of your next of kin.
 - Receipt of a letter about the MARS scheme from the Assistant Care Group Director following your occupational health appointment.
 - Clarity of the role of the Occupational Health Department.
 - Resolution of informal grievance.
44. The Claimant was offered an opportunity to discuss the outcome letter in person and attended a meeting on 21st August 2019 with her union representative. We accept Ms Ashton’s evidence that the further discussion did not materially affect the outcome although she verbally agreed that the absence was not properly described as “long-term” as at 14th January 2019, that the phrase “gross disobedience” in the letter of 21st March was inapt – even though it mirrored the wording of the disciplinary policy – and that it would have been better had Ms Fletcher been in contact after 28th January 2019. We accept Ms Ashton’s evidence that neither she nor Ms Buckle were ever asked by the union representative to issue an amended outcome letter, and that the only further discussion after the meeting was about a formal right to appeal, which was addressed in the follow up letter of the same day.
45. The Claimant resigned with immediate effect by letter dated 28th August 2019.

Conclusions

46. We now apply to those facts the relevant law, as identified within the list of issues, and come to the following conclusions.

Disability discrimination

The Claimant alleges that she was a disabled person at the material time as a result of anxiety. She had an episode of absence from work because of anxiety in 2013 but accepts that there was no indication at that time that it could well recur. Her anxiety first started to have a substantial adverse effect on her ability to carry out day-to-day activities on 9 January 2019 when she had a panic attack that marked the beginning of her sickness absence.

Was the Claimant a disabled person at the material time as a result of her anxiety? In particular, at what point did it become the case that the substantial adverse effect of her anxiety could well last 12 months or more?

47. The Claimant was not disabled at the material times.

48. As acknowledged in the list of issues the 2 week absence in 2013 is a discrete episode and does not indicate the presence of any underlying condition. It is entirely analogous with the position in the second example cited at C7 in the Guidance on the Definition of Disability (2011): “in contrast a woman has two discrete episodes of depression within a ten-month period. Even though she has experienced two episodes of depression she will not be covered by the Act.”

49. Nor does the Claimant’s further absence in 2016 assist her claim. Just because no physiological cause could be found for her symptoms of fatigue and headaches it does not mean that they must therefore have been attributable to psychiatric or psychological causes. It simply means that the underlying reason for what was only ever described as a physiological condition was never actually identified. There is certainly no medical evidence of any mental impairment at all, let alone one of which the episode in January 2019 was in fact a recurrence.

50. The mental impairment which began to have a substantial adverse effect upon the Claimant’s abilities to carry out her normal day-to-day functions after the panic attack on 9th January 2019 must therefore be viewed in isolation.

51. Even by the date of the Claimant’s resignation on 28th August 2019 this impairment was not long-term in the sense that it had already lasted 12 months.

52. The issue is therefore whether at any time after 9th January 2019 it ever in fact became likely (in the sense that it could well happen) that the impairment would last for more than 12 months: section 2 (b) to Schedule 1 of the Equality Act 2010.

53. The doctor’s letter dated 8th February 2019, albeit that it was prepared in connection with the family court proceedings, as well as confirming that the Claimant “had no other significant past medical history” describes her anxiety as “very situational” where the doctor suspects that it would “resolve following an amicable resolution”. It

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is specifically linked to the stress of the family court case and the custody dispute with her estranged husband. That case was anticipated to conclude well within a year, though in the event aspects of it did apparently drag on as listed hearings were successively adjourned.

54. The Claimant was responding to treatment. The GP notes at 2nd May 2019 record that she was “feeling better on her medications”. This is not an effect of the drugs which is to be ignored under section 5 to Schedule 1 of the Equality Act 2010 when assessing the deduced effect upon her ability to carry out normal day-to-day activities but for that medical treatment. It is an indication of her being susceptible to such treatment and therefore relevant to the issue of whether or not the adverse effects were likely to continue.
55. There is no medical evidence as to the prognosis, and therefore the likely future duration of an impairment. The doctor’s letter of 3rd September 2019 is still only a retrospective description of the Claimant’s condition over the previous eight months and does not offer any prognosis going forward.
56. The OH report of 14th February expressly stated, in response to the question in the referral asking whether there were any underlying health problems which met the Equality Act had answered in the negative. Although the question was never expressly answered again that initial assessment was never revised in any of Ms Rose’s subsequent reports.
57. The time for assessing whether or not the Claimant met the definition of disability is the date when a specific act of discrimination is said to have taken place. The claim is framed by reference to Mr Rainforth’s management of the sickness absence process, and specifically in relation to the letters he sent. That fixes the material time frame as between 15th January and 23rd May 2019.
58. There can be no doubt that this was not a condition which from the very start could be said to have been likely to last for more than a year. The Claimant certainly did not become disabled from the moment that she first went of sick on 9th January 2019. She herself, of course, took exception to the case being managed from the outset as under the long-term sickness policy. She evidently did not envisage this being of extensive duration, and her previous experienced episode of depression or anxiety in 2013 had been only very short-lived.
59. Indeed we can immediately discount any period up to the doctor’s letter of 8th February and extend that to the date of the first OH report. It cannot be sensibly suggested that at this point, mid-February 2019, any medical professional would have expressed an informed opinion that this condition was likely to persist for a further ten months or more.
60. We also find that within that further period from 14th February to 23rd May 2019 also it was not in fact likely, as could properly be judged at the time, that the Claimants impairment would last beyond 9th January 2020. That is because the effects had been present for, at most, only 4 ½ months, the primary situational cause of the condition was in the process of being resolved, there was no expert evidence to support a long-term prognosis and the Claimant was evidently responding to medical treatment.

Unfair dismissal

- 1. The parties agree that the Claimant worked for the Respondent as a community psychiatric nurse from 11 February 2013 until 28 August 2019, on which date she resigned without notice. She alleges that she resigned in response to a breach of the implied term that the Respondent would not without reasonable and proper cause act in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between herself and it.**
- 2. The Claimant began a period of sickness absence on 9 January 2019 due to anxiety and did not return to work before her resignation. The acts that the Claimant alleges individually or cumulatively breached the implied term relate to the way in which her sickness absence was managed and how her grievance about her treatment was dealt with. The acts can be summarised as follows:**
 - a. In the period from 9 January to 24 June 2019 Mr David Rainforth, the Claimant's line manager at the time, managed her sickness absence in a way that was unsupportive, punitive and lacking in understanding of the effects of her anxiety.**

61. The test as to whether an employer has conducted itself in a manner calculated or likely to destroy or seriously to undermine the relationship of trust and confidence is an objective one. It is not sufficient that an employee subjectively believes that that relationship has been irretrievably damaged.
62. The Respondent had reasonable and proper cause to follow its absence management policy in the way that it did. This is not a breach of the procedure itself, and nor is it any breach of the implied term as to trust and confidence.
63. Mr Rainforth properly attempted to arrange an early referral to OH and immediately thereafter sought to engage with the Claimant to agree an appropriate method of communication with a view to supporting her back to work as soon as possible.
64. The volume of letters is by no means excessive, actions are not taken precipitously but are prompted by the Claimant's failure to respond or to attend meetings, or by a reasonable requirement to inform her of issues. The Claimant did not suggest any alternative or more appropriate method of communication after 7th March 2019
65. Nor did the Claimant, or somebody on her behalf, ever seek to contact Mr Rainforth or anyone else from the Respondent to propose any alternative arrangements to the proposed sickness absence review meetings or the requests to confirm attendance at those meetings by telephone. It would not, in fact, have been difficult for the Claimant to identify a means of contacting Mr Rainforth other than by speaking to him on the telephone, if she did not wish to do so. She had his phone number to text and had contact details for Ms Fletcher and Mr Saxby, and, if she had indeed been unable to find it earlier, Mr Rainforth's own email address after 21st March 2019.

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66. Although the Claimant was physically unable to speak to anybody at the Respondent personally in the immediate aftermath of her panic attack this was clearly not a continuing state of affairs. She was prepared to attend an in person meeting with Ms Fletcher. She did attend in person OH appointments. Also as at 7th May 2019 she was apparently prepared to meet with Mr Rainforth in a “mediation“ meeting. The repeated issuing of invitation letters to an in person absence review meeting does not, therefore, amount to conduct which objectively breached the implied term as to trust and confidence. Certainly the last letter from Mr Rainforth, dated 23rd May 2019, was an invitation to a meeting with the same persons present with whom the Claimant had indicated, through OH, that she would in fact have been prepared to meet.

67. All sickness absence review invitation letters assert that: “The purpose of the meeting is to discuss your health at this time and identify if there is anything we can do to support you. This is a supportive meeting and it is hoped that arrangements can be made to help you come back to work”. This stated purpose is not at all indicative, objectively, of any intention not to be bound by the terms of the contract. Quite the opposite.

68. Whilst the reference to a potential charge of “gross disobedience” under the disciplinary policy was accepted to have not been the most appropriate, the decision on 21st March 2019, to commence an informal investigation into the Claimant’s conduct was clearly made with reasonable and proper cause. By this stage the Claimant had failed to attend here arranged meetings, without explanation, and had contacted Mr Rainforth on only one occasion. It had nonetheless been made clear in the preceding letter to the Claimant and it was reaffirmed in conversation with her union representative that this was not a course which the Respondent wished to have had to take, and in the event it was not pursued.

69. Although the Claimant was not formally notified of a change in her line management until 24th June 2019, Mr Rainforth did not in fact do anything else in respect of managing the sickness absence after the sending of the letter on 23rd May 2019.

b. In January 2019 Mr Alec Saxby, Human Resources Advisor, refused to speak to the Claimant’s sister about her absence and unnecessarily contacted the person noted on the Respondent’s electronic records as the Claimant’s next-of-kin.

70. Whilst it is right that we ourselves were not particularly impressed by Mr Saxby as a witness, and his interactions with the Claimant’s sister led to tensions, as reported to OH, objectively he did nothing to breach the implied term as to trust and confidence as between employer and employee.

71. It is perfectly proper for Mr Saxby to have exercised caution in respect of what information he divulged to a third party, the Claimant’s sister. She was not expressly authorised, and nor did she ever actually purport to speak on the Claimant’s behalf after the first phone call of 14th January 2019 and she ceased to have any involvement after 25th January 2019.

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72. Unfortunately the sister's interventions were, in the event, distinctly unhelpful. As a manager in a different NHS Trust she considered that she was able to pronounce authoritatively on how Mr Rainforth should operate the Respondent's policies. When he disagreed with her interpretation she categorised his response as rigid and uncooperative. It is this representation of his conduct, and not anything which he actually did, which predisposed the Claimant not to participate in the proper management of her sickness absence. We are satisfied that Mr Rainforth did not ever "insist that the Claimant ring him" which is what, based upon her sister's report, she alleges. The letter of 15th January 2019, and indeed all subsequent correspondence, is, we find in context, to be understood as a reiteration of what the Respondent's policy actually stated with regard to establishing appropriate direct lines of communication with an absent employee, and not the sister's erroneous assertion of what was NHS policy.
73. There was reasonable and proper cause to contact the Claimant's named next-of kin on 24th January 2019. This was in the very early stages of the absence and the initial panic attack had clearly been severe if it prevented the Claimant from talking to her manager at all. There had been no communication on her behalf since 17th January 2019, and even that had been a general approach to HR by her sister again seeking to reassert her interpretation of how the policy should be applied. There had been no reply to Mr Rainforth's letter of 15th January 2019, the Claimant had not attended an OH appointment on 22nd January 2019, and she did not answer her phone nor promptly return a call on 24th January 2019. There was evidently proper cause for concern about her wellbeing.
74. It is, of course, extremely unfortunate that the information held on the Claimant's personnel file as to the next-of kin still gave the name of her estranged husband, so that this contact understandably caused her distress. Whilst this information might have been updated in various ways, and perhaps should have been by a manager acting on information from the Claimant, the ultimate responsibility for ensuring that it is correct lies with her. It is not a breach of contract to have used the contact details as they actually appeared in the Claimant's HR file at that time. Although legitimately upset at what had happened again the sister's intervention making accusations of harassment was unhelpful and would have been perfectly reasonable for those phone calls to have been cut short in the circumstances, as Mr Rainforth in fact says that he did.

c. Ms Steph Fletcher of Human Resources failed to progress the informal grievance the Claimant raised with her on 25 January 2019.

75. Whilst it is accepted that it would have been better had Ms Fletcher contacted the Claimant directly, the lapse of the provisional arrangement for the m to meet in the week commencing 28th January 2019 is not in fact a failure to address a grievance, nor any breach of contract.

d. On 22 February 2019 Mr Rainforth notified the Claimant of the need to re-apply for her nursing registration the week before it was due to expire but offered her no support in making the application

76. The professional requirement to re-validate as well as to renew registration was three-yearly. The Claimant had been aware of this deadline from well before she

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went of sick. It was communicated to her both by her professional body and on reminders on her pay slips from the Respondent. It had also been addressed with her in supervision in 2018.

77. It was entirely her responsibility to prepare the portfolio of work necessary to secure re-validation. There is no indication that she was on target to have done this by 1st March at the point when she became ill.

78. The suggestion that Mr Rainforth might somehow have actively assisted her in the re-validation process at a point when the Claimant was not engaging in the sickness review is unfortunately purely fanciful.

e. At a meeting on 4 May 2019, Ms Louise Rose of Occupational Health put pressure on the Claimant not to present a formal grievance, not to resign and to meet Mr Rainforth to see whether they could resolve their differences

79. As Ms Gould submits any encouragement not to resign, thereby ending the employment relationship, cannot by definition evince any intention not to be bound by the contract so as to constitute a breach of the implied term as to trust and confidence.

80. Nor, similarly, is it any breach of contract to have recommended, with the Claimant's ostensible consent, a "mediation" meeting with a view of getting the Claimant back into work.

81. Given that apparent consent we do not accept the Claimant's assertion that Ms Rose "pressurised" her not to pursue a grievance. In any event that is the Claimant's decision and she did in fact then present her grievance on 3rd June 2019.

f. Ms Fran Ashton did not deal thoroughly and comprehensively with the issues raised in the Claimant's formal grievance, gave findings that were unclear, did not address whether the handling of the Claimant's sickness absence had been appropriate in the light of her anxiety and did not notify the Claimant of her right of appeal.

82. We are satisfied that the investigation of the grievance was in fact thorough, timely and reasonable in its conclusions.

83. The Claimant was, of course, expressly offered the right of appeal which she did not take up.

g. Although Ms Ashton and Ms Jennifer Buckle accepted at a grievance outcome meeting on 21 August 2019 that elements of the Claimant's grievance had been upheld but had not been recorded in the original outcome letter, the Respondent refused the Claimant's union representative's request to issue an amended outcome letter. This was the last straw that precipitated the Claimant's resignation.

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84. Although a number of matters were discussed and agreed at the outcome meeting these did not materially affect the decision that no further action be taken on the grievance.
85. No request was in fact made to amend the terms of the letter to reflect those further oral discussions. The alleged “last straw” as such did not happen. In any event not to have done so in the circumstances would not have amounted to any breach of contract.
86. The contemporaneous communications with her union representative do show that the Claimant had, however, effectively already decided to resign before the meeting on 21st August 2019.

4. The Respondent does not argue that, if its conduct did lead to a constructive dismissal, there was a potentially fair reason for it.

5. The issues in the claim of unfair constructive dismissal therefore are:

- a. **Did the acts that the Claimant alleges actually occur?**
- b. **If they did, did they amount to a breach of the implied term of trust and confidence?**
- c. **If they did, did the Claimant lose the right to resign in response to that breach because she had affirmed the continuing existence of her contract?**

87. In so far as the events complained of took place, they do not bear the interpretation that the Claimant seeks to put upon them and do not, therefore amount either individually or collectively to a fundamental breach of contract entitling her to resign without notice.

88. Because there was no actual breach the Claimant has not “affirmed” the contract. Whilst the so-called “last straw event at the 21st August meeting did not occur, the conclusion of the protracted grievance procedure without full written recognition of the points where the Claimant’s concerns had been in part acknowledged might have been sufficient in other circumstances. It may have added to earlier events so as to act as the trigger for resignation, had there in fact been any previous breach of contract to be re-activated.

Disability discrimination

7. The allegations of disability discrimination are as follows:

- a. **Mr Rainforth’s unsupportive and punitive management of the Claimant’s sickness absence amounted to direct disability discrimination: the Claimant believes that he would have been more supportive and sympathetic if he had been managing a person who was absent for a reason relating to physical ill-health. In the alternative, she alleges that his**

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management of her sickness absence amounted to harassment related to her disability.

- b. The Claimant says that Mr Rainforth's practice of requiring regular and direct contact with him put her at a substantial disadvantage compared with a person without anxiety, as her condition made her unable to face direct and regular contact with him. She alleges that the Respondent failed to meet its duty to make a reasonable adjustment to this practice. She suggests that it could have allowed her to communicate with the Trust via her sister.**
- c. If the Claimant was constructively dismissed and any part of the conduct that led to that constructive dismissal fell within paragraphs 7.1 or 7.2, she alleges that that constructive dismissal was an act of direct disability discrimination or discrimination by failure to meet the duty to make reasonable adjustments.**

The issues in relation to this aspect of the claim will include:

Did Mr Rainforth's management of the Claimant's sickness absence in fact amount to less favourable treatment of her because of her anxiety and/or did it in fact relate in any way to her anxiety?

Did Mr Rainforth in fact apply a practice of requiring employees on sick leave to have regular and direct contact with him as their line manager and, if he did, did it put the Claimant at a substantial disadvantage because of her anxiety?

If it did, what adjustment would it have been reasonable for the Respondent to have made to that practice?

89. The short answer to the claims of discrimination is, of course, that they fail because the Claimant was not in fact disabled at the material time. We would however have dismissed these complaints in any event.

90. It has been conceded that the Respondent did not apply its policies because the Claimant was disabled, or because she was suffering a mental impairment. A claim of direct discrimination must therefore fail. Similarly there can be no suggestion that in these circumstances the Respondent intended to harass her.

91. Nor, objectively, is it reasonable to conclude that the actual application of those policies, notwithstanding the Claimant's subjective perception, can reasonably be held to have had the effect of violating her dignity or of creating an intimidating, hostile, degrading or humiliating environment for her. We repeat what we have said at paragraphs 61 to 69.

92. Similarly the desire to support the Claimant back into work by reiteration of the invitation to a long-term sickness absence review meeting is not a provision, criterion or practice which in fact placed the Claimant at a particular disadvantage. She was

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never actually “required” to maintain any level of contact with Mr Rainforth. She simply did not ever engage with him to agree the appropriate frequency of contact as requested on 15th January 2019 and nor did she thereafter communicate with him to discuss progress during the sickness absence. We find that Mr Rainforth was not rigid in his expectations as the Claimant’s sister said to her that he was, and the Claimant of course did not ever propose any actual adjustments to the method or extent of communication. It was never in fact put forward after 14th January 2019 that her sister should be allowed to communicate on her behalf. Absent any explanations or alternative suggestions the Respondent could not reasonably have known that she was alleging any particular disadvantage.

93. The Claimant was not constructively dismissed, so there cannot be a discriminatory dismissal.

As Mr Rainforth was no longer responsible for managing the Claimant’s sickness absence after 24 June 2019, have the claims in paragraph 7.1 and 7.2 been presented outside the statutory time limit and, if they have, have they been presented within a just and equitable period?

94. The last actual alleged act of discrimination by Mr Rainforth is the sending of the letter on 23rd May 2019. That is when time begins to run, and not 24th June or any later date. The claims are therefore on the face of it out of time. Anything which occurred earlier than 31st May 2019, which is three months before the initiation of ACAS early conciliation, is out of time. We would have been prepared to extend time on the grounds that it would be just and equitable to have done so in the case of such a short period, had that sending of the letter on 23rd May in fact constituted the last in a series of discriminatory acts. However it clearly does not: we repeat paragraph 66 in this context.

95. The previous communication from Mr Rainforth was however on 21st March 2019. In respect of any act extending over a period and ending on that earlier date the approach to ACAS on 30th August 2019 would be nearly 2 ½ months late and the claim itself presented on 8th October 2019 would have been almost 6 months out of time. These are significant delays in the context of an ordinary 3 month time limit in which to bring Tribunal proceedings. We would have required a deal of persuasion to extend time in this hypothetical situation.

EMPLOYMENT JU DGE LANCASTER
DATE 3rd December 2020

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1. The Claimant alleges unfair constructive dismissal, discriminatory constructive dismissal and failure to meet the duty to make reasonable adjustments.

Unfair dismissal

2. The parties agree that the Claimant worked for the Respondent as a community psychiatric nurse from 11 February 2013 until 28 August 2019, on which date she resigned without notice. She alleges that she resigned in response to a breach of the implied term that the Respondent would not without reasonable and proper cause act in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between herself and it.
3. The Claimant began a period of sickness absence on 9 January 2019 due to anxiety and did not return to work before her resignation. The acts that the Claimant alleges individually or cumulatively breached the implied term relate to the way in which her sickness absence was managed and how her grievance about her treatment was dealt with. The acts can be summarised as follows:
 - a. In the period from 9 January to 24 June 2019 Mr David Rainforth, the Claimant's line manager at the time, managed her sickness absence in a way that was unsupportive, punitive and lacking in understanding of the effects of her anxiety.
 - b. In January 2019 Mr Alec Saxby, Human Resources Advisor, refused to speak to the Claimant's sister about her absence and unnecessarily contacted the person noted on the Respondent's electronic records as the Claimant's next-of-kin.
 - c. Ms Steph Fletcher of Human Resources failed to progress the informal grievance the Claimant raised with her on 25 January 2019.
 - d. On 22 February 2019 Mr Rainforth notified the Claimant of the need to re-apply for her nursing registration the week before it was due to expire but offered her no support in making the application.
 - e. At a meeting on 4 May 2019, Ms Louise Rose of Occupational Health put pressure on the Claimant not to present a formal grievance, not to resign and to meet Mr Rainforth to see whether they could resolve their differences.
 - f. Ms Fran Ashton did not deal thoroughly and comprehensively with the issues raised in the Claimant's formal grievance, gave findings that were unclear, did not address whether the handling of the Claimant's sickness absence had been appropriate in the light of her anxiety and did not notify the Claimant of her right of appeal.
 - g. Although Ms Ashton and Ms Jennifer Buckle accepted at a grievance outcome meeting on 21 August 2019 that elements of the Claimant's grievance had been upheld but had not been recorded in the original outcome letter, the Respondent refused the Claimant's union representative's request to issue an amended outcome letter. This was the last straw that precipitated the Claimant's resignation.

4. The Respondent does not argue that, if its conduct did lead to a constructive dismissal, there was a potentially fair reason for it.
5. The issues in the claim of unfair constructive dismissal therefore are:
 - a. Did the acts that the Claimant alleges actually occur?
 - b. If they did, did they amount to a breach of the implied term of trust and confidence?
 - c. If they did, did the Claimant lose the right to resign in response to that breach because she had affirmed the continuing existence of her contract?

Disability discrimination

6. The Claimant alleges that she was a disabled person at the material time as a result of anxiety. She had an episode of absence from work because of anxiety in 2013 but accepts that there was no indication at that time that it could well recur. Her anxiety first started to have a substantial adverse effect on her ability to carry out day-to-day activities on 9 January 2019 when she had a panic attack that marked the beginning of her sickness absence.
7. The allegations of disability discrimination are as follows:
 - a. Mr Rainforth's unsupportive and punitive management of the Claimant's sickness absence amounted to direct disability discrimination: the Claimant believes that he would have been more supportive and sympathetic if he had been managing a person who was absent for a reason relating to physical ill-health. In the alternative, she alleges that his management of her sickness absence amounted to harassment related to her disability.
 - b. The Claimant says that Mr Rainforth's practice of requiring regular and direct contact with him put her at a substantial disadvantage compared with a person without anxiety, as her condition made her unable to face direct and regular contact with him. She alleges that the Respondent failed to meet its duty to make a reasonable adjustment to this practice. She suggests that it could have allowed her to communicate with the Trust via her sister.
 - c. If the Claimant was constructively dismissed and any part of the conduct that led to that constructive dismissal fell within paragraphs 7.1 or 7.2, she alleges that that constructive dismissal was an act of direct disability discrimination or discrimination by failure to meet the duty to make reasonable adjustments.
8. The issues in relation to this aspect of the claim will include:
 - a. As Mr Rainforth was no longer responsible for managing the Claimant's sickness absence after 24 June 2019, have the claims in paragraph 7.1 and

7.2 been presented outside the statutory time limit and, if they have, have they been presented within a just and equitable period?

- b. Was the Claimant a disabled person at the material time as a result of her anxiety? In particular, at what point did it become the case that the substantial adverse effect of her anxiety could well last 12 months or more?
- c. Did Mr Rainforth's management of the Claimant's sickness absence in fact amount to less favourable treatment of her because of her anxiety and/or did it in fact relate in any way to her anxiety?
- d. Did Mr Rainforth in fact apply a practice of requiring employees on sick leave to have regular and direct contact with him as their line manager and, if he did, did it put the Claimant at a substantial disadvantage because of her anxiety?
- e. If it did, what adjustment would it have been reasonable for the Respondent to have made to that practice?