Case No. 1401248/2019/V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs C Vickers	AND	Dorset Property (Weymouth) Limited (1)
		Mr Barrie George (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton (by Video – CVP) **ON** 4 January 2021 to 7 January 2021

EMPLOYMENT JUDGE GRAY **MEMBERS** **MR D CLEMENTS**
MR D STEWART

Representation

For the Claimant: **Mr Probert (Counsel)**
For the Respondents: **Mr Henry (Professional Representative)**

JUDGMENT – LIABILITY ONLY

The unanimous judgment of the tribunal is that:

- **The complaint of indirect discrimination on the grounds of disability is dismissed on withdrawal.**
- **The complaint of constructive unfair dismissal is well founded and succeeds against the First Respondent.**

- **The complaint of breach of contract is well founded and succeeds against the First Respondent.**

- **The complaint of failure to make reasonable adjustments is well founded and succeeds against the First and Second Respondents.**

- **The complaint of discrimination arising from disability is well founded and succeeds against the First and Second Respondents.**

- **The complaint of harassment relating to the letters of 5 February 2019 and 6 March 2019 is well founded and succeeds against the First and Second Respondents.**

- **The complaint of harassment relating to the letter of 18 March 2019 is not well founded and fails.**

JUDGMENT having been delivered orally on the 7 January 2021 and written reasons then having been requested at the hearing on the 7 January 2021, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim by the Claimant for unfair constructive dismissal, breach of contract, and disability discrimination in respect of a failure to make reasonable adjustments, something arising in consequence, harassment and indirect discrimination. The Respondents resist the claim.

2. The claim was received on the 11 April 2019 and the dates of the ACAS early conciliation certificates in respect of both Respondents are 26 February 2019 to 13 March 2019 so that a complaint on or after the 27 November 2018 would be in time.

3. It had been intended for this hearing to be heard in person but it was converted to video with the parties' consent.

4. On commencement of the hearing arrangements were made for the provision of an electronic bundle (330 pages including the index) and witness statements. Before evidence there was an agreed addition to the bundle by the Claimant of 3 pages relating to two emails from 2015. We were also provided with a copy of the Claimant's chronology.

5. The witness statements were from the Claimant, her partner Mr Murless and the Second Respondent and Director of the First Respondent and Mrs Street (Financial Controller at the relevant time) on behalf of the Respondents.

6. As a matter of administration, the parties confirmed that the correct legal title of the First Respondent is Dorset Property (Weymouth) Limited and not Dorset Property Group Ltd, so this was amended by agreement.

7. The hearing time table was agreed based on that originally set out by Employment Judge Rayner at the case management hearing before her. There were some alterations with reading time rescheduled to 2pm on day one to reflect that the electronic bundles were only provided after the hearing had started (due to it being converted from in person to video at the end of the previous week). It was also expected that all the evidence would be finished by close of day two and submissions would be presented in the morning of day three. Mr Probert on behalf of the Claimant provided a written skeleton argument to us and Mr Henry before the hearing commenced on day three and we are grateful to him for doing this.

8. The issues we had to determine were discussed by reference to those set out in the case management order of Employment Judge Rayner.

9. It was confirmed that as well as those set out by Employment Judge Rayner we were also being asked to address an additional complaint of harassment added by amendment in relation to the response letter (dated 18 March 2019) sent by the Respondents to the Claimant after receipt of the Claimant's resignation letter.

10. The Claimant confirmed that she withdrew her complaints of indirect discrimination so it was agreed these would be dismissed on withdrawal.

11. It was noted that as the specific complaints of discrimination related to the letters of the Respondents dated 5 February 2019, 6 March 2019 and 18 March 2019, and the termination of employment was on the 15 March 2019 there were no time limit jurisdictional issues for us to consider.

12. After hearing the evidence from the parties, it was agreed as being proportionate to consider and deliver judgment on the questions of liability first, and then deal with remedy as appropriate, as further evidence would be required on issues relevant to that.

13. The issues we were therefore required to address on the questions of liability only were agreed and confirmed as being as follows:

14. Constructive unfair dismissal

a. The Claimant claims that the First Respondent acted in fundamental breach of contract in respect of their actions/omissions which are alleged to be acts of discrimination and a breach of the implied term of mutual trust and confidence (POC 23 – page 18) as follows;
    i. the First Respondent failed to act on the advice it commissioned through an Occupational Health (OH) report and particularly the risks this report highlighted to the Claimant in being expected to have meetings with the Second Respondent (POC 23);
    ii. Despite this, the First Respondent repeatedly requested the attendance of the Claimant at such meetings until the Claimant felt unable to comply further (POC 23).
b. The First Respondent denies that any of their conduct could be considered a fundamental breach of the Claimant's contract of employment and/or that it could be considered a course of conduct that amounted to a fundamental breach (RR 6.2.20).
c. The First Respondent
    i. Contends that the Claimant was frequently supported throughout her employment (RR 6.2.21-22);
    ii. Denies that the Claimant was given unmanageable workloads, lack of resources or suffered less remuneration (RR 6.2.22-24).
d. Did the Claimant resign because of the breach?
e. Did the Claimant tarry before resigning and affirm the contract?
f. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

15. Disability

a. Did the Claimant have a physical or mental impairment at the material time, that is between July 2018 - 15 March 2019, namely Familial Hypercholesterolemia (FH)?
b. If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
c. If so, was that effect long term? In particular, when did it start and:
    i. Has it lasted for at least 12 months?
d. Is or was the impairment likely to have lasted at least 12 months or the rest of the Claimant's life, if less than 12 months?
e. N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.
f. Were any measures taken to treat or correct the impairment? But for those measures would the impairment have been likely to have had

a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

16. Section 26: Harassment on grounds of Disability

a. Did the Respondent engage in unwanted conduct as follows:
    i. the repeated requests for the Claimant to attend face-to-face meetings with the Second Respondent
    ii. [**PLUS**] – Paragraph 27a (c) of the particulars of claim as amended (page 19 of the bundle) – The Second Respondent writing directly to the Claimant rather than through her Solicitors as requested, in response to the Claimant's resignation letter.
b. Was the conduct related to the Claimant's protected characteristic?
c. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? If not, did the conduct have the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

17. Section 15: Discrimination arising from disability

a. The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act is the repeated requests made of the Claimant to attend face-to-face formal review meetings with the Second Respondent (POC 24). No comparator is needed.
b. Can the Claimant prove that the Respondent treated her as set out in paragraph 8.1 above (the application of the First Respondent's absence management procedure with the expectation for the Claimant to attend a case review meeting with the Second Respondent (POC 25-26)) because of the "something arising" in consequence of the disability?
    i. The "something" was the Claimant's absence from work following her suspected heart-attack and stress condition caused by the Claimant's disability.
    ii. In addition, or in the alternative, the "something" was the significant effect of stress upon the Claimant's FH condition which made the face-to-face meetings impossible, (POC 24).
c. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent's position is that the treatment was a proportionate means of achieving a legitimate aim (RR 6.2.9):

i. The capability procedure was commenced because the Respondent wanted to do everything in their power to help the Claimant back to work (RR 6.2.12).
    1. the business aim or need sought to be achieved was to assist the Claimant to return to work
    2. As to the reasonable necessity for the treatment, it was to allow the Respondent to assess the Claimant's needs in the workplace on her return to work;
    3. As to proportionality: taking into account the size and resources, it was reasonable to request the Claimant to attend at a neutral venue, to send a representative or to provide written representations.

d. Alternatively, can the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

18. Reasonable adjustments: section 20 and section 21

a. Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely
    i. The application of the First Respondent's absence management procedure with the expectation for the Claimant to attend a case review meeting with the Second Respondent (POC 25).
b. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that
    i. There was an increased risk of the Claimant suffering a health problem linked to her FH condition; and
    ii. There was a reduced likelihood of a lasting recovery by the Claimant (POC 25).
c. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:
    i. To follow the adjustments advocated by the OH Report, in particular
    ii. for the meeting to be held at a neutral venue with a neutral third party (POC 25)
d. Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

19. Breach of contract

a. Did any proven breach of the Claimants contract by the Respondent repudiate that contract?

b. Is the Claimant entitled to her notice pay as damages for any breach of contract proven against the first Respondent?
c. To how much notice was the Claimant entitled?

20. Evidence was heard from 2pm to 4:50pm on day one. Then from 10am to 4:30pm on day two. During this time appropriate rest breaks were taken as agreed with the parties.

21. Submissions were delivered from 10:30am (after the panel had completed the reading of Mr Probert's written submission) to 1pm, again with rest breaks as agreed with the parties and inclusive of panel questions.

22. The hearing was then adjourned until 12pm on day four for panel deliberations.

23. Oral Judgment was delivered from 12:30 to 1:30pm. This was initially for judgment on the complaints against the First Respondent and after further supplemental submissions from both parties it was confirmed in respect of the complaints of disability discrimination against the Second Respondent also.

24. An oral application for reconsideration was then made by the Respondent and determined by just after 4pm (as detailed below).

25. There was not sufficient time to then proportionately consider remedy so the following case management orders were agreed:

    a. On or before the **21 January 2021** the parties will inform the Tribunal of:

        i. Their suggestions for the proportionate length of a remedy hearing (which is expected to be conducted by video);

        ii. The size of the evidence bundle required for issues relevant to remedy and who will be responsible for providing the electronic copy for the parties and Tribunal panel;

        iii. Number of witnesses and word count of their respective statements;

        iv. The parties' dates to avoid for listing purposes.

    b. On or before the **4 February 2021** the Respondent will serve a Counter Schedule of Loss on the Claimant.

THE FACTS

26. We heard from the Claimant, and Mr Murless on her behalf. We heard from the Second Respondent and Mrs Street on behalf of the Respondents.

27. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

28. Mr George is the Second Respondent and a director and shareholder of the First Respondent Company since 1 October 2008.

29. In his statement (paragraph 6) Mr George explains that "The business was founded in 1984 by Mrs Ann Fookes. By the mid 2000s the business comprised 6 offices and Mrs Fookes decided to franchise them, setting up The Dorset Lettings Group (the predecessor of the 1st Respondent Company) as franchisor. By October 2006, when I first became involved in the business, three offices had been franchised to the company's previous managers (Blandford, Shaftesbury and Sherborne) and I purchased two of the other franchises (Dorchester and Wimborne), under condition that I had the option to buy the franchisor within two years, which I duly did on 1 October 2008. Mrs Fookes continued to own and operate the Weymouth office (as a franchise from 1 October 2008) until it was bought back by the 1st Respondent Company on 1 April 2015.".

30. At paragraph 2 he explains the position of the Claimant "From the start of the Claimant's employment on 02/04/2008 until 1 April 2015 the Claimant was employed by Mrs Ann Fookes, initially as the then owner of the 1st Respondent's Company and then, from 1 October 2008, as the then owner of the Weymouth Dorset Lettings franchise business which was established on 1 October 2008. From 1 April 2015 the Claimant's was employed by the 1st Respondent's Company under the directorship and part-ownership (shareholder) of the Second Respondent.".

31. It is agreed that the Claimant has a continuous employment start date with the First Respondent since April 2008 and that she was employed as the Office Manager of their Weymouth Branch until her resignation with immediate effect on 15 March 2019.

32. Around the start of the more direct relationship between the Claimant and the Respondents it is accepted that Mr George was made aware of the Claimant's condition of Familial Hypercholesterolemia (which for ease we adopt the parties reference to this as "FH").

33. This can also be seen by reference to the emails of the 9 and 11 February 2015 between the Claimant and Mr George (we labelled as pages 328, 329 and 330). The Claimant writes in her email reply "…You have been aware that the last year has been a particularly difficult time for me, firstly, my health concerns after being diagnosed with FH, all the medical intervention I have had to adjust to whilst trying to maintain 'normal everyday life' and my need to try and avoid unnecessary stress which I do try to do, where possible…". We note that the Claimant has put the Respondents on notice of her FH and the need for her to try and avoid unnecessary stress.

34. There is a copy of the Claimant's Statement of Main Terms of Employment document starting at page 58 of the bundle and we note at page 60 of that it deals with notice. Based on the Claimant's length of service this would be 10 weeks if dismissed.

The Claimant's FH

35. Whether the Claimant's FH makes her a disabled person pursuant to the Equality Act 2010 is an issue we are being asked to determine. The parties accept that the relevant period is between July 2018 and 15 March 2019.

36. FH was formerly diagnosed as can be seen by the medical letter of 5 June 2014 (page 242). It is accepted by the Respondents that FH is a long-term impairment.

37. As the Claimant describes in her statement (paragraph 2) … "Familial Hypercholesterolemia (FH) [Pages 242-244]. As I understand it, FH is where I do not have the gene that filters 'bad cholesterol' out of the blood and therefore significantly increases my risk of early heart disease.". At paragraph 3 of the disability impact statement (page 171) … "Familial hypercholesterolemia (FH) is a genetic condition whereby the liver is unable to remove LDL ('bad cholesterol'). This means that levels of LDL in the blood remain dangerously high, risking—even at an early age - heart attack and stroke. The risk of fatality with FH is significantly more than in other scenarios. Being genetic I have had it all my life and it will be with me forever.".

38. While looking at the medical evidence our attention was also drawn to the medical letter dated 31 August 2014 (page 248) which had further detail on FH and noted … "the need for risk factor reduction" by the Claimant.

39. As set out in paragraph 3 of the Claimant's witness statement … "This diagnosis was completely life changing for me and I quickly had to come to terms with the fact that as it is a genetic condition, I have had, and will have it, forever. Consequently, FH has had, and will continue to have, a substantially negative effect on every single aspect of my day-to-day life;

something I have attempted to demonstrate in my Disability Impact Statement [Pages 171 - 173]. For instance, I now have to attend regular check-ups and I am required to take Statins daily in order to artificially lower the 'bad cholesterol' in my blood and lessen the risk of suffering a heart attack and/or stroke. I also now have to personally conduct regular 'at-home testing' of my blood pressure in order to closely monitor their levels throughout the day to so that I can be alert to any changes to them which without medical intervention would lead to serious complications arising. To this end, I must avoid stressful situations and over-exertion as these too can cause my blood pressure to rise to dangerous levels. This has meant that I have had to restrict the extent to which I exercise and the type of other activities I had previously enjoyed which I shall go onto expand upon further below. Coupled with this has been the psychological effects of knowing I have a permanent, life-threatening condition which it is fair to say has caused me huge amounts of anxiety and stress.".

40. As noted at paragraph 5 of the disability impact statement (dated 10 July 2019) … "I have to take statins and have my blood pressure and cholesterol levels regularly monitored to prevent complications. If I were not to take my medication, I would almost certainly suffer a heart attack or stroke which could well prove fatal….". This was not challenged by the Respondents.

41. Then a paragraph 10 of her witness statement … "I have had to change my lifestyle completely. My diet must be strictly monitored, and I can no longer enjoy certain foods that most people can freely enjoy. It is therefore near enough impossible for me to eat out at restaurants and enjoy social events with friends and family without my condition getting in the way. This is something I used to look forward to and enjoy in life. I am also no longer able to do certain physical activities which I once loved, including running, as there are additional risks associated with intense forms of exercise. I was advised by one doctor that I should limit any activity to thirty minutes of brisk walking per day, and no more than five times a week. It has been difficult knowing that I must live within these restrictions. My loss of physical capability to do normal activities has turned me into a person that I no longer recognise, and I know that my partner Tristan feels that I am not the same person he first met. I have become reclusive and reluctant to socialise as I constantly fear suffering another heart episode or worse. I worry about my condition and this only causes me greater anxiety. I am genuinely scared about what the future holds which feeds into my anxiety and enhances the risks associated with the condition within a vicious circle.".

42. And paragraph 8 of the disability impact statement … "The diagnosis has had a broader effect upon me which has also severely affected my social life and self-confidence. Knowing I have such a potentially serious condition has completely knocked me for six. I am fearful of what might be around the corner, particularly having experienced my brother suffering a severe heart-

attack whilst in his 40s and knowing already that there is some calcification of my arteries. This has resulted in me suffering stress and anxiety, which ironically is another risk-factor. I have become withdrawn and certainly don't get the enjoyment from life I once did. This makes me less inclined to make an effort with family and friends and often leaves me feeling exhausted, with no energy to socialise or do any of the recreational activities I previously enjoyed. I am currently having counselling, particularly given the effects of my treatment by the Respondent.".

The working relationship between the Claimant and the Respondents from 2015 to July 2018

43. We had been presented witness evidence that at first appeared to be in conflict as to the working relationship between the Claimant and the Respondents from 2015 to July 2018.

44. The Claimant describes herself as not coping and without training and support (paragraphs 5 to 9 of her statement). The Respondent in its witness evidence did not accept this saying the Claimant had been given all the support and training she needed. However, both Mr George and Mrs Street accepted in cross examination that the Claimant was not coping in her role.

45. Despite the parties' respective positions, no formal grievance was raised about matters by the Claimant, the only reference to raising the issue is at paragraph 7 of the Claimant's statement where she says, "I made it known to the Second Respondent that I needed additional help and support to carry out my job effectively.". The Claimant does not say exactly what form the additional help and support should take. Further, the Claimant was never formally managed by way of performance or capability review by the Respondents during this time.

The heart scare

46. It is accepted that the Claimant was treated for a suspected heart attack on the 18 July 2018.

47. The Claimant describes at paragraph 11 of her statement "Upon my discharge from hospital I was initially signed off as unfit to work by my GP. I was advised that I had been lucky and it should be taken a 'warning shot'. Thereafter I attended regular meetings with my GP with my sickness certificate being extended after each visit; my GP maintaining that I remained unfit for work due to stress and anxiety [Pages 271, 273 – 275, 279 – 283 & 286].". We note the last fit note presented in the bundle at page 289 signed the Claimant off for "anxiety" from the 12 March 2019 to the 25 March 2019.

48. In evidence we were also referred to a number of GP records at this time and have noted at page 224 reference to the suspected heart attack and then reference to the Claimant being honest with her employer and asking for the support needed (23 July 2018).

49. Then at page 228 (31 August 2018) "feeling very stressed at the prospect of having to work with an unapproachable boss – cross as very capable of doing her job but is this problem insurmountable.". The Claimant confirmed in cross examination that she did not feel able to go back to work at that point. The pros and con options were then noted by the GP in the notes, but have been redacted so we do not know what they were (and the Claimant did not recall what those were either).

50. The Claimant at paragraph 12 of her statement says … "The only contact that I had from the Respondents was the acknowledgement of my sickness certificates being received. Aside from this no enquiries were made by the Respondents as to my health and wellbeing until October 2018; some four months later - not even a quick telephone call, get well card or flowers.".

51. However, this is not wholly accurate as the unchallenged evidence of Mrs Street notes at paragraph 19 reference to a number of text messages between the Claimant and her regarding the Claimant's leave and her pay.

The formal absence procedure

52. The formal absence procedure is then started by the Respondents by letter dated 11 October 2018 (pages 90 and 91). It requested the Claimant attend a Case Review meeting at the Respondents' Dorchester office on the 22 October 2018 with the Second Respondent. The purpose of this meeting was to discuss the Claimant's reason for absence and her medical condition, her future prognosis and to consider reasonable adjustments and alternative employment / job roles. It also states… "The Company would greatly value your participation in the Case Review in order that we can ensure that all relevant information is considered. If you are too unwell to travel to the Case Review and would prefer for the Case Review to take place at your home, please let me know. Alternatively, if you feel that you are too unwell to participate in the Case Review, you may wish to update us in writing covering the points in the Agenda above, and/or have a representative as above to attend in your place.".

53. It was accepted that this letter was not unreasonable and is not cause for complaint by the Claimant.

54. At paragraph 14 of her statement the Claimant describes her response "I wrote to the Second Respondent on 17 October 2018 [Page 92], declining his invitation as I was attending my elderly mother's 80th Birthday party on

that same day. I also informed him that I was due to have a 24-hour blood pressure monitor fitted in order to allow my Consultant Pathologist to review my blood pressure levels and determine if medication could and should be implemented. I took the opportunity to outline my medical condition, the course of events leading to my admission to hospital and how stressful I had been finding being at work prior to my absence. The Second Respondent was therefore fully aware (if had not already been) of the facts surrounding my illness and continued absence.".

55. The Respondents do not accept that the Claimant's letter does make it clear the reason for her absence and refers to where it says, "The stress and anxiety have been brought about as a genuine concern for my immediate health.". Mr George said in cross examination that he understood from this letter that the Claimant was signed off due to the stress and anxiety caused by her health worries.

56. We note from paragraph 15 of the Claimant's statement – "Following my reply the Second Respondent emailed me on 22 October 2018 [Page 93] to enquire if I wished for my letter of 17 October 2018 to be treated as my written submission or would I rather reschedule the meeting and to that extent he proposed a date of 1 November 2018 at the Respondent's Dorchester office…".

57. It is then at this point that the Claimant seeks to set out her position with greater clarity following a visit to her GP. This is by combination of an email dated 24 October 2018 to the Respondents (page 94) and a letter from her GP dated 24 October 2018 (page 95). As the Claimant sets out in her evidence (paragraph 18) "I emailed the Second Respondent on 24 October 2018 [page 94] to inform him that not only had I been signed off by my GP for a further month but also that he could expect to receive from my GP a letter confirming that it was not in the interests of my health and wellbeing for me to attend any immediate meeting [Page 95]. I also confirmed that I did not wish for him to rely upon the contents of my letter of 17 October 2018 as my written submission for that intended meeting…".

58. The Claimant does receive a further letter though from the Respondents dated 25 October 2018 which seeks to reschedule the Case Review to the 1 November 2018. It was accepted though that this was prepared and sent before Mr George had seen the Claimant's email or her GP letter.

59. Reference is made to this in a call on the 25th October 2018 between the Claimant and Mrs Street, which although not mentioned in the Claimant's evidence, is detailed in Mrs Streets (at paragraph 20) and the Claimant accepted in cross examination that the transcript at page 98 was agreed in broad terms.

60. The Respondents then respond with the benefit of having considered the GP's letter by email on 30 October 2018 [page 101]. Mr George says that the absence review meeting will happen in the Claimant's absence on the 1 November 2018 and he would encourage her to participate by either a written update, sending a representative or having it conducted at her home. In oral evidence Mr George explained that he had understood from the correspondence from the GP that he was not being advised that he could not continue with the Case review in the Claimant's absence. In this regard the GP letter does say "I am afraid that my advice is her GP is that she should not attend any sort of meeting at present, either at work or elsewhere, as I feel this would be detrimental to her health.".

61. The Claimant replies to this on the 31 October 2018 by email (page 102) and says … "I am writing to you in response to your last mail in which you continue to request that I attend a case meeting to review my ongoing sickness absence. Given that my GP has written to you to confirm that she has currently advised against this on medical grounds as well as the fact that the cause of my anxiety is stress down to the way my role has changed so significantly and consequently the way I have been treated at work I can only reiterate that I am unwilling to attend any meeting that is likely to make my condition even worse. I trust that you will respect my decision and not try to pressure me into participating in a process that my GP has already indicated to you is likely to make my current condition worse by putting me back into the same environment as led to my stress and anxiety in the first place.".

62. The Claimant next heard from the Respondents when she received two letters, each with enclosures, both dated 5 November 2018. The first letter [Pages 103 - 105] was confirmation that the rescheduled meeting had taken place in her absence and enclosed the minutes. In the covering letter it does say they wanted to understand how the Respondents could support the Claimant in her return to work. However, the minutes from the meeting (paragraph 14 on page 105) do appear to make it clear that the Respondent had established there was no possibility of a phased return to work or any reasonable adjustments being made to facilitate the Claimant's return to work being made "due to the considerable lack of communication" during her period of absence.

63. However, from this position the Claimant does participate and appears to have no issue with the obtaining of a medical report from Occupational Health.

The Occupational Health report

64. The Occupational Health report is dated 28 January 2019 and is at pages 122 to 125. It is an important document in this case and we have considered

it carefully. It notes its purpose as being "… management has sought advice about the health problem, fitness to work and appropriate adjustments or support for her in the workplace." (page 122).

65. It provides a current and relevant health status:

"We discussed her health in detail and the summary of events is that Mrs Vickers has been absent from work since 18th July 2018 to the present day with anxiety and stress as diagnosed by her General Practitioner (GP). She reports that she does not have any personal issues and therefore her symptoms are due to work related that have developed over the past five years and until they came to a head on 18.07.18. There were organisational changes, turnover of staff, an increase in her workload and unachievable expectations. The staff were asked for ideas on how to improve the business but when she offered ideas or suggestions, they were not considered but the same question would be asked again at subsequent meetings She felt that there was no concern for her wellbeing and general health'.

She was diagnosed with familial hypercholesterolemia (FH) in either late 2013 to early 2014 and it is a hereditary condition that makes the body unable to remove the bad cholesterol from the blood. On 18.07.18, she was admitted to hospital with a raised blood pressure and chest pains which she was experiencing before she had tests for a suspected heart attack. On 17.10.18, she had a 24-hour blood pressure monitoring test and was informed that if the top figure (systolic) is above 130, she will be prescribed medication. On average, the systolic reading is borderline at 129. She remains under a Consultant Specialist to review the FH and she saw her GP this morning and her fit not has been extended for a further month."

66. It notes that the underlying condition affecting her ability to work is "Work-related stress and familial hypercholeroleamia." And it affects her at present as "she reports that she continues to feel apprehensive about work".

67. It notes that it is unlikely the Claimant would be covered as being a disabled person (page 123), although ultimately that determination is a legal one.

68. At page 125 it notes:

"In addition. I have reviewed this case using the Faculty of Occupational Medicine Guidelines and consider that:

She is able to understand the nature of a management meeting and the issues raised.
She does not have the ability to participate in any investigation or management meetings.

She may require a representative to support her or act on her behalf in certain circumstances.
She may require extra time or written explanation to allow her to engage in the management process.
She is could experience a deterioration in her health and wellbeing as a result of engaging with management in this process at this time.

I would suggest an informal meeting with a neutral party at a neutral venue if this would help to expedite the process as current occupational health thinking is that unless the employee is able to engage with management and draw a line under the perceived current workplace issues. it is unlikely that she will be able to move forward from a psychological perspective as this cannot be medically resolved.".

69. We noted in particular from this report "She does not have the ability to participate in any investigation or management meetings" and "She is could experience a deterioration in her health and wellbeing as a result of engaging with management in this process at this time.".

70. In cross examination Mr George accepted that this was a stark warning that if he continues to get the Claimant to engage there is a risk to her health. "Reading it now interpret it as a warning we were reliant on Croner. Yes, accept a warning there.".

71. As to offering an informal meeting with a neutral party at a neutral venue, Mr George responded that he considered it to be advice only and they had offered a neutral venue with the Dorchester office, albeit it was part of the Respondent Group.

The Respondents' further letters and the Claimant's resignation

72. It is within this content that the further letter of the 5 February 2019 (page 134 and 135) is sent to the Claimant which does appear to be a carbon copy of the original invite letter, inviting the Claimant to a Case review meeting at the Dorchester office on the 14 February 2019 with the Second Respondent. About this Mr George confirmed in cross examination that he believed they had offered a neutral venue (although we note the venue has not changed since the original letter in October 2018), but accepted they had not offered a neutral person to hear it nor to move the process from formal to informal. He explained that the reason for this was he was reliant on the advice of Croner and "if Croner got it wrong then they got it wrong, they have got their expertise wrong".

73. The Claimant refers to this letter at paragraph 27 of her statement "I was staggered that the recommendations in the OH Report, along with my GP's and my own written concerns were being completely ignored once more.".

74. The Claimant instructs solicitors to respond for her and their letter dated 13 February 2019 (page 138 and 139) does flag the key issue of the OH report (as can be seen at page 139) “Eventually you did seek an Occupational Health Report which stated that our client ‘does not have the ability to participate in any... management meetings... She could experience deterioration in her health and wellbeing as a result of engaging with management in this process at this time.’”.

75. This results in a further letter dated 6 March 2019 inviting the Claimant to attend a rescheduled Case review meeting with the Second Respondent, albeit sent via the Claimant’s solicitors as requested (page 142 to 144). This, as with the previous letters, invites the Claimant to a case review meeting saying … “Following the letter we have received from your Solicitor, Porter Dodson, dated 13th February 2019 we would like to invite you to a rescheduled Case Review Meeting.”.

76. This letter does not appear to offer anything different to that offered by the previous letters … “We have been informed that you will be taking a break away until the 6th of March. We would like to reschedule the next meeting to the 26‘" March 2019 at Dorset Property Dorchester Office.” …. “As previously stated in my letter of 5th February 2019 I am holding this Case Review, which I invite you to attend, to consider the agenda….”. The agenda is broadly the same as that set out in the original letter on October 2018 to consider… “1. Your medical condition and the prognosis for the future. Discussion of the medical report. 2. Absence to date and assessment of the impact on the business. 3. Consideration of reasonable adjustments to your role to assist your return to work and ongoing employment. 4. Consideration of alternative employment/job roles to assist your return to work and ongoing employment. 5. The way forward/ongoing review.”. It offers the same alternative as the original letter in October 2018 “Again, the Company would greatly value your participation in the Case Review in order that we can ensure that all relevant information is considered. If you are too unwell to travel to the Case Review and would prefer for the Case Review to take place at your home or an alternative venue, please let me know. Alternatively, if you feel that you are to unwell to participate in the Case Review, you may wish to update us in writing covering the points in the Agenda above, and/or have a representative as above to attend in your place.”.

77. This correspondence has not been adapted to reflect what the Claimant, her GP, Occupational Health and then the Claimant’s solicitors have informed the Respondents.

78. It is the receipt of this further letter that triggers the Claimant's resignation (pages 145 and 146). As the Claimant states in her letter dated 15 March 2019:

"You will appreciate therefore the devastation I felt on being forwarded your letter of 6th March, coinciding with my return from holiday (of which you were aware). That letter immediately undid all the good from my break away and took me back to exactly the same level of stress and anxiety I had experienced before my holiday.

The content of that letter is unacceptable in light of the OH advice and the subsequent points raised by my solicitor. OH had advised you that I was not fit to participate in a management meeting, warning of this being a risk to my health, yet you sought to argue that an absence management meeting did not count in that it was not 'management' per se. I simply cannot see the distinction.

Despite this, your approach would have been much easier for me to handle had you paid any attention at all to the OH advice. For instance, the recommendation was that necessary contact would be best via an informal meeting with a neutral party at a neutral venue. Your invitation to a meeting went completely against this in that it was an invitation to a formal meeting, with you and expected my attendance in the first instance at the Dorchester office.

This is I'm afraid a continuation of the kind of behaviour which has had an immense impact on my health and others around me. It is symptomatic of an approach whereby it is 'your way or the highway'. You are fully aware of my familial hypercholesterolaemia and the events of my suspected heart attack last July. The effects of stress upon an individual with my history is well known, but was something that I in any event made you aware of and which you should have appreciated from the OH advice.

In short, I am unable to work for someone who has such a scant regard for the health and 'wellbeing of a member of their staff. I love my job but, putting it frankly, it is not something I am prepared to give my life for."

79. There is then the Respondent's response to this letter dated 18 March 2019 (page 147) which acknowledges the Claimant's resignation and invites the Claimant to a grievance hearing at the Dorchester office.

80. Mr George explained it was a standard letter he was asked to send out by Croner and he apologised for it being sent to the Claimant direct as he didn't realise. We note that the letter from the Claimant did not come via her solicitors nor did it request that any response or acknowledgment be sent via her solicitors.

81. Considering the letters of the 5 February 2019, 6 March 2019 and the 18 March 2019 which the Claimant says are acts of harassment towards her. We have noted that the Claimant refers to the distress and anguish of receiving the letters of the 5 February 2019 and 6 March 2019 in her witness statement, although she does not expressly assert that she felt humiliated by those letters because of her health condition as asserted by her Counsel in his submissions.

82. The Claimant refers to the letter dated 18 March 2019 at paragraph 34 of her statement saying, "I was left absolutely speechless and appalled as this appeared simply to add insult to injury.".

THE LAW

83. Having established the above facts, we now apply the law. We were assisted by the legal summary Mr Probert provided in his written submissions and that was accepted as agreed by Mr Henry.

Constructive Dismissal / Breach of Contract

84. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

85. If the Claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Employment Rights Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

86. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances

to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.".

87. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall 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: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

88. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.

89. The Court in Kaur offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part of a course of

conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign. (5) Did the employee resign in response (or partly in response) to that breach?

90. Further, as summarised by Mr Probert and agreed by Mr Henry:

"6. If the employee can show that the employer's behaviour, viewed objectively, evinced an intention no longer to be bound by the terms of the contract, he can show that there has been a fundamental breach entitling him to terminate without notice (**Buckland v Bournemouth University Higher Education Corpn [2010] ICR 908**).

7. Every breach of the implied term of trust and confidence is a repudiatory breach of contract (**Morrow v Safeway Stores [2002] IRLR** 9).

8. The employee is also allowed to rely on a series of acts by the employer to show that the employer did not intend to be bound by the terms of the contract. The cumulative effect of a course of conduct can amount to a breach (**Barke v SEETEC Business Technology Centre Ltd [2006] All ER (D) 41 (Jan), EAT**). A series of small breaches of the contract may entitle the employee to rely on a 'final straw' breach, which of itself might not be fundamental if viewed in isolation (**Garner v Grange Furnishings Ltd [1977] IRLR 206). In Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1**, the Court of Appeal affirmed the approach taken in **Omilaju v Waltham Forest London Borough Council [2005] ICR 481** to last straw cases and made it clear that an employee can rely upon the totality of an employer's acts, notwithstanding a prior affirmation, as long as the final straw is part of the same series of acts.

9. The breach must cause the termination of the contract by the employee (**Joseph Steinfeld v Reypert (EAT 550/78**)). The employee must indicate clearly that he is resigning in response to the breach (**Logabox Ltd v Titherley [1977] ICR 369**).

10. The implied term of trust and confidence is well established in employment law, and as clarified by the EAT in **Baldwin v Brighton and Hove City Council [2007] IRLR 680**, the tribunal must decide whether the employer's conduct, objectively considered, was calculated or (short of intention) likely to seriously undermine the necessary trust and confidence in the employment relationship so to amount to a breach of the implied term. In **BCCI SA v Ali (No 2) [2000] ICR 1354, [1999] IRLR 508**, the High Court held that the test is whether the employer's conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice.

11. The employer's conduct will be judged, as a whole and objectively, for its effect on the employee. The employer's conduct does not in any way have to be deliberate (**The Post Office v Roberts [1980] IRLR 347**). The tribunal will ask whether the employee could have been expected to have put up with the employer's conduct. Thus, the employee may cite previous breaches of the contract (including those which he may have waived) in order to show that cumulatively the employer's behaviour breached the term relating to trust and confidence."

91. As to the Claimant's claim for breach of contract this is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

Disability discrimination

92. ***The question of disability*** - As set out in section 6 and schedule 1 of the Equality Act 2010 a person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.

93. As to the question of knowledge, paragraph 20(1) of Schedule 8 to the Equality Act 2010, provides that a person is not subject to the duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know that the relevant person is disabled but also that her disability is likely to put her at a substantial disadvantage in comparison with non-disabled persons. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known).

94. The following key points of law are noted from our review of the relevant law and from the agreed legal summary from the parties:

95. The burden of proving disability lies squarely on the Claimant.

96. From the definition from the Equality Act 2010, as referred to above, four essential questions need to be answered: (1) does a person have a physical or mental impairment? (2) does that have an adverse effect on their ability to carry out normal day to day activities? (3) is that effect substantial? (4) is that effect long-term? These questions may overlap to a certain degree; however, a tribunal considering the issue of disability should ensure that

each step is considered separately and sequentially (Goodwin v Patent Office [1999] IRLR 4*).*

97. An impairment will only amount to a disability if it has a substantial adverse effect on the individual's ability to carry out day-to-day activities which are normal. Whether an effect is substantial requires a consideration whether it is more than minor or trivial: section 212 Equality Act 2010.

98. Paragraph. 2(1), Schedule. 1, Equality Act 2010 states that an impairment will have a long-term effect only if: (1) it has lasted at least 12 months; (2) the period for which it lasts is likely to be 12 months; or (3) it is likely to last for the rest of the life of the person affected.

99. In respect of the meaning of the word 'likely' as used in the above context, this means whether something "could well do" or "could well happen".

100. In relation to "normal day to day activities", to focus of the Act is on the things that the Claimant cannot do or can only do with difficulty, rather than on things they can do (Goodwin). As a matter of principle, it is impermissible for a tribunal to seek to weigh what a Claimant can do against what they cannot (Ahmed v etroline Travel Limited [2011] EQLR 464). These activities can include anything that a Claimant is required to do as part of their professional life (Paterson v Metropolitan Police [2007] IRLR 763).

101. Although there must be a causal link between the impairment and a substantial and long-term adverse effect in the ability to carry out day-to-day activities, that causal link does not have to be direct. If the impairment causes the substantial adverse effect on the Claimant's ability to carry out day-to-day activities, it is not material that there is an intermediate step between the impairment and its affect, provided that there is a causal link between the two Sussex Partnership NHS FT v Norris [2012] EQLR 1068, (we were referred in particular to paras.40-44 of the judgment).

102. In a case where, as a result of a medical condition, the effects of an impairment on ability to carry out normal day-to-day activities fluctuate and may be exacerbated by conditions at work, the tribunal should consider whether the impairment has a substantial and long-term adverse affect on the employees ability to perform normal day-to-day activities both while actually at work and while not at work – Cruickshank v VAW Motorcast Limited [2002] IRLR

103. Pursuant to Schedule 1(5) Equality Act 2010, the effect of medical treatment (including medication and corrective measures) needs to be discounted when considered substantial adverse effect on the ability to do day to day activities.

104. Knowledge of disability does not require an employer to know someone is "disabled" under the legal definition; rather it is about their knowledge of the facts constituting an employee's disability (Gallop v Newport City Council [2014] IRLR 211).

105. ***Discrimination arising from disability*** - As for the claim for discrimination arising from disability, under section 15 (1) of the Equality Act 2010 a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this 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.

106. ***Failure to make reasonable adjustments -*** The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the Equality Act 2010. The duty comprises of the following requirements, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the Equality Act 2010, A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

107. ***Harassment -*** The definition of harassment is found in section 26 of the Equality Act 2010. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

108. The provisions relating to the burden of proof are to be found in section 136 of the Equality Act 2010, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the

provision. A reference to the court includes a reference to an employment tribunal.

109. As agreed by the parties as part of their further supplemental submissions, sections 109 and 110 of the Equality Act 2010 permit complaints to be raised against an individual as well as the employer and findings of discrimination in this claim can therefore be found against both Respondents.

THE DECISION

110. To now apply our factual findings and relevant law to determine the issues on liability we are being asked to determine. We have done this by specific reference to the relevant parts of the agreed list of issues as follows (our findings in bold for ease of reference):

111. Constructive unfair dismissal

a. The Claimant claims that the First Respondent acted in fundamental breach of contract in respect of their actions/omissions which are alleged to be acts of discrimination and a breach of the implied term of mutual trust and confidence (POC 23 – page 18) as follows;

i. the First Respondent failed to act on the advice it commissioned through an Occupational Health (OH) report and particularly the risks this report highlighted to the Claimant in being expected to have meetings with the Second Respondent (POC 23); **We find that the First Respondent did fail to act in that way. We note in particular from the Occupation Health report obtained by the First Respondent that that Claimant "… does not have the ability to participate in any investigation or management meetings" and "She is could experience a deterioration in her health and wellbeing as a result of engaging with management in this process at this time.". Occupational Health therefore suggested "… an informal meeting with a neutral party at a neutral venue if this would help to expedite the process".**

ii. Despite this, the First Respondent repeatedly requested the attendance of the Claimant at such meetings until the Claimant felt unable to comply further (POC 23). **We have found that this did happen with the Respondents' letters of the 5 February 2019 and 6 March 2019. As we have noted these letters are in the same terms as the letter that originally commenced the formal process in October**

2018, with the primary position being an invitation to a meeting at a specific location (the Dorchester office) on a particular date with the Second Respondent. The meetings were to discuss such things as the Claimant's reason for absence, medical condition, future prognosis and to consider reasonable adjustments and alternative employment / job roles. The letters also state (as the previous letters had) that … "The Company would greatly value your participation in the Case Review in order that we can ensure that all relevant information is considered. If you are too unwell to travel to the Case Review and would prefer for the Case Review to take place at your home, please let me know. Alternatively, if you feel that you are too unwell to participate in the Case Review, you may wish to update us in writing covering the points in the Agenda above, and/or have a representative as above to attend in your place.". The Claimant is therefore still expected to participate and engage in the formal process at that time.

b. Applying the guidance offered to tribunals in Kaur, considering the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? **This was the letter of 6 March 2019**.

(2) Has he or she affirmed the contract since that act? **No, the Claimant resigns by letter dated 15 March 2019.**

(3) If not, was that act (or omission) by itself a repudiatory breach of contract? **In our view yes, the First Respondent was aware of the risk to the Claimant's health (the warning) and had been reminded of it by the Claimant's Solicitors before then making the same request of her. We find this to be a breach of mutual trust and confidence and that it did "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".**

(4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.

Based on our findings to this point we have not gone on to consider this.

(5) Did the employee resign in response (or partly in response) to that breach? **In our view yes, this is clear from the contents of the Claimant's resignation letter.**

c. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act? **We find the dismissal to be unfair. We have not been presented any evidence or submissions as to what the fair reason would have been.**

112. Breach of contract

a. Did any proven breach of the Claimant's contract by the First Respondent repudiate that contract? **We find this to be so for the reasons we have set out above in respect of the complaint of constructive dismissal.**

b. **The Claimant would have been entitled to 10 weeks' notice entitlement had there not been the breach of contract as proven against the First Respondent**.

113. Disability

114. Is the Claimant as disabled person within the meaning of the Equality Act 2010?

a. Did the Claimant have a physical or mental impairment at the material time, that is between July 2018 - 15 March 2019, namely Familial Hypercholesterolemia (FH)? **It is Accepted by the Respondents that this is a long-term impairment. It is formerly diagnosed as can be seen by the letter of 5 June 2014 (page 242). Also, at page 248 the letter 31 August 2014 provides further detail noting "the need for risk factor reduction".**

b. **As the Claimant describes in her witness evidence (paragraph 2 of her witness statement) … "Familial Hypercholesterolemia (FH) [Pages 242-244]. As I understand it, FH is where I do not have the gene that filters 'bad cholesterol' out of the blood and therefore significantly increases my risk of early heart disease.". Further, at paragraph 3 of the disability impact statement (page 171) … "Familial hypercholesterolemia (FH) is a genetic condition whereby the liver is unable to remove LDL ('bad cholesterol'). This means that levels of LDL in the blood remain dangerously high, risking—even at an early age - heart**

attack and stroke. The risk of fatality with FH is significantly more than in other scenarios. Being genetic I have had it all my life and it will be with me forever.".

c. Did this impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities? **The Respondents do not accept that it does. We have therefore considered carefully the evidence of the Claimant and the judgment of Sussex Partnership NHS FT v Norris [2012] EQLR 1068, and in particular paragraphs 40 to 44 of the judgment**.

d. From that we determined the following:

   i. **That the statute requires a causal link between the impairment (in our case FH) and a substantial and long-term adverse effect on the ability to carry out day-to-day activities. However, the Equality Act does not require that causal link to be direct. "If on the evidence the impairment causes the substantial adverse effect on ability to carry out day-to-day activities it is not material that there is an intermediate step between the impairment and its effect provided there is a causal link between the two.".**

   ii. **The impairment (FH) leads to an impairment at an intermediate stage, that is the increased susceptibility of the Claimant to suffer a heart attack and/or stroke.**

   iii. **Does that increased susceptibility to suffer a heart attack and/or stroke result in a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?**

   iv. **It would seem therefore that the material question for us is whether the increased risk of a heart attack and/or stroke would itself have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities**.

e. **We remind ourselves that we need to consider what the Claimant cannot do, not what she can do. In this regard we have been provided with the following witness evidence from the Claimant, as set out in her witness statement and disability impact statement, which we accept and which supports that she would be so impaired (that is in ways that are more than minor or trivial)**.

f. **At paragraph 3 of her witness statement … "This diagnosis was completely life changing for me and I quickly had to come to terms with the fact that as it is a genetic condition, I have had, and will have it, forever. Consequently, FH has had, and will continue to have, a substantially negative effect on every single aspect of my day-to-day life… I now have to attend regular check-ups and I am required to take Statins daily in order to artificially lower the 'bad cholesterol' in my blood and lessen the risk of suffering a heart attack and/or stroke. I also now have to personally conduct regular 'at-home testing' of my blood pressure in order to closely monitor their levels throughout the day to so that I can be alert to any changes to them which without medical intervention would lead to serious complications arising. To this end, I must avoid stressful situations and over-exertion as these too can cause my blood pressure to rise to dangerous levels. This has meant that I have had to restrict the extent to which I exercise and the type of other activities I had previously enjoyed which I shall go onto expand upon further below. Coupled with this has been the psychological effects of knowing I have a permanent, life-threatening condition which it is fair to say has caused me huge amounts of anxiety and stress."**.

g. **Then at paragraph 10 … "I have had to change my lifestyle completely. My diet must be strictly monitored, and I can no longer enjoy certain foods that most people can freely enjoy. It is therefore near enough impossible for me to eat out at restaurants and enjoy social events with friends and family without my condition getting in the way. This is something I used to look forward to and enjoy in life. I am also no longer able to do certain physical activities which I once loved, including running, as there are additional risks associated with intense forms of exercise. I was advised by one doctor that I should limit any activity to thirty minutes of brisk walking per day, and no more than five times a week. It has been difficult knowing that I must live within these restrictions. My loss of physical capability to do normal activities has turned me into a person that I no longer recognise, and I know that my partner Tristan feels that I am not the same person he first met. I have become reclusive and reluctant to socialise as I constantly fear suffering another heart episode or worse. I worry about my condition and this only causes me greater anxiety. I am genuinely scared about what the future holds which feeds into my anxiety and enhances the risks associated with the condition within a vicious circle."**.

h. **Then at paragraph 8 of the disability impact statement (dated 10 July 2019) … "The diagnosis has had a broader effect upon me which has also severely affected my social life and self-confidence. Knowing I have such a potentially serious condition has completely knocked me for six. I am fearful of what might be around the corner, particularly having experienced my brother suffering a severe heart-attack whilst in his 40s and knowing already that there is some calcification of my arteries. This has resulted in me suffering stress and anxiety, which ironically is another risk-factor. I have become withdrawn and certainly don't get the enjoyment from life I once did. This makes me less inclined to make an effort with family and friends and often leaves me feeling exhausted, with no energy to socialise or do any of the recreational activities I previously enjoyed. I am currently having counselling, particularly given the effects of my treatment by the Respondent."**.

i. We also though need to consider whether that effect was long term and in particular, when did it start and has it lasted for at least 12 months? **We find that it started from the date of diagnosis based on the Claimant's evidence as set out above as being how she acted after being diagnosed (formally on the 5 June 2014). It has continued to impact the Claimant in the way she describes since that date, so has lasted for more than 12 months**.

j. **Further, we can also see how the work stress factor and the Claimant's ability to work would be substantially adversely affected from the suspected heart attack on the 18 July 2018. The Claimant is signed off work by reason of stress and anxiety from that date and remains so until after her resignation on the 15 March 2019. None of the work place stressors for the Claimant were resolved by the point of her resignation. As noted in the Occupational Health report the underlying condition affecting her ability to work is "Work-related stress and familial hypercholeroleamia.". It affects the Claimant at present as "she reports that she continues to feel apprehensive about work". This remains the position to the Claimant's resignation (15 March 2019) and looking at the position up to that point, in our view there is nothing to say (from the evidence as presented to us) that it was not likely (or that it could not well happen) that this would continue for 12 months or more in total (so up 17 July 2019)**.

k. We also must consider the position the Claimant would be in but for any measures taken to treat or correct the impairment. Would the Claimant's impairment have been likely to have had a substantial

adverse effect on her ability to carry out normal day-to-day activities but for those measures. **As the Claimant states in her unchallenged evidence (at paragraph 3 of her witness statement) … "I now have to attend regular check-ups and I am required to take Statins daily in order to artificially lower the 'bad cholesterol' in my blood and lessen the risk of suffering a heart attack and/or stroke. I also now have to personally conduct regular 'at-home testing' of my blood pressure in order to closely monitor their levels throughout the day to so that I can be alert to any changes to them which without medical intervention would lead to serious complications arising." … "To this end, I must avoid stressful situations and over-exertion as these too can cause my blood pressure to rise to dangerous levels." Then at paragraph 5 of her Disability Impact Statement … "I have to take statins and have my blood pressure and cholesterol levels regularly monitored to prevent complications. If I were not to take my medication, I would almost certainly suffer a heart attack or stroke which could well prove fatal…."**.

l. **We therefore find that the Claimant's impairment would have been likely to have had a substantial adverse effect on her ability to carry out normal day-to-day activities (that is more than minor or trivial) but for those measures**.

m. **For these reasons we find that the Claimant was a disabled person pursuant to the Equality Act 2010 by reason of FH at the material times to this claim**.

115. Reasonable adjustments: section 20 and section 21

a. Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely

i. The application of the First Respondent's absence management procedure with the expectation for the Claimant to attend a case review meeting with the Second Respondent (POC 25). **The Respondents accept this was applied. We note that this is the primary position in the letters of the 5 February 2019 and 6 March 2019. As set out above these letters are in the same terms as the letter that originally commenced the formal process in October 2018, with an invitation to meet at a specific location (the Dorchester office) on a particular date, with the Second Respondent, to discuss such things as the Claimant's reason for absence, medical condition, future prognosis and to**

consider reasonable adjustments and alternative employment / job roles.

b. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that

   i. There was an increased risk of the Claimant suffering a health problem linked to her FH condition; and

   ii. There was a reduced likelihood of a lasting recovery by the Claimant (POC 25).

c. **In our view both of these are confirmed by the totality of evidence that was available to the Respondents at that time from the Claimant directly, her GP, her Solicitors, and in particular the Occupational Health Report commissioned by the Respondents. The Occupational Health Report states that the underlying condition affecting the Claimant's ability to work is "Work-related stress and familial hypercholeroleamia.". It affects the Claimant at present as "she reports that she continues to feel apprehensive about work". Further, the Claimant "does not have the ability to participate in any investigation or management meetings" … and could "… experience a deterioration in her health and wellbeing as a result of engaging with management in this process at this time"**.

d. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

   i. To follow the adjustments advocated by the OH Report, in particular, for the meeting to be held at a neutral venue with a neutral third party (POC 25). **The Occupational Health Report expressly states "I would suggest an informal meeting with a neutral party at a neutral venue if this would help to expedite the process as current occupational health thinking is that unless the employee is able to engage with management and draw a line under the perceived current workplace issues. it is unlikely that she will be able to move forward from a psychological perspective as this cannot be medically resolved."**

e. Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above? **The Respondents may not have expressly known or accepted that the Claimant was a disabled person within the meaning of the Equality Act, but in our view, they did have constructive knowledge due to the totality of evidence that was available to the Respondents at that time. This was from the Claimant directly about her health (including what she had set out in her email from 2015), her GP, her Solicitors, and in particular the Occupational Health Report commissioned by the Respondents. Mr George accepted the Occupational Health report contained a stark warning that if he continued to get the Claimant to engage there was a risk to her health. This position was then reinforced by the letter from the Claimant's solicitors dated 13 February 2019**.

f. **The Respondents have presented no evidence to support a position that the proposed adjustment was not reasonable nor that it would not remove the disadvantage to the Claimant. The Respondents' position was they were following Croner advice and if they (Croner) got it wrong then they got it wrong**.

116. Section 15: Discrimination arising from disability

a. The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act is the repeated requests made of the Claimant to attend face-to-face formal review meetings with the Second Respondent (POC 24). No comparator is needed.

b. Can the Claimant prove that the Respondent treated her as follows - the application of the First Respondent's absence management procedure with the expectation for the Claimant to attend a case review meeting with the Second Respondent (POC 25-26)) because of the "something arising" in consequence of the disability?

    i. The "something" was the Claimant's absence from work following her suspected heart-attack and stress condition caused by the Claimant's disability.

    ii. In addition, or in the alternative, the "something" was the significant effect of stress upon the Claimant's FH condition which made the face-to-face meetings impossible, (POC 24).

c. **In our view both of these are confirmed by the totality of evidence that was available to the Respondents at that time from the Claimant directly, her GP, her Solicitors, and the Occupational Health Report. The Claimant is absent from work following a suspected heart attack and stress condition. The second "something" is in particular confirmed by the Occupational Health Report. The Report states that the underlying condition affecting the Claimant's ability to work is "Work-related stress and familial hypercholeroleamia.". It affects the Claimant at present as "she reports that she continues to feel apprehensive about work". Further, the Claimant "does not have the ability to participate in any investigation or management meetings" … and could "… experience a deterioration in her health and wellbeing as a result of engaging with management in this process at this time"**.

d. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent's position is that the treatment was a proportionate means of achieving a legitimate aim (RR 6.2.9):

    i. The capability procedure was commenced because the Respondent wanted to do everything in their power to help the Claimant back to work (RR 6.2.12).

        1. the business aim or need sought to be achieved was to assist the Claimant to return to work

        2. As to the reasonable necessity for the treatment, it was to allow the Respondent to assess the Claimant's needs in the workplace on her return to work;

        3. As to proportionality: taking into account the size and resources, it was reasonable to request the Claimant to attend at a neutral venue, to send a representative or to provide written representations.

e. **In respect of the asserted proportionate means of achieving a legitimate aim we do not find the Respondents have proven that they did operate in a proportionate way to achieve the aim of assisting the Claimant to return to work. They did not follow the advice of the Occupational Health report. The advice given to protect the Claimant's health and assist her back to work was to use … "an informal meeting with a neutral party at a neutral venue". The Respondents reason for not doing this was**

because they were following Croner advice and if they (Croner) got it wrong then they got it wrong.

f. Alternatively, can the Respondent show that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability? **The Respondents knew the Claimant's health circumstances since at least 2015 and this was then explained in full in the Occupational Health report, so for the same reasons as above we find the Respondents did have the necessary constructive knowledge**.

117. Section 26: Harassment on grounds of Disability

a. Did the Respondent engage in unwanted conduct as follows:

i. the repeated requests for the Claimant to attend face-to-face meetings with the Second Respondent. **By this the Claimant means the letters of the Respondents dated the 5 February 2019 and the 6 March 2019. In relation to these, as set out above, the primary position of these letters (in the same terms as the letter that originally commenced the formal process in October 2018) is to make an invitation to meet at a specific location (the Dorchester office) on a particular date, with the Second Respondent, to formally discuss such things as the Claimant's reason for absence, medical condition, future prognosis and to consider reasonable adjustments and alternative employment / job roles. This is unwanted by the Claimant as shown by her direct communications to the Respondents, based on what her GP and her Solicitors say and in particular as supported by the contents of the Occupational Health report.**

ii. The Respondents writing directly to the Claimant rather than through her Solicitors as requested. **By this the Claimant meant the response to her resignation letter from the Respondents dated 18 March 2019. It is not clear this is unwanted conduct because the Claimant did not say in her resignation letter, which was from her to the Respondents, that they should not reply to her, or only write to her via her Solicitors. Further, this was not part of the "process" referred to in the Occupational Health report.**

b. Was the conduct related to the Claimant's protected characteristic? **In respect of the first allegation in our view yes. The**

Occupational Health Report states that the underlying condition affecting the Claimant's ability to work is "Work-related stress and familial hypercholeroleamia.". It affects the Claimant at present as "she reports that she continues to feel apprehensive about work". Further, the Claimant "does not have the ability to participate in any investigation or management meetings" … and could "… experience a deterioration in her health and wellbeing as a result of engaging with management in this process at this time". The recommendation made based on the Claimant health condition related to her disability was therefore … "an informal meeting with a neutral party at a neutral venue". This was not offered.

c. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? If not, did the conduct have the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. **In respect of the first allegation in our view yes. We have noted that the Claimant has stated that she felt distressed and anguished by the letters of the 5 February 2019 and 6 March 2019, and she resigns over the contents of the 6 March 2019 letter. Therefore, we find this conduct did have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her and it was reasonable for the conduct to have that effect in view of the "warning" about the risk to the Claimant's health**.

d. **In respect of the second allegation we have not found this to be unwanted conduct as the Claimant's resignation letter was sent direct by her to the Respondents and did not seek for any reply back to her to go via her Solicitors. Nor was it conduct related to the Claimant's protected characteristic as the letter dated 18 March 2019 is not part of the "process" addressed in the Occupational Health Report**.

118. For these reasons we determined that:

a. The complaint of constructive unfair dismissal is well founded and succeeds against the First Respondent.

b. The complaint of breach of contract is well founded and succeeds against the First Respondent.

c. The complaint of failure to make reasonable adjustments is well founded and succeeds against the First and Second Respondents.

d. The complaint of discrimination arising from disability is well founded and succeeds against the First and Second Respondents.

e. The complaint of harassment relating to the letters of 5 February 2019 and 6 March 2019 is well founded and succeeds against the First and Second Respondents.

f. The complaint of harassment relating to the letter of 18 March 2019 is not well founded and fails.

The Respondents' application for reconsideration

119. After our unanimous oral judgment on liability had been delivered the Respondents' representative, Mr Henry, then orally applied for a reconsideration of that judgment.

120. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 71 an application for reconsideration made in the course of a hearing need not be in writing.

121. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

122. The grounds relied upon by Mr Henry were (in summary):

a. That the claim we had decided was the Claimant being required to attend a case review meeting in breach of the Occupational Health report. Mr Henry asserted that this was not what was claimed in the claim form, nor what happened. The relevant letters he submitted offered alternatives to the Claimant attending, such as her sending someone in her place or submitting representations in writing.

b. That the finding the Claimant was a disabled person was wrong. Mr Henry referred to page 123 of the bundle and the finding of the Occupational Health report that said "In my view. Mrs Vickers is unfit for work for the next two to three months unless the work related issues can be addressed to reduce her stressors.". Mr Henry submitted that two to three months from the date of the report (end of January 2019) would mean the Claimant would be fit for work before 12 months from the date of the heart scare (18 July 2018) and sooner if the work related issues were addressed.

c. He understood the point of the Sussex authority but submitted the Claimant had not shown her impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities. Mr Henry submitted that anyone in their 50s should try to live the way the Claimant asserted she did for their own good health, irrespective of any alleged disability. He submitted the Claimant was only making minor adjustments to how much she ate and drank.

d. In relation to the Patterson authority he submitted that the Claimant's inability to undertake her role as Office Manager for the Respondents did not impact on her day to day activities, because there was no evidence she could not work elsewhere.

123. In response Mr Probert submitted that (in summary):

a. That the issue in the claim is the "repeated" requests to attend a meeting and this is clear from the claim form and the agreed list of issues as set out by Employment Judge Rayner. Mr Probert referred us to the issues at paragraph 4.1.1 (page 35 of the bundle) concerning constructive dismissal and submitted that this is exactly what we had addressed. Further paragraph 7.1 (page 36 of the bundle), paragraph 9.1 (page 38) and paragraph 10.3 (page 39).

b. That our findings on substantial adverse effect and the Sussex authority are based on the unchallenged evidence that we were presented. Mr Henry was not right to focus us on what the Claimant could do. There was plenty of evidence of adverse impact and it lasting for 12 months or more only requires it to be shown that it is "likely" or "could well". Further that we should consider the case authority of Ring v Dansk almennyttigt Boligselskab [2013] IRLR 571 in response to the submission Mr Henry makes about Patterson. Mr Probert submits that the European authority makes Mr Henry's submission about the Claimant's ability to participate in work an impossible distinction.

124. We agree with the submissions made my Mr Probert as to the claim we had to decide and that the agreed list of issues was followed.

125. We also note how paragraph 17 of the particulars of claim links back to paragraph 16 referring to the recommendations of the Occupational Health report. This includes that the Claimant could "experience a deterioration in her health and wellbeing as a result of engaging with management in this process at this time". The Respondents' position as asserted by Mr Henry that the Claimant was offered alternatives to attending, such as her sending someone in her place or submitting

representations in writing, still require her participation in the process and her engagement.

126. In respect of whether the Claimant is a disabled person or not we agree with Mr Probert's submissions. It is about what the Claimant cannot do, not what she can. As to work, the position as at March 2019 was the Claimant was still signed unfit for work, the work place issues had not been resolved at that point, so this inability to work "could well" continue. In any event our decision on the question of whether the Claimant was a disabled person or not was not based only on the Claimant's work activities. We considered day to day activities beyond that, and how the Claimant would be impaired but for any measures taken to treat or correct the impairment.

127. It was therefore our decision that it was not in the interest of justice to reach a different decision on these matters and accordingly, we refused the application for reconsideration pursuant to Rule 72(1) because there was no reasonable prospect of the Judgment being varied or revoked.

128. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 14 to 19; the findings of fact made in relation to those issues are at paragraphs 28 to 82; a concise identification of the relevant law is at paragraphs 84 to 109; how that law has been applied to those findings in order to decide the issues is at paragraphs 111 to 118.

Employment Judge Gray

Dated: 12 January 2021

Judgment sent to Parties: 19 January 2021

For the Tribunal Office