



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121265/2018

5 **Held in Edinburgh on 3, 4, 5 March & 28 September 2020**

**Employment Judge M Sangster
Tribunal Member Elliot
Tribunal Member Buon**

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Ms R Campbell

**Claimant
Represented by
Mr Welsh**

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Training for Care

**Respondent
Represented by
Mr R Bradley
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claims of disability discrimination and unfair dismissal do not succeed and are dismissed.

REASONS

25 **Introduction**

1. The claimant presented claims of constructive unfair dismissal and discrimination on the grounds of disability.
 2. The claimant requested, during the course of the hearing, if details of the precise nature of her medical conditions could be excluded from the written judgment. It was discussed that, to determine some of the issues, the conditions may require to be broadly identified, but agreed that full/precise details did not require to be included in the judgment.
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E.T. Z4 (WR)

3. It was agreed between the parties that the claimant was a disabled person for the purposes of the purposes of s6 of the Equality Act 2010 (EqA) as a result of three separate conditions. The respondent conceded that it had knowledge of two of those conditions (a bowel condition and an autoimmune condition) but denied that it had knowledge of the third condition (related to her ear/hearing).
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4. The claimant gave evidence on her own behalf.
5. The respondent led evidence from Alison Gray (**AG**), previously Senior Manager, Planning & Development and Catriona Bateman (**CB**) Senior Manager, Contracts & Finance.
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6. A joint set of productions was lodged, extending to 349 pages. An agreed chronology and list of issues was also produced.

Issues

7. The issues to be determined by the Tribunal, as agreed between the parties, were as follows:
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- a. Did the respondent have actual or constructive knowledge of the claimant's ear/hearing condition at the time of the alleged discrimination?
- Direct discrimination because of disability - s13 Equality Act 2010 (EqA)*
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- b. Did the respondent subject the claimant to the following treatment?
- i. Denying her promotion opportunities due to the way the respondent restructured the company in the 2018 restructure;
- ii. Demoting the claimant:
- Changing the claimant's job description without notifying her;
 - Concealing the changes to the job description from the claimant;
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- iii. Making discriminatory comments regarding the claimant's sick leave;

iv. AG disclosing the claimant's private medical information to Mark Le May, when she had expressly been asked not to do so; and

v. AG further disclosing the claimant's private medical information to colleagues in the senior management team.

5 c. If so, was that treatment '*less favourable treatment*', i.e. did the respondent treat the claimant less favourably than it would have treated others ("comparators") in not materially different circumstances?

d. If so, was this because of the claimant's disability?

10 *Discrimination arising from disability*

e. Was the claimant treated unfavourably in any of the following respects:

i. Being denied promotion opportunities within the 2018 restructure;

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ii. Commenting on the claimant's absence record; and

iii. Demoting the claimant

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- changing the claimant's job description without notifying her;
- concealing the changes to the job description from the claimant.

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f. If so, was this due to something arising in consequence her disability? Namely her absences over the previous three years which arose as a result of her disabilities?

g. If so, was the treatment pursuant to a legitimate aim?

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Constructive Unfair Dismissal

5 h. Did the factual allegations made by the claimant amount to a breach of any express or implied terms of the claimant's contract of employment? The claimant relied upon the following:

- 10 i. Demoting the claimant;
- ii. Changing the claimant's job description without notifying her;
- iii. Concealing the demotion by means of deception;
- iv. Concealing the changes made to the job description by means of deception;
- 15 v. Discriminating against the claimant contrary to s13 EqA; and
- vi. Discriminating against the claimant contrary to s15 EqA.

20 i. If so, were such alleged breaches (taken alone or cumulatively) sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement for the claimant to treat the contract as terminated?

25 j. Did the claimant, by her conduct, waive any such breaches with the result that he did not remain entitled to terminate the contract?

k. Was the claimant's resignation in response to any alleged repudiatory breach?

30 l. If the claimant was dismissed: what was the principal reason for dismissal; was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ('**ERA**'); and, if so, was the dismissal fair or unfair in accordance with s98(4) ERA?

Findings in fact

8. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
9. The respondent is a not-for-profit training provider that provides training for individuals involved in social care and childcare. The respondent is based in Edinburgh, but provides services throughout central Scotland. The respondent employs around 10-13 members of staff at any time, with 2-4 of those individuals working on a full time basis.
10. The claimant commenced employment with the respondent on 30 September 2008, as an Administrative Assistant. She worked 21 hours per week, Tuesday to Thursday, throughout her employment
11. Quite soon after she commenced her employment with the respondent she became ill and was admitted to hospital. On her return she informed AG about her bowel condition and indicated to her that she didn't want anyone else who worked for the respondent to know about this. AG in turn confided in the claimant that she had a similar condition. Given that she had a similar condition, AG was extremely aware of how sensitive the matter was and did not disclose the claimant's condition to anyone else who worked for the respondent.
12. In 2009/10, the claimant developed an autoimmune condition. She was open about this condition with her colleagues.
13. In April 2012 the claimant was promoted to the position of Course & Claims Administrator, within the Administration Team. AG became her line manager at that point. On 1 June 2015 she was further promoted to the position of Course & Claims Coordinator, within the Administration Team. Other members of the Administration Team at that time were Sharon MacLeod (**SM**), General/Receptionist, Louise James (**LJ**), Short Course Coordinator and Theresa Webster, Finance.

14. In 2013/14 Mark Le May (**MLM**), the founder and Manager of the organisation said to the claimant when she returned to work following a period of absence *'I know you know, there are no secrets between Alison and I'*.
- 5 15. In August 2015 there was a restructure of the organisation, due to MLM retiring. Rather than replace MLM, it was determined that the organisation would be run instead by a 4 person, senior management team. This consisted of Jean Watt (**JW**) Head of Adult Care, Helen Moffit (**HM**), Head of Childcare, AG, Senior Manager, Planning & Development and an individual to be appointed into the role of Senior Manager, Systems and Employability. CB
10 was subsequently appointed into that role. No changes were proposed to the remainder of organisation, which consisted of a Professional Staff and the Administration Team.
16. In August 2015 an individual was appointed to the role of Course & Claims Assistant, reporting to the claimant.
- 15 17. In 2016 the claimant developed a condition in relation to her ear/hearing. She was open about this condition with her colleagues. She required to attend ENT appointments on a regular basis throughout 2017 and 2018. Due to the times of the ENT clinics, her appointments were at times when she would normally have been working. AG was aware that the claimant was
20 experiencing issues related to her ear/hearing and was attending regular ENT appointments as a result. She did not however discuss this with the claimant or ask for any further details.
18. At some stage during 2017, when a number of students in a particular class became ill with a gastric virus, LJ stated to the claimant *'It's OK Ros, everyone
25 knows you have a problem. Catriona is downstairs now disinfecting the door handles.'* On a separate occasion in 2017, after being off for a tummy bug, HM asked the claimant how her tummy was.
19. The employment of the Course & Claims Assistant, who had been appointed in August 2015, terminated in May 2017. AG asked the claimant at the time
30 whether she would like the organisation to advertise for and recruit a replacement. The claimant indicated that she didn't want her to do so. She

stated that it was a huge time commitment to train someone new and she didn't want to go through that again at that point. Instead, it was agreed that SM would provide support for the claimant when needed, with the claimant supervising the work she did in relation to Course & Claims. The claimant did not take over line management responsibility for SM. SM continued to report to the senior management team. This was in accordance with the respondent's policy that, notwithstanding the fact that members of staff may be supervised by more than one person in relation to different elements of their role, there should only be one overall line manager.

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10 20. In her 2017 performance review, which was conducted towards the end of 2017, the claimant indicated that she would like to *"further develop my role within TFC perhaps to do something slightly different as I have been doing the same job, more or less, since I first started nine years ago."* She was aware that her line manager, AG, was intending to retire the following year and asked during her performance review whether this would create any opportunities for her. The claimant indicated that she had marketing expertise which could be used by, and may be beneficial for, the organisation. She stated however that she would not be able to increase her contracted hours. AG indicated that succession planning was at an early stage and no decisions had been made as yet.

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30 21. The claimant, SM and LJ all indicated during their 2017 performance reviews that they were finding their workload very heavy. As a result, discussions took place in relation to the recruitment of a new member of staff. It was agreed that the new member of staff would be an Administrative Assistant, and that they would provide support to the claimant and LJ, as well as cover for reception during lunch breaks and absences. The job description for the Administrative Assistant was discussed with the claimant and LJ. Interviews for the position took place in February 2018. The claimant was due to be present at these interviews, but was unable to attend. The new Administrative Assistant commenced work on 1 March 2018. Whilst elements of her work were supervised by the claimant and LJ, the Administrative Assistant reported to, and was line managed by, AG.

22. On 22 February 2018 the claimant met with AG and CB. She was informed that, in order to save money and reduce the number of individuals involved in the management of the organisation, a decision have been taken not to replace AG and HM when they retired later that year. Instead, their duties would be split between JW and CB, the remaining members of the senior management team. In addition, two individuals in the Professional Staff Team, responsible for adult care and childcare, would have their titles changed to Head of Adult Care and Head of Childcare. There was no change to their substantive duties however and the positions would not form part of the Senior Management Team. The claimant was not qualified to undertake these roles.
23. During the meeting, further discussion took place with the claimant in relation to the possibility of her undertaking a promotional role within the organisation, in addition to her current duties, as she had suggested in her 2017 performance review. The claimant confirmed that she may be interested in taking on the role, but stated that her preference would be for a new role to be created, that of Depute Manager, and for her to be appointed into that role. She hinted that she would resign if such a position were not created for her. AG and CB were surprised at the claimant's suggestion, indicating that the intention was to reduce management, rather than increase. They stated however that they would consider the proposal and revert to her.
24. The claimant's proposal, for the creation of a Depute Manager post, was considered by the SMT, in conjunction with the Board of Directors/Committee. It was determined there was no need to create such a role, particularly given the stated desire to reduce the number of management positions and save costs in the organisation.
25. AG and CB had a further meeting with the claimant on 8 March 2018. They informed the claimant at that meeting that her proposal had been considered but it was not possible to create a Depute Manager role. They explained the reasons for this. They indicated that the claimant was a highly valued member of staff and they hoped that she wouldn't resign as a result. They indicated that the promotional role was still open for consideration, if the claimant wished to pursue this. The claimant indicated that she had a lot going on in

her personal life at that time, so she would require to consider matters and let them know.

26. The claimant was absent from work from 31 March to 15 April 2018.

27. On 3 May 2018 the claimant indicated to AG that she would like to meet with the Board of Directors to hear why her career progression request wasn't acted upon. A meeting was arranged for the claimant to meet with two members of the Board on 9 May 2018. The promotional role was also discussed at that meeting and the claimant was informed that 8 hours a month could be allocated to this, rather than 4 hours which had previously been mooted. This was confirmed in a follow up meeting, later that day with the claimant, JW and CB. During the follow up meeting the claimant confirmed that she would consider taking up the role on that basis. It was agreed that details of the exact role and responsibilities, as well as salary changes, would be drawn up a meeting would be held with the claimant in the next couple of weeks to discuss matters further.

28. When the claimant's job description was being updated to incorporate the additional promotional role, it was noticed that the wording in the previous job description did not match the claimant's current role. For example, the job description indicated that the claimant had line management responsibility, but that was no longer the case and hadn't been since the Administrative Assistant's employment terminated in May 2017. The job description was updated to reflect the work the claimant was currently undertaking. Other than the change to reflect the fact that the claimant did not, at that time, have line management responsibility, the changes updated terminology only, they did not reflect substantive changes to the claimant's role.

29. A revised job description was sent to the client by email on 22 May 2018. A meeting took place on 24 May 2018 to discuss this. JW, CB and the claimant were present. During the meeting, the revised job description was discussed. Having discussed the content of the promotional role, it was then proposed that the remainder of the job description be considered to see which of the claimant's duties could be delegated to others to allow her to undertake the

promotional role. It became apparent at that point that claimant thought the hours for the promotional role were in addition to her contracted hours, whereas JW and CB intended this to be inclusive. The meeting was brought to an end as a result, so the claimant could consider her position.

5 30. The claimant was then absent from work from 29 May to 11 June 2018,
returning to work on 12 June 2018. She met AG and CB that day and informed
them that she was declining the promotional role, as she didn't feel it could be
done within her contracted hours. AG & CB indicated that this matter could
perhaps be discussed again at a later date, when the new Administrative
10 Assistant was fully trained. They highlighted that it was imperative that the
Administrative Assistant was trained on the claimant's tasks as soon as
possible, so that she could cover the claimant's tasks when she is absent, as
her attendance 80%. This was particularly relevant given that, up to that point,
AG provided this cover if the claimant was absent. She was however about to
15 take a two week holiday, the claimant was then due to be on holiday for three
weeks and thereafter AG was retiring. It was agreed that AG would meet with
the claimant to discuss and agree an appropriate training plan for the
Administrative Assistant, which the claimant could discuss with the
Administrative Assistant and implement while AG was on holiday.

20 31. Given AG's impending holiday, the meeting to discuss the training required
for the Administrative Assistant was arranged for the afternoon of 14 June
2018. AG discussed the training plan with the claimant, completing some of
this with her. At the conclusion of the meeting, she handed the claimant the
partially completed training plan, so that the claimant could complete the
25 remainder of this with the Administrative Assistant. She also passed to the
claimant a copy of the job description for the Administrative Assistant and the
claimant's job description. AG felt that it would be helpful for the claimant to
also have a copy of her own job description, as the Administrative Assistant
would require to cover the claimant's duties when she was absent. The job
30 description passed to the claimant was the same job description as had been
emailed to her on 22 May 2018, albeit with the duties for the promotional role
removed. AG then went on holiday immediately following the meeting.

32. On Wednesday 20 June 2018, there was a full staff meeting. At this meeting the new structure for the organisation was formally announced and a structure chart provided, designed to show reporting lines, rather than hierarchy. The claimant was surprised when she saw this. It showed all the members of the Administration Team on the same line. She felt that she should be above the others in the Administration Team. In particular, the Administrative Assistant was shown as being on the same line as her, which appeared to suggest that they were of the same level. The chart however simply showed the line management structure, rather than the hierarchy of the organisation. All members of the Administration Team would, following AG's retirement, report to CB, whose title would change to Senior Manager, Contracts and Finance.
33. On Tuesday 26 June 2018 at 15:18 the claimant sent an email to CB, JW & AG stating *'It has come to my attention that you have made considerable changes to my job description. I was unaware that the job description that you showed me recently had these significant changes made to the already existing Co-ordinator part of role, as I thought we were only discussing the Marketing/PR aspect...It was only when Alison Gray passed me the training plan for my Assistant that I noticed she had inserted underneath the Assistant's job description my own job description. I was confused as to why she had given me this and I tried to pass it back to her, however, she was insistent that I retain this. Once we had the full staff meeting on the 20th June 2018 I began to realise things were not how they should be. I then examined the job description fully and was dismayed to see that many changes have been made and that Alison Gray had covertly tried to pass me this new information, whilst passing it off as my original job description, which, of course it was not. To summarise, I would be interested to hear your thoughts on the following; Why have you not consulted with me or made me aware of these changes? What is the reason for these changes? Why were the changes not highlighted on the new job description? I should like to have your reply, in writing by the end of the day on Thursday 28th of June 2018.'*
34. CB responded to the claimant on 27 June 2018 at 16:37 stating *'We are sorry to hear that you feel your job description hasn't been discussed with you and*

that you felt unable to come and discuss this matter with Jane and I yesterday when we were in the office. Please could you clarify which 'considerable changes' you have identified in your job description and also give more information regarding this statement – 'Once we had the full staff meeting on the 20th June 2018 I began to realise things were not how they should be'? As you have, in your email, referred to a member of the senior management team who is currently on holiday we will be unable to respond fully until we have spoken with her and received clarification from you on the above matters.'

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10 35. On Thursday 28 June 2018, the claimant drafted an email confirming her resignation. She felt she had been demoted and, unless this was rectified following a discussion she intended to have with JW that morning, she would send the email. JW arrived in the office at 11:35 and the claimant asked to see her immediately, interrupting a discussion JW was engaged in. JW could
15 see she was agitated and agreed to see her in a private room. The claimant had two job descriptions with her as well as some organisation charts. The claimant indicated to JW that she required to know which of the two job descriptions was her correct job description and why she hadn't been provided with answers to her three simple questions. JW reiterated, as had
20 been indicated in the email from CB the day before, that to answer the questions they needed to speak to the claimant's line manager, AG, who was currently on holiday, but returning the following week. The claimant indicated that she felt that JW should be able to respond to these points given that she was part of the senior management team. The claimant referred JW to the
25 two job descriptions asking her which was the correct one. JW indicated that she recognised the latter one. This was due to the fact that it resembled the job description discussed at the meeting with the claimant on 24 May 2018 in relation to the promotional role, which JW was present at. The claimant then referred JW to the organisation charts from 2016 and the chart that had been
30 presented at the recent staff meeting. She indicated that the 2016 chart showed her having line management responsibility of the Course & Claims Assistant but the chart from June 2018 did not show her as having line management responsibility for the Administrative Assistant. JW highlighted to

the claimant that the Administrative Assistant supported a number of departments, not just Course & Claims. The claimant indicated that she felt she had been demoted, that this was constructive dismissal and that she was leaving the organisation forthwith and starting proceedings against them.

5 36. The claimant then returned to her desk, slightly tweaked the email she had previously prepared and sent this at 11:45. The email, which was sent to AG, CB, HM & JW, stated as follows: *'Further to your email dated 27/06/2018; It is not that I feel that my new job description has not been discussed it is that it has not ever been discussed with me. I did feel quite able to approach*
10 *Catriona and Jean, however, as previous verbal discussions have ended in confusion, on your part I wished for this to be answered in writing. As I had to construct this email during my lunchbreak that is why it was sent in the afternoon and not the morning. I think it is quite obvious what the 'considerable changes' are as it was a member of the senior management*
15 *team who deleted certain parts of my role. Most notable was the deletion of my line management role, deleted and now supervisory only. The previous staff structure and job description shows that I am line managing staff. This is a very clear demotion that you were obviously not willing to discuss with me. The fact that you now wish to stall giving me a response to three very simple*
20 *questions does nothing to inspire my trust or confidence in your ability to effectively manage. Alison Gray was highlighted only due to the fact that this was how I discovered that I had been demoted, her role in this whole sorry affair has nothing to do with the questions I asked you. I have spoken with Jean this morning and unfortunately she has not been able to clarify any of*
25 *the questions asked. I now wish to inform you that I am leaving Training for Care under the ruling of constructive dismissal for demoting me. My solicitor will be in touch in due course.'*

37. CB responded at 12:07 stating *'Hi Ros, just tried to call but no answer. I think this is something we need to talk about as we certainly did not intend to*
30 *demote you. I am in a meeting in Glasgow so unavailable this afternoon but will be in the office on Tuesday.'* The claimant did not receive this email, as she had already left the building.

38. JW wrote to the claimant later that day stating *'Following our meeting today, you were obviously very distressed. I would like to invite you in for a meeting on Tuesday 3rd of July at 2pm so we can discuss your concerns calmly and look at a way forward. This will give me time to speak to your line manager and investigate your concerns.'* The meeting was proposed for 3 July 2018 to give LW time to speak to AG, following her return from holiday.
39. The claimant responded on 2 July 2018 stating that she did not wish to attend any meetings and wished for matters to be addressed in writing only. She reiterated the three questions she had. She then stated *'You have made substantial change to my job description and due to these changes you have now effectively demoted me. In looking back on a sequence of situations regarding your gradual erosion of my role I feel that I am being put to detriment due to being a disabled member of staff. I believe that this is the reason why you have demoted me and also the reason why you will be promoting two members of staff, who are currently only management support over me and into higher management positions. The grievance issue that was raised with the Committee over these two members of staff been promoted over me and why are you effectively blocked my request for a promotion to Assistant Manager has I believe also influenced you into demoting me.'* This was the first occasion the claimant mentioned being subjected to a detriment as a result of her disabilities.
40. A response to the claimant's email was sent to her by CB on 3 July 2018. This was a lengthy email, which included the following: *'We are sorry that you felt unable to accept our reasonable request to wait a few days until all senior managers were available, and that you decided to leave before we were able to gather all of the information we needed. We are also disappointed that you did not attend the meeting today when we could have all made a genuine effort to resolve your concerns. Now that Alison Gray, your line manager, has returned from annual leave, and the senior management team have had a chance to meet, we have been able to investigate fully and are in a position to answer your questions. When adding to your job description for the potential marketing role we noticed that your current job description was*

incomplete, as noted in your review in September 2016, so we updated this in line with your current responsibilities and removed anything that was clearly out of date. We are not aware of any erosion of your role and can assure you that any changes made were in no way considered to be a demotion, but was simply to reflect the change of circumstances in the administration department. In reference to your email on 28th June regarding 'deletion of your line management role' the Course and Claims Assistant was line managed by you but left in 2017 and, as agreed by you, was not replaced...During the recent appointment of the Admin Assistant post you were consulted about the job description and involved in the interview process so you are aware that the Admin Assistant is line management by senior management, this is because it was agreed that the assistant was to support both Course and Claims and Short Courses. And, as with all staff members who are accountable to more than one person, e.g. reception, our position is that there should only be one line manager, this does not in any way take away from the responsibilities of other members of staff involved in their management/coordination. Had you waited for Alison to return from annual leave to discuss this with us we would have been content to revise the wording in a way that was mutually acceptable... We are extremely shocked that your email suggests that we have discriminated against you because of your health and you must know that we have always been very supportive during any period of ill-health and absence. We are saddened that you have become so disillusioned with your role at Training for Care and have lost confidence in the senior management team. As a small organisation we have always been a close-knit team and have been able to talk to each other when problems arise. We hope this addresses your concerns and you can appreciate that there has been no demotion in your job role...'

41. On 17 July 2018, the claimant confirmed to the respondent that she still wished to resign from her employment. The respondent acknowledged this. Her final day of employment was 31 July 2018.

Claimant's submissions

42. Mr Welsh, for the claimant, read from a written document extending to 9 typewritten pages, which was later lodged.

43. In summary, he submitted that the offer of the promotional role was designed to set the claimant up to fail and trick her into signing up to a new job description. The claimant discovered during the staff meeting on 20 June 2018 that she had been demoted. She was not consulted about this and no one informed her that she had lost her line management status. These changes were concealed from the claimant by senior management, by way of deception. The claimant was the only person to be disadvantaged by the new structure.

44. The claimant complained to senior management. She gave the respondent ample time and opportunity to respond to the serious concerns she raised. She asked questions that were never answered. She was met with a series of delaying tactics and evasive behaviour. A senior manager, JW failed to recognise her original job description. This was 'the last straw'.

45. The action taken by the respondent was influenced by the fact that the claimant had a high level of absence. This made senior managers nervous at giving her more senior roles in the organisation. They wished to remove her from a position of control, with line management authority and autonomy over the compliance function, and restrict her position as a result. The respondent took significant efforts to conceal changes to the claimant's job description and not inform her of these because they knew that they were demoting and removing responsibility from a disabled member of staff.

46. The claimant was also subjected to discriminatory comments made in relation to her disabilities, and the absences arising as a consequence of those disabilities. AG also breached the claimant's confidence by informing others about the claimant's bowel condition.

Respondent's submissions

47. The respondent provided a written document which contained comments on each of the agreed issues.

5 48. In relation to the direct discrimination claims it was asserted that there was no evidence to support the allegations of less favourable treatment and that the burden of proof did not shift, as there is no evidence that the conduct alleged occurred 'because of' the claimant disabilities. The allegation that comments were made about the claimant's sick leave cannot constitute direct discrimination

10 49. In relation to the claims of discrimination arising from disability, in relation to the majority of these, it was submitted that there is no evidence to support the allegations or the essential finding that any unfavourable treatment occurred 'because of' the claimant's absences. In relation to whether the claimant was treated unfavourably in relation to comments being made about her absence record, the Tribunal were invited to prefer the evidence of the respondent.

15 50. The claimant was not constructively dismissed. The claimant's case is that there was a course of conduct which was deliberately calculated to destroy or seriously damage the relationship of trust and confidence. There was however no evidence to support that. The claim should be dismissed.

20 Relevant law

51. Section 4 EqA provides that disability is a protected characteristic.

Direct discrimination

52. Section 13(1) EqA provides that:

25 *'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'*

53. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two

House of Lords authorities - (i) in **James v Eastleigh Borough Council** [1990] IRLR 288 and (ii) in **Nagaragan v London Regional Transport** [1999] IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as

5 **Nagaragan**, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in **R (on the application of E) v Governing**

10 **Body of the Jewish Free School and another** [2009] UKSC 15.

54. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of **Anya v University of Oxford** [2001] IRLR 377.

15 55. In **Shamoon v Chief Constable of the RUC** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, Tribunals may wish to concentrate initially on why the claimant was treated as they

20 were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

Discrimination arising from disability

25 56. Section 15 EqA states:

“(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

5 Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it is pointed out that ‘arising in consequence of’ could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

10 57. There is no need for the alleged discriminator to know that the ‘something’ that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only (***City of York Council v Grosset*** [2018] ICR 1492, CA).

15 58. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

20 *‘the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the “something” was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.’*

25 59. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving

the legitimate aim and reasonably necessary in order to do so (*Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601).

Burden of proof

5 60. Section 136 EqA provides:

'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'

10 61. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of *Igen v Wong* [2005] IRLR 258, and *Madarassy v Nomura International Plc* [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish prima facie case of discrimination by reference to the facts made out. If the claimant
15 does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

20 62. In *Madarassy*, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal "could conclude" that on a balance of
25 probabilities the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the
30 claimant or the respondent, or whether it supports or contradicts the

claimant's case, as explained in *Laing v Manchester City Council* [2006] IRLR 748, an EAT authority approved by the Court of Appeal in *Madarassy*.

5 *Constructive Unfair Dismissal*

63. As an employee with more than two years' continuous employment, the claimant had the right not to be unfairly dismissed by the respondent, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it without notice by reason of the employer's conduct (s95(1)(c) ERA).

64. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd* [1998] AC 20).

65. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (*Lewis v Motorworld Garages Ltd* [1986] ICR 157).

66. As to what can constitute the last straw, the Court of Appeal in *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and

confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

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67. In order for there to be a constructive dismissal, not only must there be a breach by the employer of an essential term such as the trust and confidence obligation; it is also necessary that the employee resigns in response to the employer's conduct (although that need not be the sole reason - see **Nottinghamshire County Council v Meikle** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

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68. The Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

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(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?

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(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term?

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(5) Did the employee resign in response (or partly in response) to that breach?

69. If an employee establishes that he has been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal
5 reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in
10 accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

15 **Discussion & Decision**

Knowledge of disability

70. The first issue for the Tribunal to consider was whether the respondent had actual or constructive knowledge that the claimant was a disabled person as
20 a result of her ear/hearing condition at the time of the alleged discrimination. The respondent accepted that that condition amounted to a disability.

71. The Tribunal found that the respondent had constructive knowledge of this. They were aware that the claimant was experiencing issues related to her ear/hearing and was attending regular ENT appointments as a result. Due to
25 the times of the ENT clinics, the claimant's appointments were at times when she would normally have been working. Had the respondent made enquiries about the reason for these appointments, it would have been apparent to them that the claimant's condition amounted to a disability for the purposes of the EqA.

Direct discrimination because of disability

72. The Tribunal considered each allegation of direct discrimination, considering whether the alleged treatment occurred, if so, whether it amounted to less favourable treatment and if so, what the reason for that treatment. The Tribunal reached the following findings in relation to each alleged act of direct discrimination.

a. **Denying the claimant promotion opportunities due to the way the respondent restructured the company in the 2018 restructure.**

There were no promotion opportunities for the claimant in the 2018 restructure. This was due to the way the respondent chose to restructure. To that extent, the alleged treatment occurred. The Tribunal found however that the claimant was not treated less favourably than others in this respect. It was quite clear that no one in the Administration Team, of which the claimant formed part, had any opportunity for promotion in the 2018 restructure. The claimant was accordingly not treated less favourably than her colleagues. The restructure was confined to a reduction in the number of people in the Senior Management Team (four to two). In addition, two members of the Professional Team had their job titles changed. Their substantive roles did not however change. Given the finding that the this did not amount to less favourable treatment, there was no requirement to consider the reason for the treatment complained of.

b. **Demoting the claimant.** From May 2017 onwards the claimant no longer had line management responsibility. She did however continue to have supervisory responsibility for the work of others in relation to the Course & Claims department, she retained the title of Course & Claims Co-ordinator and the salary attached to that role. Notwithstanding this, the Tribunal did conclude that the claimant no longer having line management responsibility could be deemed to be a demotion. It did not however amount to less favourable treatment as any employee whose only direct report resigned and who indicated that they did not want to take on the responsibility of retraining a

replacement would have been treated in the same way. In addition, the reason for that was that the claimant did not wish to take on the responsibility of training up a new member of staff at that time. To the extent that she was demoted, this occurred in May 2017 as a result of her decision. The reason for this was not that she was a disabled person.

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c. **Changing the claimant's job description without notifying her.**

The claimant's job description changed in May 2017 when the Administrative Assistant's employment terminated, albeit the changes to her job description were not documented at that time. From that point onwards, whilst the claimant continued to have supervisory responsibility for any work others did in in relation to the Course & Claims department, she did not have line management responsibility. This was discussed and agreed with the claimant in May 2017. The changes to the written job description in May 2018 merely documented the changes which had been discussed and agreed with the claimant 12 months previously. The Tribunal concluded therefore that the changes to the claimant's job description were not made without notifying her. The respondent discussed the changes with the claimant in May 2017, when she indicated that she did not want the respondent to recruit a replacement for the Course & Claims Assistant. The Tribunal accordingly did not accept that the conduct alleged was established.

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d. **Concealing the changes to the job description from the claimant.**

The Tribunal found that the changes were not concealed from the claimant. They were openly discussed and agreed with her. It was her decision that a replacement Course & Claims Assistant should not be recruited. That decision effectively brought an end to the claimant's line management responsibilities, changing her job description at that time. When the written job description was amended in May 2018, to reflect the reality of the position from May 2017 onwards, the revised written job description was emailed to the claimant. This was done on

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22 May 2018. For reasons which were not established, the claimant did not review the detail of the job description sent to her at that time. A further copy was provided to her on 14 June 2018. The Tribunal concluded therefore that the changes to the claimant's job description were not concealed from her. The Tribunal accordingly did not accept that the conduct alleged was established.

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e. **Making discriminatory comments regarding the claimant's sick leave.** The Tribunal found that, at the meeting on 12 June 2018, CB indicated to the claimant that her attendance rate was at 80%. This was highlighted to underline the importance of training the Administrative Assistant to cover the claimant's role when she was absent. It was particularly important that she do so, given that AG, who ordinarily provided cover if the claimant was off, was about to go on holiday and then, shortly thereafter, retire. The Tribunal do not accept that this amounted to less favourable treatment. Arrangements would require to be made to cover the work of any individual who was off and it was appropriate for the respondent to discuss this with the claimant. The claimant also alleged that during this meeting she was informed by AG that her absence had been 'very disruptive'. The Tribunal did not accept that this was said. The evidence demonstrated that the respondent accepted that the claimant would have periods of absence and took measures to support the claimant and cover her work during any such periods of absence. At no stage was the claimant informed that her absence levels were unacceptable, that they required to improve or that formal warnings would be given if they did not.

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f. **AG disclosing the claimant's private medical information to Mark Le May, when she had expressly been asked not to do so.** The claimant asserted that AG must have done so as, in around 2013/14, MLM said to the claimant when she returned to work following a period of absence '*I know you know, there are no secrets between Alison and I*'. The claimant took this to mean that AG had told MLM about the claimant's bowel condition. Whilst this may have been said, the

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Tribunal did not accept that AG disclosed any information to MLM in relation to the claimant's bowel condition. The Tribunal accepted as credible the evidence from AG that she maintained the claimant's request for confidentiality in relation to her condition. AG gave compelling evidence that she also suffered from a similar condition and was aware, as a result, that this was a sensitive matter which the claimant may not wish others to know about. She did not therefore tell anyone else about the claimant's condition. The Tribunal accordingly did not accept that the conduct alleged was established.

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10 g. **AG further disclosing the claimant's private medical information to colleagues in the Senior Management Team.** The claimant alleged that AG also told others in the Senior Management Team about her bowel condition and this was evidenced in the following scenarios:

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i. In 2017, when a number of students in a class became ill with a gastric virus LJ stated to the claimant *'It's OK Ros, everyone knows you have a problem. Catriona is downstairs now disinfecting the door handles.'*

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ii. After being off for a tummy bug in 2017, HM asked the claimant how her tummy was. This led the claimant to believe that HM knew more about her condition than she should have.

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The Tribunal did not accept that either of these scenarios demonstrated that AG had breached the claimant's confidence and disclosed to others that the claimant had a bowel condition. For the reasons set out above, the Tribunal accepted the evidence of AG that she did not tell anyone about the claimant's condition. In relation to the comments made to the claimant by LJ and HM, the Tribunal accepts that these were said, but not that the only conclusion which can be reached from those comments is that the individuals knew about the claimant's bowel condition. In relation to the comment from LJ, the claimant accepts that she was open with her colleagues in relation to

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her auto-immune condition. LJ could very well have been referring to that. HM could have simply been concerned about the claimant having a tummy bug. The Tribunal accordingly did not accept that the conduct alleged was established.

- 5 73. For these reasons the Tribunal concluded that the claims of direct discrimination do not succeed.

Discrimination Arising from Disability

- 10 74. In relation to the claims of discrimination arising from disability the Tribunal started by referring to section 15 of the EqA.

- 15 75. Section 15(2) states that section 15(1) will not apply if the employer did not know, and could not reasonably have been expected to know the claimant had the disability. The respondent accepted that it was aware that of two of the claimant's conditions amounted to disabilities. The Tribunal found that the respondent ought reasonably to have been aware that the third condition also amounted to a disability.

- 20 76. The Tribunal considered the guidance *Pnaiser*. The first question is whether the claimant was treated unfavourably. In determining this, no question of comparison arises. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. The Tribunal considered each allegation of discrimination arising from disability, to ascertain whether unfavourable treatment was established, and found as follows in relation to each:

- 25 a. **Being denied promotion opportunities within the 2018 restructure.** It is clear that there was no opportunity for the claimant to be promoted in the 2018 restructure. This accordingly amounted to unfavourable treatment.

- 30 b. **Commenting on the claimant's absence record.** As set out above, the Tribunal found that the only comment made was that the claimant's

attendance rate was at 80%. The Tribunal found that this did not amount to unfavourable treatment. The claimant was not disadvantaged by this. The context of the statement was that steps would be taken to ensure that any future absences would be appropriately covered once AG retired. The claimant was not treated unfavourably.

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c. **Demoting the claimant.** For the reasons set out above, the Tribunal found that the claimant was demoted in 2018. This could amount to unfavourable treatment.

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d. **Changing the claimant's job description without notifying her.** For the reasons set out above, the Tribunal found that this did not occur. There was accordingly no unfavourable treatment.

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e. **Concealing the changes to the job description from the claimant.** For the reasons set out above, the Tribunal found that this did not occur. There was accordingly no unfavourable treatment.

77. The next question concerns the reason for the alleged treatment. In order to establish the reason, the focus is on the respondent's conscious or unconscious thought process. If there is more than one reason, then the reason allegedly arising from disability need only be a significant (in the sense of more than trivial) influence on the unfavourable treatment, it need not be the main or sole reason. Applying that test, to unfavourable treatment established, the Tribunal found as follows:

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a. **Being denied promotion opportunities within the 2018 restructure.** There were minimal changes to the respondent's organisation in the 2018 restructure. The Senior Management Team was reduced from 4 to 2 and some members of the Professional Team had their job titles, but not the content of their roles, changed. There were no changes to the positions of anyone in the Administration Team. The reason why the members of the Senior Management Team

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were not being replaced, and no other roles were created, was due to cost.

- b. **Demoting the claimant.** The reason for the unfavourable treatment was that the Course & Claims Assistant had resigned and the claimant stated that she did not wish to spend time training up a new assistant.

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78. The next question is whether the reason for any unfavourable treatment established was something 'arising in consequence of' the claimant's disability. It was held in *Pnaiser* that the expression 'arising in consequence of' could describe a range of causal links. More than one relevant consequence of the disability may require consideration and whether something can properly be said to arise in consequence of disability is a question of fact in each case. It is an objective question, unrelated to the subjective thought processes of the respondent, and there is no requirement that the respondent should be aware that the reason for treatment arose in consequence of disability. The Tribunal found as follows:

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- a. **Being denied promotion opportunities within the 2018 restructure.** The reason why the members of the Senior Management Team were not being replaced, and no further roles were created, was due to cost. The claimant's absences played no part in the decision whatsoever. The claimant was not treated unfavourably as a result of her disability related absences.

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- b. **Demoting the claimant.** The reason for the unfavourable treatment was that the Course & Claims Assistant had resigned and the claimant stated that she did not wish to spend time training up a new assistant. The claimant's disability related absences played no part the respondent's decision that the claimant should no longer have line management responsibility. Rather, it was due to the claimant's choice that she did not wish to spend the time training up a new assistant.

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79. For these reasons the Tribunal concluded that the claims of discrimination arising from disability do not succeed.

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Constructive Unfair Dismissal Claim – s94 ERA.

80. The claimant relied upon a series of events as being conduct calculated to destroy the mutual trust and confidence between the parties. She stated that the last straw was JW's failure to recognise the claimant's job description from 2015. The Tribunal noted however that the claimant had drafted her letter of resignation prior to the meeting with JW and that the claimant indicated to the Tribunal in evidence that she formed the intention to resign prior to the meeting with JW. She stated that she intended to resign if JW didn't provide her with responses to the questions she posed when she met with her. The Tribunal accordingly considered that the failure to provide responses to the questions posed, and the failure to recognise the 2015 job description, were the final straw.

81. In considering the claimant's claim of constructive dismissal, the Tribunal considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. The Tribunal's conclusions in relation to each element were as follows:

a. **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?** The Tribunal noted that the most recent act on the part of the respondent which the claimant relied upon was the failure to recognise the 2015 job description and the failure to provide responses to the questions posed, both of which occurred during the meeting on 28 June 2018.

b. **Has he or she affirmed the contract since that act?** The Tribunal noted that the claimant resigned at the meeting and, immediately following the meeting confirmed her resignation in writing. The Tribunal found that the claimant had not affirmed the contract.

c. **If not, was that act (or omission) by itself a repudiatory breach of contract?** The Tribunal found that JW indicating that she could not answer the concerns which the claimant had raised less than 48 hours before and requesting that the claimant wait until her line manager

returned from holiday the following week was not, by itself, a repudiatory breach of contract. JW's position and request was reasonable in the circumstances. Similarly the Tribunal found that it was entirely reasonable that JW did not recognise the claimant's 2015 job description. She was not the claimant's line manager, so would have had no requirement to see or be familiar with her 2015 job description.

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d. **If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?** The Tribunal noted that the Court of Appeal in *Omilaju* stated that the act or omission relied upon need not be unreasonable or blameworthy, but it must, in some way, contribute to the breach of the implied obligation of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence. The Tribunal took into account the fact that, the claimant first raised her concerns, and posed the three questions which she required to be answered, at 15:18 on Tuesday 26 June 2018. She was aware that her line manager was on holiday at that time. Notwithstanding this, she felt that a response should be provided immediately. Whilst the claimant interpreted the fact that JW didn't recognise her 2015 job description and JW's indication that she could not provide a response until the claimant's line manager returned from holiday the following week as hurtful and destructive of her trust and confidence in the respondent, the response from JW was reasonable and justifiable in the circumstances and given the timescales. It was not capable of contributing to any breach of the implied obligation of trust and confidence.

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82. Given that that the final straw relied upon by the claimant did not amount to a breach of contract of itself, and did not form part of a course of conduct which, viewed cumulatively, amounted to a (repudiatory) breach of the implied duty of

trust and confidence, the claimant's claim of constructive unfair dismissal must fail.

5 83. For the avoidance of doubt, even if the Tribunal had required to consider the entire course of conduct relied upon by the claimant, it would not have found that there was any individual act which constituted a fundamental breach of contract, or that there was a course of conduct which, viewed objectively and cumulatively, amounted to a repudiatory breach of the implied duty of trust and confidence.

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Employment Judge: Mel Sangster
Date of Judgment: 12 October 2020
Entered in register: 13 October 2020
15 and copied to parties