EMPLOYMENT TRIBUNALS

Claimant ***Respondent***
Ms Debra Skelton NHS Sunderland Clinical Commissioning Group

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE ON 16-18 August 2021
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances

Claimant in person
For the respondent: Mr James English, Solicitor

JUDGMENT

The claim is not well founded and is dismissed

REASONS (bold is my emphasis italics are quotations and numbers in brackets pages in the bundle)

1. Introduction , Some Relevant Law and Issues

1.1. The claimant, born on 4 October 1969, presented a claim on 7 July 2020 of unfair dismissal contrary to the Employment Rights Act 1996 (ERA) and ticked the box for "another type of claim the Employment Tribunal can deal with". She mentioned ill health but not disability and ticked none of the boxes headed "discrimination". The attachment to the claim was huge and, though it once mentioned the Equality Act 2010 (EqA), when I held the first Private Preliminary Hearing (PH) by telephone on 17 September 2020, I saw no basis of a claim under it.

1.2. She had worked for the respondent, or predecessors of it, since 7 April 1997. She raised a grievance the outcome of which she said was a travesty. She was on sick absence with work related stress and dismissed for that. In the alternative the respondent said her relationship with colleagues was so damaged it could have dismissed under the heading of "some other substantial reason".

1.3. Many litigants in person think a Tribunal has a general power to decide fairness over the whole period of employment. That is not so. My orders at the first PH cited relevant law and asked the claimant to confirm to the respondent and the Tribunal the legal claim(s) she intended to pursue and give **a brief statement** of what the respondent did or failed to do which made their decision to dismiss unfair. She was stressed during the hearing and I appreciated the law I outlined was not what she expected. I suggested, and the respondent's solicitor, Mr McKeever, agreed, rather than

listing the full merits hearing, she should have the opportunity to consider what I had written in detail , decide what witnesses were **relevant to the issues** and then have another PH.

1.4.1 The law I set out included some procedural matters such as Rule 2 of the Employment Tribunal Rules of Procedure 2013.The substantive points were as follows.

1.4.2. Section 98 ERA provides:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it
(a) relates to the capability.. of the employee for performing work of the kind he was employed by the employer to do,
(3) In subsection (2) (a) "capability" in relation to an employee , means his capability assessed by reference to skill, aptitude ,health or any other physical or mental quality.
(4) Where an employer has fulfilled the requirements of subsection (1), 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

1.4.3. Abernethy-v-Mott Hay & Anderson held the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by it which cause it to dismiss the employee. That is what the employer has to show. If I accept the reason for dismissal was absence due to ill health which falls under "capability", the next question is whether the respondent acted reasonably in treating that as a sufficient reason. Helpful cases on fairness in ill health dismissals are Spencer-v-Paragon Wallpapers and East Lindsay DC-v-Daubney . Iceland Frozen Foods-v-Jones ,HSBC-v-Madden and Sainsburys-v-Hitt held a Tribunal must not substitute its view for that of the employer unless the latter falls outside the band of reasonable responses. In UCATT-v-Brain, it was put thus:*"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.*

1.4.4. The claimant must be given a fair **opportunity** to show there was a real prospect of a return to work. In Polkey-v-AE Dayton Lord Bridge said " *an employer having prima facia grounds to dismiss . will .. not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, .. which are necessary .. to justify that course of action. Thus in the case of incapacity the employer will not normally act reasonably unless he gives the employee fair warning and an opportunity to.. show he can do the job…* She must take the opportunity then, not afterwards

1.4.5. In McAdie-v-Royal Bank of Scotland an Employment Tribunal (ET) found as a fact the Bank was responsible, and culpably so, for the employee's ill-health. Lord Justice Wall said
It seems to us there must be cases where the fact the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employment for such an employee, .
However, … it must be right that the fact an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work.

it is important to focus not, as such, on the question of that responsibility but on the statutory question of whether it was reasonable for the Bank "in the circumstances" (which of course include the Bank's responsibility for her illness), to dismiss her for that reason. On ordinary principles, that question falls to be answered by reference to the situation ***as it was at the date the decision was taken****. Thus, the question which the Tribunal should have asked itself was "was it reasonable for the Bank to dismiss Ms. McAdie on 22 December 2004, in the circumstances as they then were, including the fact that their mishandling of the situation had led to her illness?*

That was not the approach which the Tribunal avowedly took. The elegantly expressed reasoning at para. 87 of the Judgment - "no reasonable employer would have dismissed in these circumstances because no reasonable employer would have found themselves in these circumstances" – focuses explicitly not on what it was reasonable for the Bank to do in the circumstances in which it found itself (however culpably) but on whether it should have got into those circumstances in the first place. If that is really the approach taken by the Tribunal, it was plainly a misdirection".

1.4.6. In Ezsias-v-North Glamorgan NHS Trust 2011 IRLR 550, an employer's dismissal of an employee following the breakdown of the working relationship between him and his colleagues was for some other substantial reason, not the employee's conduct. The tribunal was alive to the refined but important distinction between dismissing the claimant for his conduct in causing the breakdown of his relationships and dismissing him for the fact those relationships had broken down. The tribunal was entitled to find it was the fact of the breakdown which was the reason for the claimant's dismissal and his responsibility for that breakdown was incidental.

1.5. On 28 October 2020 the claimant made a request to add '*Discrimination for Disability*' to her claim. A 'Summing Up" of her case presented as part of her grievance on 8 January 2019 ran to nearly 30 pages and was difficult to follow. After attending a grievance meeting on 11 March 2019, she went off sick. Each time she was due to attend a meeting at the respondent, she felt emotional and physically sick ,that she had been made out to be a liar, her whole skill set "*slated*" and personal comments made she had mental health problems. All this was documented in the 'summing up'. She felt "*thrown out with the garbage*' when her employment was terminated on 24 February 2020.

1.6. I held the next PrPH on 4 November 2020. As before, Mr McKeever represented the respondent. Mr Tom Gilbart of Counsel had been instructed very late by the claimant. He acted quickly to formulate the unfair dismissal case. The claim of disability discrimination was to be under s15 EqA

2010. The unfavourable treatment was dismissal and It was because of something, absence from work, arising in consequence of her disability (depression). He argued dismissal was not a proportionate means of achieving a legitimate aim. However, more needed to be done to formulate an amendment application than he had had time to do**.**

1.7. Mr Gilbart cited Iwuchukwu-v-City Hospitals Sunderland NHS Foundation Trust 2019 EWCA Civ 498 (per Singh LJ, Para 122): *"In the EAT HHJ Shanks appears to have thought McAdie is authority for the proposition that the fact an employer has caused, or materially contributed to, the capability concerns that arise in relation to an employee can never be taken into account, since all that matters is what the circumstances are at the date of the decision to dismiss. In my view, that is a misunderstanding of what this Court (approving what Underhill J had said in the EAT) held in McAdie. Indeed, what Underhill J said in that case is inconsistent with the general proposition that appears to have found favour with HHJ Shanks. What he said was that the previous history was potentially relevant, as one of the "circumstances" to which regard must be had when considering the reasonableness of the dismissal but it could not be dispositive. It certainly could not lead to the conclusion an employer could never fairly dismiss an employee on grounds of capability because the employer itself* ***had contributed*** *to the lack of capability (for example because of an injury at work caused by the employer's negligence)".*I am very familiar with Iwuchukwu because I conducted the "re-trial" on remission from the EAT before the Court of Appeal overturned it. I agreed with Mr Gilbart's analysis entirely. It is why I said in paragraph 10 of my order the unfair dismissal claim stood **some** reasonable prospect of success.

8. The unfair dismissal issues were, and remain:
1.8.1. What were the facts known to, or beliefs held by the employer which constituted the reason, or if more than one the principal reason, for dismissal?
1.8.2. Were they, as the respondent alleges, related to the employee's capability ? If not were they some other substantial reason?
1.8.3. Having regard to that reason did the employer act reasonably in all the circumstances:
(a) in having reasonable grounds for its genuine beliefs
(b) in following a fair procedure
(c) in treating that reason as sufficient to warrant dismissal?
1.8.4. If it acted fairly substantively, but not procedurally, what was the chance it would nevertheless have fairly dismissed if a fair procedure had been followed?

1.9. On 23 February I held a Public PH to decide the amendment application The claimant appeared in person. Having cited Davies-v-Sandwell Borough Council in which Mummery L.J. stated the problems caused to ETs of discursive recollections which do not advance the case and swamping it with documents that have no bearing, or only a marginal bearing, on the real issues" I added
The claimant seems to think the more she puts into her case, the better her chances of success become. The reality is the greater the chance of the Tribunal not seeing her best points because it "cannot see the wood for the trees". I appreciate she is not legally represented, but it is for her to formulate her case, not for me. … In short, the claimant will help herself if she tries to "pick his best points" rather than pursue every point which can be made. I do not underestimate how difficult it is for an unrepresented claimant to pick her best points ...

1.10. For reasons I gave in writing I refused the application to add an EqA claim. I also refused to strike out or make a deposit order on the unfair dismissal claim . However I cited Woods-v-WM Car

Services (Peterborough) Ltd where the EAT explained the implied term that an employer would not, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee.To constitute a breach of this implied term, it is not necessary to show the employer intended any repudiation of the contract. Any breach of that implied term is fundamental. I added if the behaviour of the respondent amounted to such a breach, the claimant could have resigned and claimed "constructive dismissal", as to which her union would probably have advised her. She did not, she went sick instead. The claimant said at this hearing her union representative had advised against this course. She cannot "turn the clock back" and have me consider what might have happened.

1.11. I said she now had to explain, having regard to the law I had cited, and without emotive and generalised language, what was said and/or done which made her go off sick and what she says the respondent could and should have done which would have enabled her to return to work. Mr McKeever said the respondent tried everything and even the claimant's union representative at the time complimented it on its efforts. The claimant had said she could not have returned after what had happened and anything the respondent suggested would have been viewed by her as. In her words, "*too little too late*". This was her last opportunity to do set out her case so the Trial Judge did not have to rummage around in a huge document bundle or read grievances and minutes of meetings to find the claimant's case. I quoted from her statement of case "*I received harassment, bullying and isolation from both administration staff and a Band 7 manager. Included in this is the lack of support and intervention from both Lee Cooper and Vicky McGurk (managers of admin and team) to stop the intimidation and hostile behaviour from the staff involved. At times, the response from admin and Dave Britton (Band 7) was aggressive in manner. .. Lee Cooper (manager) had discussions about the behaviour and nasty comments from the admin staff and Dave Britton with both Lisa Purvis (Band 5) and Janet Wilkie (Band 7)".* This does not tell any reader who the people named are, what position they held in relation to each other or to the claimant, what they said or did which constituted *harassment, bullying and isolation* or when it happened. I reiterated her witness statement needed to give, in date order, **a summary of what was said and done which led to her going sick and then what more could have been done to enable her to return which was not done.**

1.12. For reasons I explained I adopted a practice I, and many Judges, have used successfully before, of ordering the claimant to put in one statement in chronological order all facts about which she intended to tell the Tribunal and send it first to the respondent. It need not be huge, must relate to what she has put in her claim form but may add detail and refer to documents(not merely list them and expect a reader to find what is relevant). I ordered the respondent then to send her its statements. She then had time to send statements of any other witnesses she intended to call.

1.13. On 6 August, the respondent sent, as ordered, a chronology and cast list and confirmed the case was ready for trial. From 10-11 August 2021 a series of emails showed the claimant wished to call four people, Lisa Purvis, Susan Wilson, Margaret Kennedy and Jacqueline Murray. She had no witness statements for any of them, but Ms Purvis and Ms Wilson did provide them the next day . Some had issues with joining by CVP and were not available to give evidence when they would normally fit into the logical sequence. EJ Aspden did what she could on 11 August to give directions. The claimant was adamant she did not want a postponement. She set out in her emails issues about IT and her son which have caused her difficulties in recent months and partly explain problems being raised less than a week before the hearing starts. That said, I refused permission for her to

call Margaret Kennedy and Jacqueline Murray as to do so would have delayed concluding the hearing and would have no realistic prospect of changing the outcome

1.14. It is a co-incidence I have dealt with all PH's and the final hearing, but fortunate because I have read it in far more detail than any other Judge who might have been allocated to the final hearing would have had the opportunity to do. It is only during the hearing that some factors have "come together "as I will explain in my findings of fact and conclusions.

2. Findings of Fact

2.1. I heard for the respondent Ms Patricia Harle MBE and Mr Scott Paul Watson. I heard the claimant, Ms Purvis and Ms Wilson. I had an agreed 700 page document bundle. A main role of Sunderland, or any, Clinical Commissioning Group (CCG) is arranging for the care for those who need it after discharge from acute hospitals. The claimant was a Band 4 Team Administration Co-ordinator. She raised issues with her previous line manager, Judith McNaught at South Tyneside NHS Foundation Trust (STNFT) in 2018. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) are complex but in essence on the completion of a transfer any purported variation of the contract is void unless agreed and for an economic, technical or organisational ("ETO") reason entailing changes in the workforce. The claimant and others were, using her abbreviation, "*TUPED*" to the respondent on 1 November 2018.

2.2. The claimant's witness statement runs to 27 pages before a 2 page "Summary". The events span her time working in the "Restitutions Team" at STNFT, going sick in 2014 and having surgery. When she returned in November 2015 she did not feel welcome. It is vital to note the claimant was a Band 4 "team leader", not "management" in the sense most people use it,but having some authority over lower banded workers in her team. Ms Wilson worked at the same place in 2015/2016. One day she noticed the claimant working at a desk previously used by someone seconded from Clinical Health Care (CHC). No-one introduced the claimant whom she noted was busy and focused on the large amount of work on her desk. Later the claimant told Ms Wilson she was a Band 4 who had led the team, been off on sick leave and was now on a phased return.

2.3. Ms Wilson noted some of the team physically bypassed/ostracised her and were dismissive of her requests including: a manager, Janet, a nurse consultant, Jacqui, and a Band 3 Janice **who had acted up to Band 4 during the claimant's sickness.** The claimant re-started "1:2:1 admin catch up" meetings to discuss how work was going, whether any areas could be improved or any issues of concern. She provided management which had been lacking. Ms. Wilson's impression was some of the team felt the Band 4 position had been "usurped" by the claimant as Janice had returned to Band 3 status and this was resented. At lunch times, Janice decided when the team would congregate at a communal table. The claimant had a considerable workload so did not join the others when asked but politely declined. There was a noticeable atmosphere in the office when this occurred. An attitude of 'us and them' was demonstrated when two managers were made redundant in a 'restructure'. The team suggested a meal to celebrate these managers losing their jobs.

2.4. The claimant gives a "blow by blow" account of disagreements with colleagues in September 2016. She had more surgery in October 2016 and returned to work in May 2017. There were more disagreements from September 2017 to January 2018. This part of her statement is very difficult to

follow as she refers to people by forenames which include Janet, Janice, Jacqui, Julia and Judith. There were more clashes in February, April, September, October 2018.Some of the team made life difficult for her, were rude, ignored and excluded her, were dismissive **and challenged her authority**. In one incident in October 2018, Vicky McGurk, the CCG's Head of CHC and Complex Cases wanted a "slops tray" removed, the claimant got the blame from the admin team. She raised this with line managers who did nothing allowing this bad behaviour to continue

2.5. Ms Purvis is from a private sector background but was employed by STNFT or its predecessors for a few months at a time from March 2008 to March 2018 and finally July 2018-January 2019. In 2018, she waited nearly 3 months to get paid. Mr Lee Cooper her manager repeatedly said he was chasing HR and they were ignoring him, however, he had made a mistake **but would not admit to it.** She says the claimant was knowledgeable **but sometimes could go into too much detail ,which could annoy people.** Ms Purvis has had different opinions to her but that never lead to any falling out. Ms Purvis was there when the clinical team transferred to the respondent under TUPE on 1 November 2018. She said it could be a stressful environment as there was a lot of money involved and it dealt with a sensitive work in conjunction with the local authority.

2.6. Ms Purvis confirmed the people who isolated the claimant were Angela Houston, Dawn Skelton, the claimant's sister in law, and, less so, Kristina Metcalfe. While Ms Purvis got on with those people they were not treating the claimant well, so she raised this with Mr Cooper who said he knew about it and as soon as they were "*Tuped*" would deal with it but until then his hands were tied. The claimant had known Mr Cooper, for over 10 years and had a good working relationship with him. She hoped he would sort out the "*bullying, aggressive and isolating behaviour*" she was receiving but he did nothing. In fact he may have removed some of her line management responsibilities to himself. Despite consultation with unions TUPE transfers are a stressful and uncertain time for those involved and require good management at the grass roots level.

2.7. Around this time a Band 7 named Dave Britton started. Though the claimant is not clear as to his role it involved changes to IT and office space etc. One day Ms Purvis had asked him a question about desks. He stood over her in an open office and shouted with his arms flaying saying he was sick of her constant nagging. A colleague emailed her "*WTF????" come outside for a walk what is wrong with him*?. Ms Purvis informally approached a Band 8a (Penny) who said "*don't worry he's like that, but tomorrow it will be all forgotten."* The next morning he did it again but this time Ms Purvis told him in a loud voice to go away which he did. She reported this to a director (Ann Fox) who asked what Ms Purvis wanted her to do about it. Ms Purvis says a stern colleague, Paula, behaved alongside Mr Britton aggressively. When she mentioned this to Mr Cooper he told her to shut up and he would discuss it with her later. Inappropriate behaviour towards the claimant, and others by Mr Britton was excused as him " ex-military".

2.8. After the transfer Ms Purvis says Mr Cooper was not himself. He had been taken to a disciplinary hearing and a sanction was he could no longer apply for a Project Manager Post. Mr Britton eventually got this position to Mr Cooper's dismay as he said Mr Britton had a reputation for being useless. Mr Purvis speaks of the" shambles" the team became due to mismanagement. The claimant also complains of Mr Britton's manner on 1 November concerning IT equipment and office cabinet space and further incidents on 12 and 20 November leading to a meeting with Mr Cooper, on 28 November. The claimant sought union advice in early December 2018, but the difficulty for unions is that all concerned are probably members. There were meetings on 12 December, one with

Mr Cooper and Ms McGurk on 19 December. By January 2019, the claimant felt unwanted and isolated leading to more discussions on 24 and 31 January 4, 5 and 6 February.

2.9. STNFT employs thousands of staff, has elaborate grievance/ disciplinary procedures and a host of HR professionals . It can transfer staff from one part of its premises to another. In contrast the CCG employs about 60-100 and if a grievance, dealt with under procedures " inherited " from STNFT becomes time consuming and divisive CCG is not as well placed to deal with it. The claimant raised an informal grievance on 6 February 2019 about a number of incidents at work and her working relationships with her colleagues. Basically, her complaints, later made formally at great length and with a confusing amount of detail are of insubordination by those she was supposed to be managing, confusing messages as to whether she or Mr Cooper were their managers and an abdication of responsibility by Mr Cooper of his role in disciplining those who were disrespectful of her authority. **I put to Ms Purvis this all sounded rather childish and she agreed. However, it was serious for the claimant and I see why.** This led to a meeting on 25 February 2019, with Ms McGurk who said there were no issues of concern , everyone liked the claimant who was hard working.

2.10. There was an Occupational Health (OH) referral on 28 February. An OH Report dated 5 March 2019, before the absence began, made recommendations including: (i) Counselling – which was provided (ii) Mediation – in which the claimant refused to participate (iii) a work/life risk assessment – this was not arranged before her absence began (iv) regular one-to-one meetings which were undertaken. On 11 March mediation was offered which the claimant thought was "too little too late" There was a 1-1 on 12 March with Mr Cooper. Her next complaint in her statement at page 27 is about retrieving pictures of her child from her desk after she went sick. She explained the significance of what she had been told about this better to me in this hearing than I can ever see her having done before. That is effectively where her statement ends.

2.11. The claimant progressed to a formal grievance on 15 March 2019, shortly before her sickness absence began on 18 March 2019. She says *I couldn't remain at work any longer staff making me feel the way I was made to feel: alone,isolated, bullied and harassed at every opportunity, challenged at times in an aggressive and nasty manner, especially from the likes of Angela, Dawn and Dave. I spent more days leaving my desk or going for walks to hide the emotional and depressive state I was being forced into. The lack of support from management was evident, even though Lee, Vicky and especially Janet viewed behaviours and were fully aware of what was going on but chose to agree at the time but denied anything at interview.*

2.12. In late March 2019 the claimant went to see the doctor for a 'fit note' and was also referred for an abnormality on her skin to a cancer specialist who found suspicious moles. These were removed the same day, confirmed as **skin cancer,** a further date was booked to check for any further spread. Fortunately the cancer was removed but any such diagnosis is "scary". She did not receive any written messages of support from any staff. This just added to the reasons why she could not return. During this period her mother was also very ill.

2.13. An OH report dated 2 April 2019, confirmed she did not wish to proceed with mediation and was unfit to return to work in any capacity. This did not change in any subsequent report. Both her GP and OH confirmed she would not be fit to return until the grievance had been completed for her mental health and wellbeing. At a monthly sickness review meeting (June 2019), they asked if she

would come back into another office while the grievance process was being undertaken. They could not tell her what or where any temporary job would be.She felt she had to agree to being redeployed before finding out what they had to offer. That is not what her union representative told her, her advice was she did not have to accept what was offered. T**he genuine, but mistaken, view of the claimant creates a Catch 22 situation of the respondent effectively saying "*if you are interested we will look for what placement may be available"* and the claimant saying "*tell me what you have at what grade and where, then I'll tell you if I am interested*"**

2.14 At a meeting on 2 August 2019, it was suggested the claimant might return to work to a temporary post but again she declined. This was also discussed on 18 September 2019 but again declined. The claimant says "*The GP gave me antidepressants as I was not sleeping and was at a low state, getting depressed and constantly crying. This was also happening with the Counselling Services and Occupational Health and it was taking its toll on my family and parents.* She now complains of how long Stage 2 took, but her health, at least in part, contributed to that.

2.15 The Stage 2 decision maker was Jill Lambert. I asked the claimant whether she would have had first hand knowledge of what happened and she accepted Ms Lambert would not . On 25 September 2019 the claimant attended the Stage 2 outcome meeting which took 16 minutes and was told it was not upheld. She was not allowed to comment but told if she was not happy she could appeal. **This is quite right and proper.** Upholding a grievance directed at someone may lead to disciplining him/her, hence most grievance procedures expect the person bringing the grievance to show their version is **more likely than not** to be true . People accused may lie. All any grievance investigator can do is decide the more likely. The result is not a cover up if the wrong person is believed unless the manager reaching it knows the truth "first hand" and refuses to accept it. Ms Lambert did not.

2.16. The claimant appealed and then received a copy of all staff's Investigation Meeting Records, which contained several distortions of the truth. She says *I raised responses and questions against the Staff's meeting records as I did not have the opportunity to do this at stage 2 which I expected to be given answers at stage 3. When this did not happen, I asked again at Stage 4 but yet again, no reply. They just said they read them and were considered. That was not good enough or acceptable or a fair process. I highlighted contradictions in what they said even within their own. The comments were very personal, some were irrelevant to the case. Comments made by managers and staff for example: 'it's a better place without her', concerns when Debbie returns for the rest of the team and what support they team must have'. Also a number of staff* ***condoning*** *Dave Britton's behaviour as he is 'ex-military'.* **I took care to establish the claimant wanted, if not to cross examine the people she says lied, to have them re-interviewed and her challenges put to them for their response.** She says after providing her detailed log of each incident and evidence to support the incidents where possible, despite those she accused having no evidence to back up what they were saying, the "*truth*" of "*bullying by Admin and David Britton.* was not "***acknowledged"*** at stage 2 or stage 3. **I took care to establish she wanted to be fully vindicated, her account accepted and those who said differently found to be lying.**

2.17. The Stage 3 decision maker was Ann Fox CCG Executive Director of Nursing, Quality and Safety. I specifically asked the claimant whether Ms Fox would have had first hand knowledge and she accepted she would not. Ms McGurk said in the Stage 3 meeting, '*you would think Deb had a personality transplant from February 2019 to the staff's interview meetings*'. Ms McGurk appears to

be saying what others alleged about the claimant would be out of character for her but this is an expression of opinion, not fact. The Stage 3 appeal was largely unsuccessful and only one element was partially upheld on 27 November 2019. The panel reaffirmed the recommendations made at the initial consideration of the grievance. The claimant appealed again.

2.18. Ms Harle has been a lay member of the CCG since January 2018. She has worked for the NHS directly or indirectly for 46 years in different roles from dental nurse to non-executive director at an NHS Trust. She chaired the stage 4 grievance appeal hearing on 8 January 2020, alongside the CCG's chief officer, David Gallagher. Kay Fletcher was their HR adviser. The claimant attended with her trade union representative, Gemma Taylor. Ann Fox, with Jenna McGuiness, HR Manager, presented the management case. Eleanor Hardy, Personal Assistant took the notes.

2.19. Before the hearing date Ms Harle received a huge amount of paperwork (i) the grievance procedure (119-146); (ii) the informal grievance document (181-190); (iii) notes from the two informal grievance meetings (191-193 and 195); (iv) the formal grievance document, grievance themes and her additional allegations document (196-205, 207-217 and 231-234); (v) all of the staff grievance investigation meeting notes (240-250, 253-297, 299-301 and 304-305); (vi) the claimant's response to them set out in a document of her own (306-346); (vii) the stage two grievance report by Ms Lambert (347-380) and her outcome letter (387-388); (viii) the stage two appeal letter (391-392); (ix) a statement the claimant provided from Lisa Purvis (401-402); (x) all the stage 3 grievance appeal documents (403-439); (xi) the stage 3 grievance appeal letter (442-449); and the stage 4 grievance appeal documents (453-499). Ms Harle spent the full week before reading through it all to try and get a full understanding of exactly what it was the claimant was unhappy about.

2.20. There were no witnesses brought by the claimant or management. Ms Harle said the panel had read all the information and then asked the claimant and her union representative to provide salient points of what she was appealing against . Ms Taylor asked if everyone had received the additional information supplied by them prior to the meeting. During the hearing Ms Harle continually tried to reassure the claimant all the information had been read and would be taken into consideration but she encouraged both her and Ms Taylor them to pick out the main points and link them to why she felt the earlier outcomes were unfair. It was very difficult to get her to say what specifically she disagreed with from the stage 3 outcome. Eventually they managed to agree on the key issues were which they then addressed, and later covered in the outcome letter.

2.21. At one point the claimant became upset. The meeting was adjourned at 9.25 and recommenced at 10.30. During the hearing itself there was not a great deal of extra information or detail from the claimant or her representative. Ms Fox then presented the management response gave details of the stage 3 hearing held on 20 November 2019, and the rationale for their decision. Everyone had the opportunity for questioning and clarification throughout the hearing. At the end Ms Harle reiterated its purpose , said the panel would consider everything but would not be giving a decision there and then because there was just so much to work through.

2.22. The following day, on 9 January, Ms Harle, Mr Gallagher and Ms Fletcher spent the full day considering the issues. In the outcome letter (513-516) they identified 17 points and gave the rationale for the decisions on all in the outcome letter dated 14 January 2020. They upheld the decision and outcome of the stage 3 hearing. Ms Harle did feel the claimant would not have been

satisfied with whatever they said She had previously stated she would not be bringing witnesses to the Stage 4 hearing, but would when she pursued her case outside of the grievance process.

2.23. I will quote **some** passages from the outcome letter.The Stage 2 issues investigated were
1. Inappropriate behaviours towards you by Angela Houston, Kristina Metcalfe and Dawn Skelton.
2. Inappropriate behaviours towards you by Dave Britton.
3. Lack of management support provided to you.
4. Cup tray incident in October 2018 during which it is alleged Dawn Skelton behaved inappropriately and aggressively.
5. Office move incident in November 2018 during which it is alleged Dave Britton was aggressive, loud and disrespectful towards you and Paula Fishburn was sharp with you.
6. Cabinet/fridge incident in November 2018 during which it is alleged Dave Britton, Angela Houston and Dawn Skelton behaved liked vultures towards you.
7. Issues with clinical leads and the manner in which letters are allocated to you, in particular that Paula Fishburn and Julia Keith were patronising and ignored your CHC experience.
8. Duties had been removed from your Band 4 role and you asserted that there was no requirement for a Band 4 role in the structure.
The Stage 3 panel had confirmed the Stage 2 outcome for points 1, 2 and 4-8, whilst point 3, the lack of management support, was partially upheld.

The Stage 4 outcome was

1. Inappropriate behaviours towards you by Angela Houston, Kristina Metcalfe and Dawn Skelton
During the appeal hearing you clarified that part 4 of your grievance, the cup tray incident, should also be considered under this heading, as it was intended to be another example of the inappropriate behaviours, rather than a separate incident. We considered all the evidence, and for the avoidance of doubt this included your evidence documents as submitted at Stage 3, the witness statements from stage 3, and all documents submitted to the stage 4 panel.Whilst the panel acknowledge there is a clear difference of perspective on what has taken place, and it is clear this has been a cause of significant upset for you, we, and previous stages of the grievance process, are obliged to consider all the statements and evidence provided. ***Based on this there is insufficient evidence on the balance of probability to uphold your grievance.***

2. Inappropriate behaviours towards you by Dave Britton
During the appeal you clarified that part of your concern in relation to the outcome on this point was that evidence from Lisa Purves has not been appropriately considered, and the investigation in relation to the incident in reception with Dave was not fully investigated.
In relation to the reception incident; as per page 17 of the Stage 2 grievance report your concerns in relation to Dave's behaviour were considered at this stage. The Stage 3 panel reported they had primarily considered this matter in relation to Dave ignoring you, rather than the grunting or looks directed towards you. Upon consideration however we do not believe this materially impacts the reasonableness of their decision, or indeed their reasoning. We considered what the testimony of the receptionist could have added, had she been spoken to and confirmed your account of events, and found that this would not have impacted the outcome. We agree with the Stage 2 investigations reasoning on this, which was confirmed by the Stage 3 panel, in that it was understandable and

reasonable Dave's behaviour may have been impacted by the knowledge of the grievance submitted. ***The behaviour described however was not in and of itself sufficient to be labelled 'inappropriate' from an objective point of view; this is not to diminish or deny how you felt about this encounter.***
With respect to the wider findings in relation to this part of your grievance we consider the Stage 3 panel reached the correct decision in not upholding your grievance. On the balance of probabilities, considering all witness statements and evidence, it was reasonable for the Stage 3 panel to conclude there was insufficient evidence to uphold your grievance.

3. Lack of management support provided to you
At Stage 3 this allegation was partially upheld. During the Appeal you described that you did not consider the actions which the Stage 3 had considered to be support as being supportive. ***When asked to describe what support you would have expected to receive you described an approach which is that of a facilitated conversation or mediation, irrespective that you had previously declined, prior to taking out your formal grievance, participating in mediation with the team.***
Whilst acknowledging how the actions taken have made you feel, we agree with the reasoning of the Stage 3 panel. *Objectively there were actions taken which would reasonably be considered to be supportive, and have been outlined as such by the managers involved. The Stage 3 panel however identified a number of shortcomings about how this was implemented and communicated which the Appeal panel strongly agree with.*

4. Cup tray incident in October 2018 during which it is alleged Dawn Skelton behaved inappropriately and aggressively
As noted above you clarified this item should be considered under point 1, and so is included above.

5. Office move incident in November 2018 during which it is alleged Dave Britton was aggressive, loud and disrespectful towards you and Paula Fishburn was sharp with you
Having considered all the information provided by all parties throughout the grievance process we agree with the Stage 3 panel; there was insufficient evidence on the balance of probabilities to uphold this aspect of the grievance. ***It should be clarified this is not 'believing' Dave's account of events versus yours, but rather finding there is insufficient evidence to reach an objective conclusion on the precise series of events.***

6. Cabinet/fridge incident in November 2018 during which it is alleged Dave Britton, Angela Houston and Dawn Skelton behaved liked vultures towards you
We were assured by Ann that all evidence in relation to this point was considered at Stage 3, and again would like to reiterate that at Stage 4 your statement of case, appeal letter, summary statement and all comments made were additionally considered. We find the decision reached at Stages 2 and 3 was reasonable on balance of probabilities, so do not uphold this element of your grievance.

7. Issues with clinical leads and the manner in which letters are allocated to you, in particular that Paula Fishburn and Julia Keith were patronising and ignored your CHC experience
Having reviewed all the evidence submitted, including the additional explanatory notes provided at Stage 4, we were unable to find anything which casts doubt on the decision making process at Stages 2 and 3. This section of your grievance is therefore not upheld.

8.Duties had been removed from your Band 4 role and you asserted there was no requirement for a Band 4 role in the structure

Having reviewed all the evidence submitted, including the additional explanatory notes provided at Stage 4, we were unable to find anything which casts doubt on the decision making process at Stages 2 and 3. This section of your grievance is therefore not upheld.

In addition to the points of your grievance as detailed above in your appeal letter you also detailed a number of additional areas of concern which we would also like to address.

Points 9, 10, 14 and 17 of your Appeal letter

We hope that during the Appeal hearing, and in the response above, you now feel assured that all evidence has been fully considered, including that from the witnesses you brought to the Stage 3 hearing, character references, and the additional documents you provided at Stage 3, with additional explanation at Stage 4.

Point 11 to 13 of you Appeal Letter

During the course of a grievance investigation it is to be expected that those interviewed may provide information which is not directly related to the specific issues being investigated, but which are given as the individual feels it helps to explain their view or understanding of events. It cannot however be completely clear to the investigating team that information is not relevant until the person has completed their statements. Once given it is correct and appropriate that the information is recorded in the minutes of the investigation meeting.

Whilst there is an option for the investigating manager to re-interview people, including presenting updated questions back to the complainant (you), this is at their discretion, and we would only expect this to happen where such additional interviews would provide additional information which would likely impact the findings of the investigation. We are happy therefore the correct process was followed in this instance.

Having reviewed the investigation, we are satisfied it was sufficient, appropriate, fair and in line with policy and procedure and so support the finding at Stage 3.

Point 15 of your Appeal Letter

It is acknowledged that rebuilding relationships following disputes is difficult, however we find the Stage 3 recommendation that mediation is a type of support which could assist your return to work to be reasonable and appropriate.

Point 16 of your Appeal Letter

We find the recommendation at Stage 3 to be reasonable.

This concludes the Grievance process and there is no further right of Appeal.

We appreciate this has been a difficult process for you, and the outcome may not be the one you had hoped for.We would like to stress again we have very carefully considered all the information you have provided, along with the information gathered throughout the grievance process.

*Our decision has been based on a thorough review of all materials and **I** hope you do at least feel that this matter has been taken seriously by the CCG.*

2.24. The respondent had a number of sickness absence review meetings with her 13 May 2019 (235-236); 24 June (251-252); 2 August (302-303); 18 September (384-386); 5 December 2019 (440-441); 16 January 2020 (517-518) before convening a Final Absence Review Meeting on 24 February 2020. At the meeting on 5 December 2019, the claimant stated she was not well enough to return to work, and given comments made by her colleagues during the grievance process she felt it had been made impossible for her to return to work in the organisation. At this meeting, she was told a Final Absence Review Meeting would be arranged, and if there were no redeployment opportunities, a possible outcome was her dismissal. She reiterated at the meeting on 16 January 2020 she did not feel mediation or redeployment were options, and she would be unable to return to work with her colleagues or for the organisation. By then it had medical evidence the claimant was unfit to carry out her role, it was not possible to say when that might change, and she herself had said she did not feel capable of returning to work. The OH report dated 18 June 2019 stated she felt unable to return to the team in the future, and this was repeated in every subsequent report on 30 July 2019 (298); 16 September (381); 28 October (396) and 16 December 2019 (450).

2.25. Scott Watson is Director of Contracting, Planning and Informatics. Before he was the CCG's Head of Service for about 12 years. He has spent his whole career in public service; the last 22 years in the NHS and Local Authorities before that. He conducted the final sickness absence review hearing on Monday 24 February 2020 (529-532). Before it he received a document pack from HR containing (i) the absence management policy (147-176); (ii) 8 OH reports (194, 218, 219-220, 238-239, 298, 381, 396 and 450); (iii) letters relating to her sickness absence review meetings (235-236, 251-252, 302-303, 382-386, 440-441 and 517-518); (iv) the letter inviting her to the final sickness absence review hearing with him (519-520); and (v) the management statement of case (521-527). He spent many hours reading all those documents before the hearing which was scheduled for noon The HR representative was Mr Nik Kapetanidis.

2.26. Mr Watson saw his role as a problem solver, to explore options to avoid dismissing and get her back to work instead. On the day the claimant emailed to say she would not be turning up but her union representative would . The claimant wanted the hearing to go ahead, for the process not to be delayed, and a decision to be made that day. Mr Watson felt very uncomfortable agreeing to this. At the hearing Ms McGurk was there to present the management case accompanied by Vicky Spoors of HR. Gemma Taylor was there to represent the claimant and Eleanor Hardy to take a note.

2.27. At the start Mr Watson said his preference was to rearrange for another day but Ms Taylor told them the claimant had been clear she did not want that to happen. Mr Watson decided to go ahead but was not willing to commit to giving a decision there and then. Ms McGurk explained the position from the CCG's perspective. By this point the claimant had been off work on sick leave for nearly a full year. OH referrals had been made, in addition to regular sickness absence review meetings. The CCG had put forward suggestions to get her back to work in her substantive post or different posts, either temporarily or permanently. She had refused those options.

2.28. Mr Watson then gave Ms Taylor the opportunity to respond and thought there would be some questions or at least some different perspective from her, but she just agreed with the management case and did not offer any contradictory or alternative views. That took him by surprise and gave the impression she and the claimant had simply accepted her employment needed to be terminated.

There was no push back at all. Mr Kapetanidis asked if they could do anything else at all to help get her back which had been tried earlier but nothing had been identified that satisfied her.

2.29. When Ms Taylor presented the case, she confirmed she had authority to represent and the claimant who simply did not want to return to work for the CCG in any role because of the breakdown in the relationships between her and her colleagues. Redeployment within the CCG was not an option as it is small and there was no role where she would be guaranteed not to bump into them. She felt mediation with her colleagues would not work. Her desired outcome was simply an official leaving date, to be paid for outstanding holidays, payment in lieu of notice and a reasonable reference. Mr Watson and Mr Kapetanidis asked again if there were any step they could look at to try and get the claimant back to work. Ms Taylor said she had no desire to return to work at the CCG in any role regardless of the options put forward.

2.30. The CCG had been missing its Admin Team Lead for nearly a year. Mr Watson had not wanted to give a decision there and then, but in the circumstances was satisfied it was the right thing to do. He reconvened the hearing, explained the decision and rationale, confirmed she would receive her payment in lieu of notice and any remaining holiday pay. The terms were set out in the letter confirming the outcome (533-535). The CCG would continue to cover the costs of her remaining counselling sessions being provided by OH. He offered the right to appeal which she never did. The next he heard was when HR notified him about this Tribunal claim . Her representative agreed the sickness procedure had been flawless. Mr Watson is aware the claimant continues to object to the various findings of her grievance, but that was not part of his hearing.

3. Conclusions

3.1. When a Judge, or internal decision maker, has to decide between conflicting versions "motive" may explain, not excuse, behaviour and make it more likely to have happened. I believe much of what the claimant alleges against her colleagues, Mr Cooper and Mr Britton is largely true, because, with hindsight, people had motives to dislike her, first her returning as a Band 4 in 2015 displacing Janice , later her tendency, as Ms Purvis explained, to go into detail when a short answer would do. I can also see some less conscientious staff could be resentful of her showing up their inadequacies and not joining them at lunchtimes. As for Mr Britton, his ex-RAF background makes it more likely, though not excusable, he would behave as alleged. Mr Cooper was, in my view, struggling with the role he had inherited after a TUPE transfer.

3.2. I considered the possibility the respondent had been responsible for her ill-health and incapacity to work. A gradual build up of isolating behaviour can take a heavy toll on an employee at work, especially when managers take no effective steps to stop it. Often victims of such behaviour come across as complaining about events which, to an outsider reading or hearing them, appear trivial and childish. Having heard the claimant, I do not think they were. Though it was not solely the cause of her illness, I find the behaviours and weak management of them contributed to her ill health.

3.3. The claimant feels " *the Grievance Process was unfair and did not take what I have stated in this summary into account. No-one likes to admit bullying, harassment or isolation in their organisation and sadly people will not be honest. The sad thing about this whole process, is, it didn't have to come to this stage if they handled it in a timely manner and if the Grievance process had looked into my responses when I viewed the staff's Investigating Meeting Records', it could have been a fairer*

process but it definitely was not. I did not feel supported by the CCG during the Grievance process. I feel it has been a witch hunt to get me out and they have succeeded. The claimant says no one listened to her. I disagree. They may not have seen the significance of some points which the claimant obscures by the sheer volume of her complaints. However, as Ms Harle explained in her outcome letter, the claimant is reluctant to accept the grievance outcome does not mean she is not believed, only that the allegations she makes cannot be upheld on balance of probability. I accept the process contributed to her ill-health but, objectively, the respondent's handling of it was not culpable. Taylor-v-OCS Group 2006 IRLR 613 held where there is an internal disciplinary appeal the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages "*with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness, or lack of it, of the process and the open mindedness (or not) of the decision maker the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.). In my view the same applies by analogy to internal grievances.

3.4. As for the decision to dismiss, the claimant had been absent from work from 18 March 2019 until the Final Review Hearing on 24 February 2020. The respondent consulted with her throughout and had up-to-date medical evidence.It explored the possibility of mediation and redeployment. She says *When I was offered again at the end of the Grievance either mediation or redeployment, again I found I was put in a position that* ***this was not possible to accept due to the above and taking everything into account.*** *The trust I had in the organisation and staff had been shattered beyond report especially after receiving the Investigation Meeting Records, no mediation or redeployment was acceptable. Also I had to accept mediation first before knowing how or when this would happen. If it was redeployment, it was a case of accept blind as they did not know at that point what was on offer.* **The last point is plainly wrong.** In any event there was no redeployment opportunity in the CCG and I find what the claimant would really have preferred was to be returned to the wider NHS, which the respondent could not do. I cannot identify any procedural failing in the dismissal process.

3.5. The respondent had a fair reason for dismissal and dismissal was in all the circumstances, well within the band of reasonableness. Accordingly, it was both procedurally and substantively fair. For completeness, had I allowed an amendment to add a s15 EqA claim , the respondent would on these facts have shown dismissal was a proportionate means of achieving legitimate aim

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 23 August 2021