EMPLOYMENT TRIBUNALS

Claimant: Miss Rosalyn Adegunle

Respondents: 1. N Brown Group PLC
2. JD Williams Co Limited

Heard at: Manchester (by CVP) **On:** 8 and 19 November 2021 and on 24 November 2021 (in Chambers)

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person
Respondents: Ms Gould, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was employed by the second respondent. All complaints against the first respondent are dismissed.

2. The claimant was not constructively dismissed by the second respondent and therefore she does not succeed in her complaint of unfair dismissal

REASONS

Introduction

1. The second respondent is the entity which employed the claimant. All references below to the respondent are to the second respondent.

2. The claimant was employed by the respondent between 2001 and 6 November 2018 when she resigned in circumstances which she claims amount to a constructive dismissal.

The issues

3. At a preliminary hearing on 25 September 2019, following discussions with the claimant, the following were identified as the reasons the claimant says she resigned.

3.1 The claimant's line manager, Mark Wilson, refused to provide a letter for the claimant's GP in relation to a dispute with her GP over the accuracy of her medical records. This refusal is said to have first occurred in December 2017 and been repeated in March 2018. (Issue 1)

3.2 On several occasions in spring/summer 2018, two of the claimant's co-workers arrived on their shift dressed in similar clothing to the claimant's outfit on the same day. She perceived this to be behaviour that was targeted at her and designed to "make me paranoid". The claimant was unsure of the identity of the two employees involved but believes they are both temporary workers no longer working at the Respondent. One may have been called 'Lucy' and worked as a temporary member of staff in the Respondent's fraud section. (Issue 2)

3.3 In a conversation with a colleague, Megan Woods, regarding mental health issues, Ms Woods made the comment "you have schizophrenia, don't you?". This is alleged to have occurred in mid-2018. The claimant states that she does not have that condition and found the comment offensive. (Issue 3)

3.4 In October 2018 the claimant attended a well-being meeting related to some sickness absence. The notes of that meeting subsequently produced by the respondent's HR department refer to her as being "delusional" when the word used in the meeting was "delirious". The claimant considered this to be inappropriate. (Issue 4)

3.5 Also, in October 2018 the claimant discovered that password-protected documents she had saved on the respondent's IT system had been accessed by another user, and the passwords had been changed. The claimant explained that she believes her documents were being accessed by an external '3rd Party' person or persons rather than by the respondent itself. She nonetheless complains, in respect of the respondent. that its IT department should have notified her of this breach and advised her of appropriate steps. (Issue 5)

3.6 Also, in October 2018, an incident occurred in the respondent's car park in which the claimant saw a woman with children gain unauthorised access to the car park. The claimant viewed this as potentially part of the '3rd party' campaign against her. As a result of her concerns. it was agreed with Mr Wilson that a supervisor ('Jade') would meet her in the car park when she next arrived at work. Jade did not meet the claimant as planned and this failure is the issue complained of. (Issue 6)

3.7 On 4th October 2018 a particular song (Sit Down) was playing on the radio when the claimant arrived at the office. The claimant finds that song upsetting. She clarified that she did not believe any of the individuals present in the office (Mark Wilson, Jade, Martin and others) had caused the song to be played. Rather, it is an example of 3rd party manipulation of her environment, which she experiences both in and out of work. She asserts that the respondent has a duty to protect her from harassment in those circumstances. (Issue 7)

3.8 The failure to allow the claimant to retract her resignation. (Issue 8)

4. The claimant's witness statement listed 11 paragraphs under the heading "*October /November 2018 reason for leaving."* There was some overlap with the 8 reasons identified above. Other paragraphs were more by way of background; issues that the claimant says occurred during the last 4 weeks of her employment with the respondent even though the matters described were not all acts of the respondent and therefore not part of her constructive dismissal claim. An example of this is paragraph 9 at page 6 of the claimant's statement. "*Another incident not reported were vans with R Noon and Son on, timely arrive at the same location as I, timed perfectly on my lunch or on way home etc."* The claimant explained in her evidence that the sight of a van with "*R Noon & Son*" written on the side was distressing to the claimant due to a previous experience but, whilst the claimant had concerns that someone was arranging for these vans to be on the road purposefully at times and places which meant that the claimant would see them, she was not making this allegation against the respondent.

5. It is also important that I note that, whilst the Judge at the preliminary hearing on 25 September 2019 had set out clearly the reasons the claimant claims she resigned, the claimant stated in her evidence at this final hearing that these were only the most recent examples in a long campaign of harassment by the respondent and that this went back to 2013 when she was detained under the Mental Health Act 1983 (MHA).

6. The claimant's position is that this detention was an unlawful act on the part of the NHS and possibly the police. Since then, the claimant claims that the respondent had refused to believe her account on various matters, the most recent examples being those provided by her at the Preliminary Hearing.

7. I decided that it was appropriate that I focus on the reasons set out in the preliminary hearing. They were the recent allegations and, if true, potentially very serious.

The Hearing

8. Following initial reading, I heard the claimant's evidence between approximately 11.15 and 15.00 on the first day.

9. We then heard from one of the claimant's witnesses, Ms Petrie.

10. One day was not sufficient to hear and conclude the case and, following discussions and agreement with the parties, we were able to identify 19 November 2021 to continue with the hearing.

11. Towards the end of the first day, the claimant noted that she wanted transcripts of recorded discussions to be considered by me and was concerned they had been removed by the respondent from the bundle of documents. Ms Gould referred me to transcripts of various discussions in 2013 at pages 338 to 352 of the bundles. The claimant confirmed that these were the recordings she wanted to refer me to. I agreed that I would read these transcripts.

12. The claimant had sent to the tribunal office some additional documents for me to consider. These were sent by the claimant on 28 October 2021 and 1 November 2021. I informed the claimant that I would look at these but, once I had done so, made clear that a number of documents attached to these emails were unreadable and provided the claimant with an opportunity to send in readable copies.

13. The claimant also, late in the afternoon of day one, told me that she had written to the tribunal asking for the tribunal to make contact with the police as the respondent had committed the crime of perjury and for the response to be struck out on these grounds. I had not seen or read this correspondence from the claimant. I informed the claimant that orders striking out a response, particularly part way through a final hearing, were rare and I did not at that stage see any grounds to strike out the response in this case. I noted that we were part way through the evidence and my focus was on reaching a decision based on the merits of the case. However, should the claimant wish to proceed with an application then I would consider it.

14. I also informed the claimant that I would not write to the police, explaining again that my focus was on hearing the evidence and reaching a fair decision. The claimant is aware that she is able to report a matter to the police if she considers that a crime has been committed.

15. The claimant emailed the Tribunal on 18 November 2021 setting out reasons why the response should be struck out. I read this written application at the start of day 2. I decided that I could reach a decision on the claimant's strike out application without first inviting a response. I refused the application. My reasons are below.

16. We then proceeded to hear the 3 remaining witnesses, being Mark Wilson (the claimant's manager), Jessica Dytham (HR Manager) and Julie Ives of USDAW.

17. At all relevant times, the claimant was a member of USDAW. In her witness evidence the claimant was critical of the standard of representation and service provided by USDAW.

18. Julie Ives (JI) was at the time the local USDAW representative. The claimant had asked JI to be a witness for her but she had declined. JI had however provided a statement and was called by the respondent. That provided the opportunity to hear the evidence of JI (which the claimant had wanted) and for the claimant to ask questions of JI (which she did).

19. As for the claimant's criticisms of USDAW, I noted:-

19.1 they did not form part of the claimant's reasons for resigning;

19.2 they were between the claimant and USDAW, they were not issues between claimant and her employer. I had no jurisdiction over the claimant's complaints against USDAW and I would not make any findings about them.

20. I heard the parties closing submissions at the end of day 2 and reserved my decision.

Application to strike out the response.

21. I summarise the reasons why the claimant said that the response should be struck out and my response to each of these.

22. I took these to be reasons put forward under Rule 37(1)(a) and/or (b) of the Employment Tribunal Rules of Procedure 2013 (Rules); that the response itself and/or the manner in which the respondent has conducted the proceedings is scandalous, unreasonable or vexatious

23. Reasons and response:-

23.1 Reason: that the respondent's witnesses have lied.

Response: I need to hear from those witnesses and make my own assessment and finding of facts.

23.2 Reason: that there had been misuse of the MHA in 2013.

Response: concern about the actions of public authorities is not a reason to strike out the response in these proceedings.

23.3 Reason: there have been actions to discriminate, bully, harass, manipulate documents, mistreat personal data.

Response: to the extent that these matters are relevant to the claim of constructive dismissal, the evidence needs to be considered.

23.4 Reason: there has been a breach of contract, breach of trust and confidence and negligence by the respondent,

Response: as 3 above.

Finding of Fact

24. The claimant was employed by JD Williams and Company Limited (the second respondent). I make this finding having been referred to the claimant's contract of employment (in the form of an offer letter and terms and conditions) at pages 225-231 as well as various items of correspondence throughout the claimant's employment. I note that more recent letters state *"JD Williams and Company Limited*

trading as N Brown" (an example is a letter dated 3 August 2018 at page 251). Whilst the trading name or brand *"N Brown"* might have been used more in the latter part of the claimant's employment, it is clear from the letterhead (and the absence of any evidence to the contrary) that the entity employing the employment remained as JD Williams and Company Limited. References below to the respondent are to the second respondent (the claimant's employer)

25. The claimant was employed in the respondent's credit control department between 2001 and 2018. This was not the claimant's only employment. She worked during weekends for the respondent and had other, unrelated, employment during the week.

26. In 2013 the claimant was absent due to sickness for a considerable period and for part of this period, was detained under the MHA. The claimant's position is that she should not have been detained, that she had been misdiagnosed and that her detention amounted to false imprisonment.

27. Also, in 2013 and 2014, the claimant made allegations about colleagues in the workplace. The detail of these is not relevant to this case, except that through those allegations, investigations and outcome there was some awareness amongst colleagues that the claimant may have had mental health issues.

28. The claimant had further sickness absence in 2017 and 2018. In 2018 the claimant was absent due to sickness over a two-week period in late April and early May 2018 and for a longer period between 16 June 2018 and 13 October 2018.

29. At all relevant times, the claimant's supervisor was Jade Petrie (JP). JP worked full time for the respondent and her work pattern included working every other weekend, when she would see the claimant. The claimant's manager was Mark Wilson (MW). As with JP, MW was a full-time employee of the respondent whose work rota required that he work on some but not all weekends. MW has been employed by the respondent since 2003.

30. The standard of the claimant's work was good during her employment with the respondent.

<u>Claimant's medical records</u>

31. On 10 February 2018 the claimant told MW that she had recently reviewed her medical records and had seen a note on there which said that the employer was not happy with her. She asked MW to arrange for someone from the respondent to contact her doctor and tell them that this entry was not correct.

32. MW was faced with an unusual request from the claimant. He contacted HR who told him that the respondent would have had no involvement with entries on an employee's medical records. Two weekends later (on 23 February 2018) MW met with the claimant to tell her this. The claimant told him that the entry had been made by a nurse but she said that that the respondent could provide a statement for review by the Information Commissioner's Office (ICO) in order for her records to be corrected. She asked MW to arrange this.

33. Understandably MW again asked for guidance from the respondent's HR team. Following this he told the claimant that the business would provide a statement but only if asked to do so by the ICO. MW also suggested to the claimant that she could obtain legal advice from the respondent's recognised union - USDAW. He also wanted to know whether the claimant had enough time off (he was aware that the claimant had other employment) and reminded the claimant of internal support services.

34. As her manager, MW had some awareness of the claimant's medical history including her detention in 2013.

Alleged comments by Ms Woods

35. In their discussions on 23 February 2018, the claimant told MW that a colleague, Megan Woods (Ms Woods) had asked her if she suffered from schizophrenia. There were no witnesses to this comment having been made.

36. MW spoke with Ms Woods about this when he next worked with her. She denied that she had said what had been alleged. MW decided that he was unable to reasonably take matters further. He spoke with MW in general terms about the importance of treating colleagues with respect. He then updated the claimant, telling her that he felt he could not take the matter further but told her to let him know if she had any future concerns about colleagues' behaviour towards her.

37. I note that this incident is not mentioned at all in the claimant' witness statement. it is not referred to under the heading *"October/November 2018 Reason for leaving"* or under the heading *"Reason for leaving".* It is one of the reasons for leaving identified at case management stage.

Absence in late April/early May 2018.

38. The claimant was absent for two weeks. On 21 April 2018, just before her absence, the claimant contacted MW to tell him that she had been a victim of fraud and that she was concerned that her house was being taken from her.

39. A few days after this the claimant provided a doctor's fit note, stating she was not fit to work due to anxiety. Following receipt of this, MW referred the claimant to occupational health providers who provided a report dated 3 May 2018. This report supported the diagnosis in the GP's fit note. It recorded that the claimant had no issues at work but that she did have personal issues which were impacting greatly on her emotional wellbeing. It recommended a course of counselling therapy and ongoing management support.

40. The respondent, through arrangements with its OH providers, was willing to support the claimant by providing counselling sessions although these were run on Wednesday afternoons and would have required the cooperation/consent of her main employer. The claimant did not access the therapy sessions offered.

41. MW met with the claimant on 26 May 2018, following her return to work when she informed MW that she was using self-help methods. She was reminded about the availability of the OH support services. Unfortunately, some two weeks later, the

claimant commenced a longer period of absence, not returning to work until October 2018.

Absence June -October 2018

42. MW maintained contact with the claimant during this long period of absence. I make the following relevant findings in relation to this ongoing contact:-

42.1 It was done in order to be supportive of the claimant.

42.2 MW reminded the claimant about support services available via the respondent.

42.3 The claimant told MW that she was accessing a course of counselling therapy sessions through her main employer.

42.4 In a discussion on 26 June 2018, the claimant told MW that she was considering leaving her role with the respondent (as well as with her main employer). MW discouraged this – saying to the claimant that she should have a supportive employer during this time of sickness.

42.5 On 22 August 2018 MW met with the claimant for a welfare meeting. Jessica Dytham (JD) an HR manager, also attended this meeting. Notes of the meeting are at pages 253-257. I find these to be an accurate summary account of the meeting.

42.6 During the meeting:

42.6.1 The claimant made references to incidents which had been investigated in 2013.

42.6.2 She told MW and JD that her phone and email accounts were being hacked but the police were not doing anything about it.

42.6.3 She said that she did not trust doctors.

42.6.4 She told MW and JD that she was accessing support through the OH services of her main employer.

42.6.5 JD and MW asked the claimant about any recent concerns at work. The claimant raised her concern about Ms Woods (above) and this was discussed.

42.6.6 The claimant told MW and JD that she was too scared to come back in to work although it was not work that was the issue but rather matters outside work.

42.6.7 MW assured the claimant that there was no pressure for her to return to work, it was important to remove what he called the *"blockers"* first.

42.6.8 The claimant said that she thought she might need a new role and that she struggled working in offices. In response, MW told the claimant not to rush into a decision which she may regret, and he offered his support to help the claimant return to work.

42.7 On 24 August the claimant contacted MW to ask that an investigation be carried out into incidents in 2013. In response MW spoke with JD who established that an extensive investigation had been carried out, and that a grievance process had also been followed which had included two appeal stages. MW informed the claimant of this by telephone and in writing (page 260).

42.8 On 18 and 28 September 2018 the claimant contacted MW and again raised matters going back to 2013, stating that she wanted to speak directly with HR. MW politely but firmly refused this direct contact, noting his role as the line manager and offering support.

43. MW met with the claimant on 9 October 2018 to discuss her return to work. At this meeting the claimant said that her doctor had recommended a phased return to work. The claimant also mentioned moving to another department. MW suggested to the claimant that on her first day back at work, she could just attend for an hour to see how things were. He also said that the claimant could choose to sit in another part of the office floor to her usual location should she prefer. A further welfare review meeting took place on 16 October 2018 which was positive and the claimant returned to work on 27 October 2018.

44. MW met with the claimant on 27 October 2018, her first day back at work. I find that MW was supportive and sympathetic. He was prepared to support a phased return to work (on the basis of reduced hours) in the coming weeks, he noted concerns about the length of absences to date and the possibility of further absence but made clear that he/the respondent would not take any action about this. The focus was on trying to support the claimant's return to work. My findings are supported by MW's evidence and the return to work form (pages 271-3).

Car Park Incident

45. The claimant raised concerns when working on the Sunday of the following weekend (4 November 2018). MW was not working over that weekend but the claimant called him on Monday 5 November 2018.

46. JP was working with the claimant over that weekend. The claimant and JP exchanged text messages on Friday 2 November. I have seen various text messages between JP and the claimant and from what I have seen JP has been a supportive colleague to the claimant. The messages of 2 November are an example of this:

Claimant: Hi Jade r u on shift tomorrow?

JP: I am. How's things?

Claimant; I'm ok but I do get scared now and again. Anticipating something's gonna happen! Xx

JP: That's understandable, do you want to text me when you arrive at work and I'll come down and meet you at the car park?

Claimant: Awh thanks! I think I'll be fine. I have to deal with this and fight the fear. Xx You're really kind, thxs xxx

JP well if you are worried just give me a text and I'll come down,

Claimant: cheers

47. The claimant did not send a text to JP on the morning of 3 November. JP did not therefore go and meet the claimant in the car park as she had offered but saw the claimant following her arrival in the office.

48. MW had not told the claimant that JP would meet her (as suggested by the claimant's version of events in the list of issues- but not by her evidence in her witness statement or at the Tribunal). The suggestion of a meeting was JP's. She suggested it to be supportive.

49. JP's evidence (which I accept) was that when the claimant arrived at work on 3 November 2018, she informed JP that she was being followed by a plain clothes police officer who had accessed the respondent's car park. The claimant said that she spoke with the security guard who told her that the person in question was an employee of the respondent who worked during the week but was using the respondent's car park that weekend so that she could go shopping in Manchester city centre. However, the claimant was not satisfied with that explanation. The claimant also asked JP if the security guard had put the radio on in the workplace that morning. JP informed the claimant that it was she who had switched the radio on.

50. The security guard also spoke with JP to ask if the claimant was OK. He said that the claimant had told him she would report him for a security breach. JP's account of these discussions (which I find to be accurate) is in a file note at page 274.

51. On 5 November 2018 the claimant called MW to make him aware of this incident. MW's evidence (which I accept) is that he understood the claimant did not feel safe at work but he did not understand her concerns. He asked the claimant to put her account of events and her concerns down in an email. The claimant replied that her emails were being intercepted and she would not be comfortable doing this. MW therefore asked the claimant to put down her account in writing in a letter to him.

<u>The claimant's resignation</u>

52. On the evening of 5 November 2018, the claimant sent an email to MW (received by MW on 6 November 2018) which said as follows:-

Dear Mark

Thank you for time in regard to the harassment claim in the workplace which still continues.

I have now come to the decision to hand in my notice.
Therefore, please accept this email as confirmation of my resignation with immediate effect.

Best wishes

53. MW saw the email on 6 November 2018. He was not surprised by the claimant's resignation. He was aware that this was a second job, that the claimant's health remained a concern and that she had told him in recent meetings that she was considering resigning.

54. MW forwarded the claimant's email to JD in HR who recommended that the claimant's resignation be accepted. It was also decided to offer the claimant a further (final) meeting to discuss her harassment allegations.

55. JD telephoned the claimant to confirm the respondent's acceptance of the resignation. The claimant's evidence is that, whilst on the phone with JD she heard a voice in the background shout that her resignation should be accepted. I find that no such background comment was made. It didn't need to be. In so far as the respondent needed to accept the resignation at all, that decision had already been made. I also find that the claimant did not ask to withdraw her resignation during this call (or at any other stage).

56. On 7 November 2018, the claimant emailed JD in the following terms:-

Dear Jessica

Further to my call, in regard to bullying and harassment in the workplace still continuing, I would just like highlight the issues I endured during the last weekend.

As mentioned, and as agreed I was working away from other members of staff, as I walked into the office they played on the radio, which was a blue radio on a chair, oh sit down, oh sit down, sit down next to me. I asked [JP] *before I sat down, had the security man been on the floor and he had.*

On Saturday, the security man was lurking in the underground car park at the roller shutter doors where they let cars.

I have given a more detailed description to facilities as the occupant of the re-emerged 3 hours later when i was leaving.

Also, my password had been changed on a protected document. The user iD 238151.

That is just a few isolated incidents.

I do not wish to endure anymore incidents like this.

If the spot is available to meet Monday mid-morning, as advised by Mark, I will take that. Please can you provide a contact number of the USDAW union or pass on my contact number. I wish for one of them to be in attendance.

Finally, if nothing is resolved in this meeting, I hereby tend my resignation as previously dated when I sent the email dated 5 November 2018 to Mark.

I am sure he advised you of this email.

Thanks.

Rosalyn

Final Meeting on 13 November 2018.

57. MW and a senior HR manager called Martin McKee (MM) arranged to meet with the claimant. The purpose of the meeting was to listen to the claimant's concerns.

58. The notes of this meeting are at pages 289 to 292. They were taken by a junior, temporary employee in the HR Department. I also heard the evidence from the claimant and MW about this meeting which I considered when reaching my findings of fact about the meeting.

59. Part of the meeting was taken up by the claimant referring back to events in 2013. The claimant provided more details about a change in the computer password. She explained that when she logged on to the computer she used in the workplace, there was another username appearing. Whilst the respondent had not been made aware of this concern immediately on the incident happening, MW explained to the claimant that it was likely that this was because someone else had been using the computer during the claimant's absence and therefore logged on with their username. I agree that this is the most likely explanation. I do not find that the respondent was engaged in anything sinister (as the claimant has alleged) concerning her data.

60. I make the following additional relevant findings as far as this meeting is concerned.

60.1 The claimant told MW and MM that her colleagues had specifically arranged for a radio station to play a song called "Sit Down" at a time when the claimant had chosen to sit in a separate part of the respondent's office.

60.2 The claimant referred again to the issue she had with the security in the car park on the weekend of 3/4 November 2018. She provided additional information about security guards "stalking" the claimant. The claimant was asked for further details (name and/or description of the

security guard who had been stalking her and more details of the timings and actions of the guard). The claimant did not provide these.

60.3 That the claimant told MW and MM that although she had no proof of this, someone was trying to make her feel delusional.

60.4 The claimant again raised the comment that she alleges Ms Wood made (see earlier)

60.5 The claimant did not ask to withdraw her resignation. The fact of the claimant's resignation was discussed briefly in terms of a payment in lieu of the claimants notice period and whether the claimant had any personal effects to collect.

61. It is important that I note here that the claimant's account of the meeting is that she used the term "delirious" rather than "delusional." The record of the meeting notes shows the word used was "delusional" Whilst the notes are not in any way a complete record of the meeting, it is hard to envisage an employee taking this note, making a record that this word was said if it was not. Further, the notes show this word (delusional) was used twice by the claimant. The other time was when the claimant referred back to events in 2013. She said that someone had put something in her drink which made her feel delusional. I am satisfied that this word was used by the claimant in the meeting and that is why it appears in the note of that meeting.

62. Whichever word was used however, the claimant alleged that others were purposefully (and maliciously) creating events or situations that were making her unwell.

Colleagues wearing the same clothes as the claimant

63. Neither party provided any evidence about this allegation. There is no detail in the claimant's witness statement; it was not referred to in the claimant's letter of 7 November 2018 (above). There is no evidence that colleagues purposefully wore the same or similar clothes as the claimant in order to target her and make her feel paranoid and I find that they did not.

Music in the workplace

64. JP gave evidence (which was not challenged) that the respondent workplace often had music playing which was usually a local radio station. There was a TV in the workplace through which employees could play radio stations. However, at the relevant time, the TV remote control had been lost and employees were using a portable radio.

65. As employees played music by tuning in to a radio station, they had no control over the music being played.

Submissions

66. I do not try to repeat all submissions made by each party here.

67. Ms Gould's submissions included the following:-

67.1 The claimant's remaining claim is one of constructive dismissal, relying on a breach of the implied term of trust and confidence.

67.2 The respondent, particularly through the actions of MW and JP, has acted reasonably throughout and been very supportive to the claimant.

67.3 A review of the eight allegations identified at the case management hearing and in the List of Issues. The final alleged breach (a refusal to allow the claimant to withdraw her resignation) occurred after the claimant's resignation and therefore should not be taken into account in deciding whether the claimant had been constructively dismissed.

67.4 At various stages during the hearing, the claimant referred to a complaint of disability discrimination, yet these complaints were dismissed at the preliminary hearing in 2020.

68. The claimant's submissions included the following:-

68.1 That she is not a legal professional;

68.2 That she is not a liar and would not make anything up;

68.3 That she did try to retract her notice;

68.4 That she has worked since she was 14 years old and knows when she is being bullied;

68.5 That the claimant has various procedures to deal with including this Tribunal claim and that it is having a severe adverse effect on her;

68.6 That the claimant has not provided all details as we would be *"here all day"*;

68.7 That she had no support from any of her colleagues; all she was offered was another referral to OH;

68.8 That there has been a lack of understanding of her claim and it has not been given due consideration;

68.9 That she was not ill (in that she did not have a disability) when employed by the respondent but people perceived she was disabled (they perceived that she had a mental impairment) and at all times, dismissed her complaints because of that perception.

The Law.

69. The claimant claims (1) that her resignation amounted to a constructive dismissal and (2) that this dismissal was unfair under s98 of the Employment Rights Act 1996.

70. Dismissal for the purposes of s98 includes the circumstances stated at s95(1)(c). *" …..an employee is dismissed by his employer if…….the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

71. In considering the issue of constructive dismissal, an Employment Tribunal is required to consider the terms of the contractual relationship, whether any contractual term has been breached and, if so, whether the breach amounts to a fundamental breach of the contract (*Western Excavating (ECC) Limited v. Sharp* [1978] QC 761).

72. It is an implied term of every employment contract that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I refer to this term as "the Implied Term."

73. In considering the Implied Term, Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited* [1981] ICR 666, said that the tribunal must *"look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

74. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: *Lewis v Motorworld Garages Limited* 1986 ICR 157 CA.

75. In the judgment of the Court of Appeal in *Omilaju v Waltham Forest London Borough Council 2005 1 All ER 75.* Dyson LJ stated as follows in relation to the last straw.

> *"A final straw, not in itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant."*

76. The Court of Appeal decision in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 *(Kaur)* commented on the last straw doctrine. The judgment included guidance to Employment Tribunals deciding on constructive dismissal claims. At paragraph 55 of the judgment, Underhill LJ states:-

> *In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

> (1) *What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> (2) *Has he or she affirmed the contract since that act?*
>
> (3) *If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> (4) *If not, was it nevertheless a part (applying the approach explained in* [LB Waltham Forest v. Omilaju [2005] ICR 481] *of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the* [implied term of trust and confidence]*? ……*
>
> (5) *Did the employee resign in response (or partly in response) to that breach?*
>
> *None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.*

77. Once a repudiatory breach of contract has been established, it is necessary to consider the part it played in the claimant's decision to resign. The following passage from the judgment of the Court of Appeal in *Nottinghamshire County Council v. Meikle [2004] IRLR 703*, is helpful.

> 33. *It has been held by the EAT in Jones v Sirl and Son (Furnishers) Ltd [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the Western Excavating case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation.*

78. In the event that an Employment Tribunal decides that the termination of a claimant's employment falls within s95(1) the employer must show the reason for

dismissal and that the reason for dismissal was a potentially fair one under s98(1) and (2) ERA. In a constructive dismissal claim, the reason for dismissal is the reason why the employer breached the contract of employment (*Berriman v. Delabole Slate Limited [1985] IRLR 305* at para 12).

Discussion and Conclusions

79. The claimant's constructive dismissal case is that there was a series of events which, individually and/or cumulatively amount to a breach of the Implied Term. It is appropriate to apply the decision-making process set out in *Kaur*.

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?

80. In addressing this first question, I disregard issue 8 (refusal to allow withdrawal of resignation). It might have been appropriate to consider whether the claimant said anything to withdraw from the words of resignation in her email of 6 November 2018 had the complaint been that there had been a resignation in the heat of the moment. On the basis of the facts as found, this was not a "heat of the moment" resignation. The claimant had mentioned on previous occasions that she considered resigning; she was plainly unhappy in her role; she had been supported by MW who told her previously to think carefully before handing in her resignation as it may be better for her to have employment with a supportive employer and that she may regret it.

81. Further and in any event, I have not found that the claimant did try to withdraw her resignation.

82. Other than this, the most recent issue was either the behaviour of JP not meeting the claimant in the car park and/or the playing of the song "sit Down" on the radio (issues 6 and 7)

Did she affirm the contract since that act?

83. No, those alleged acts took place in the few days before the claimant's resignation email sent on the evening of 5 November 2018.

If not, was that act by itself a repudiatory breach of contract?

84. No. I refer to my findings of fact on these matters:-

84.1 The respondent's employees played music from a radio station. A particular song may well have been played by a radio station and heard by the claimant. The respondent had no control over the music being played, other than selecting a radio station. Playing a radio in the workplace was something that the respondent employees, in that part of the workplace, habitually did. There was no breach of contract.

84.2 As for JP, she offered to support the claimant by meeting her in the car park and accompanying her in to work. The claimant thanked her for the offer but did not take her up on it.

If not, was it nevertheless a part (applying the approach explained in [LB Waltham Forest v. Omilaju [2005] ICR 481] of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the [implied term of trust and confidence]?

85. No. I have already set out my conclusions about issues 6 and.7. As for the other issues, I refer to my findings of fact:-

> Issue 1 – I have no criticism of the respondent's reluctance to become involved in correcting a medical record that it had not seen and had not influenced.
>
> Issue 2 – there was no evidence that colleagues of the claimant were wearing similar clothes to the claimant.
>
> Issue 3 – I have no criticism of MWs actions in addressing this issue. If Ms Woods had asked the claimant whether she was schizophrenic then it would have been upsetting to her. It could have formed part of a course of conduct which, when viewed cumulatively amounted to a repudiatory breach. However, it was not. If it did happen at all then it was a one-off incident that happened many months before the claimant's resignation. It was not the reason (or even a reason) the claimant resigned.
>
> Issue 4 – I find that the word delusional was used by the claimant and accurately recorded.
>
> Issue 5 – I find that another employee of the respondent used the computer generally used by the claimant during her absence. When the claimant turned on the computer, it asked for the log in details of the user who had used the computer last.

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

86. There was no breach by the respondent.

Employment Judge Leach

Date: 16 December 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 December 2021

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