EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lauren Sibbons**

Respondent: **NHS North East London CCG**

Heard at: **East London Hearing Centre**

On: **18 – 21 January 2022**
22 February 2022 (in chambers)

Before: **Employment Judge Barrett**
Members: **Mrs G Forrest**
Mr M L Wood

Representation
Claimant: Represented herself
Respondent: Mr Adam Ross, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant was not dismissed by the Respondent. Her complaint of constructive unfair dismissal is not well-founded and is dismissed.**

2. **The Claimant's complaints of direct disability discrimination, disability related harassment and failure to make reasonable adjustments are not well-founded and are dismissed.**

REASONS

Introduction

1. The Claimant worked for the Respondent from 31 July 2017 to 27 July 2020. She presented her ET1 claim form on 18 August 2020 following early conciliation between 27 and 28 July 2020. She raises complaints of constructive unfair dismissal, direct disability discrimination, disability-related harassment and failure to make reasonable adjustments. The Respondent resists the claims.

The hearing

2. The hearing of evidence took place over four days, 18 to 21 January 2022. The Claimant represented herself, with support from her aunt who attended with her. The Respondent was represented by Mr Ross of counsel.

3. The Tribunal heard evidence from the following witnesses:

    3.1. The Claimant; and

    3.2. On behalf of the Respondent:

        3.2.1. Ms Jenny Mazarelo, Deputy Director of Primary Care Transformation and the Claimant's former line manager;

        3.2.2. Ms Leilla Shaikh, Deputy Director of Primary Care and the Claimant's line manager until the end of the Claimant's employment;

        3.2.3. Mr Steve Collins, Acting Chief Finance Officer and the decision-maker in the Claimant's grievance appeal.

4. The Claimant and one of the Respondent's witnesses required reasonable adjustments, which were made by the provision of regularly scheduled breaks, the ability to request additional breaks, and in the case of the Claimant having her aunt with her for emotional support (on the proviso there be no discussion of the case) during breaks in her evidence. The Tribunal made provision for Ms Shaikh to view the hearing and provide her evidence via video link, as she had recently had a baby.

5. The Tribunal was provided with a bundle of 926 pages. Overnight between the first and second days of the hearing, the Claimant disclosed further documents at the Respondent's request. On the parties' review of the documents, it was clear that they did not give rise to any points of dispute, and they were not added to the bundle.

6. The parties had submitted an agreed list of issues and confirmed at the outset of the hearing that the issues were agreed, although the Respondent's Counsel flagged that some of the allegations it contained lacked specific detail. That list of issues is appended to these Reasons.

Findings of fact

7. The Claimant started working for the Respondent on 31 July 2017.

The Claimant's contractual terms

8. Her Statement of Main Terms and Conditions of Employment [117] provided, insofar as is relevant:

    8.1. Her job title was Head of Commissioning and Transformation – Primary Care.

    8.2. Her normal hours of work were 37.5 hours per week.

    8.3. Her normal place of work was the Unex Tower in Stratford, East London.

8.4. The date that her continuous service started for the purposes of the NHS Staff Council terms and conditions of service applying to the post was 31 July 2017.

8.5. The post attracted London Weighting at 20% of basic salary up to a maximum of £6,469 per annum.

8.6. The notice period on either side was 12 weeks.

8.7. Clause 11, 'Duties' provided:

'Your main duties and responsibilities are outlined in your role profile and generic job description issued to you on your appointment and are also laid down by your Head of Department. The CCG reserves the right to vary your duties and responsibilities to meet the changing needs of the CCG's services.'

8.8. Clause 15, 'Grievance procedure' provided:

'All employees are subject to the CCG's Grievance Policy. If you have any cause for complaint in respect of your Terms and Conditions of Employment you should follow this procedure… If you have any cause for complaint in relation to discrimination, harassment and victimisation, including bullying, harassment and victimisation on non-discriminatory grounds, you should also refer and follow the CCG's policy for dealing with Discrimination, Harassment and Victimisation… The person to whom you should normally refer a grievance in the first instance is your direct line manager.'

8.9. Clause 19, 'Valuing diversity' provided:

'It is the aim of the CCG to ensure that no job applicant or employee receives less favourable treatment on the grounds of sex, race, colour, religion, marital status, sexuality, age, ethnic origin, or disability or is not placed at a disadvantage by conditions or requirements which cannot be shown to be justifiable as per the Equality and Diversity [sic]. It is for each employee to contribute to the implementation and success of the Policy.'

9. The Claimant signed that document on 16 August 2017 [124].

The Claimant's disability

10. The Claimant has suffered from PTSD since she was a teenager. The Respondent accepts that this amounts to a disability, which it knew about at all relevant times.

The Claimant's son

11. At the time the Claimant started working for the Respondent, her younger son was 13. As the Respondent accepts, he has a disability, described by the Claimant as anxiety, depression and a mixed cognitive profile. During the period of this claim he was home-schooled due to difficulties accessing mainstream education.

The Claimant's commute

12. When the Claimant started working for the Respondent, she lived in Norfolk, approximately 100 miles away. She had a very lengthy commute, sometimes alleviated by staying with her parents who lived in Romford.

13. On 9 October 2017 Ms Mazarelo joined the Respondent as Associate Director for Primary Care and became the Claimant's line manager. She agreed that the Claimant could work from home one day per week as a short-term measure. The Claimant worked from home one day a week until November 2017.

14. At that time, the Claimant was having extensive building development work done at her property in Norfolk. While the building work was ongoing, she moved to Romford with her family. Her plan was always to move back to Norfolk when that work was completed.

The Claimant's pay progression application

15. In January 2018, the Claimant had an end of probation review with Ms Mazarelo in which it was confirmed that she had passed her probationary period.

16. The Respondent operates a policy whereby staff apply for pay progression on an annual basis using a pro forma declaration. The Claimant completed this form and signed it on 11 June 2018 [134]. One line of the declaration stated, "*achieved statutory appraisal & associated objectives*", against which the Claimant entered "yes". She had not by that time had a formal appraisal, but she reasonably believed that the probation review qualified for the purposes of the policy.

17. The Claimant presented the form to Ms Mazarelo for sign-off on 15 June 2018 and was told to leave it with her [JM §7].

The Claimant's sick pay request

18. From 19 June to 30 July 2018 the Claimant was absent for planned surgery. From 12 July 2018 her sick pay was reduced to half pay [901] in line with the entitlement for employees in their first year of service [533].

19. On 19 July 2018, the Claimant wrote to Ms Mazarelo, "*My pay should not be affected as I have previous service with the NHS so have over 4 years*". She asked Ms Mazarelo to validate this with payroll [532].

20. Ms Mazarelo followed up on the Claimant's request [630-631]. She was told by HR that the Claimant's contract confirmed her continuous service commenced on 31 July 2017 [629]. She passed this information on to the Claimant.

21. The Claimant was unhappy with this response and asked for the matter to be escalated [628]. Ms Mazarelo pursued the matter on her behalf. She was told by HR, and in turn told the Claimant, that it was for the CCG to make a decision whether previous service counted as continuous service, and any agreement would usually apply to annual leave entitlement only not sick leave entitlement [537]. The Claimant wrote to Ms Mazarelo on 7 August 2018 *"As per our conversation I am happy to draw a line under this"* [536].

22. We find that the Claimant at that point understood that by signing her Main Statement of Terms and Conditions of Employment, she had agreed that she did

not have previous continuous service for the purposes of sick pay entitlement. The Claimant did not ask the Respondent to exercise a discretion under the policy to pay her full sick pay for a longer period on other grounds.

Ms Mazarelo's response to the Claimant's pay progression application

23. On 2 August 2018, the Claimant asked Ms Mazarelo to forward her objectives as she was working from home and did not have a copy to hand. On 3 August 2018, Ms Mazarelo emailed the Claimant setting out the Claimant's agreed objectives [546]. She added:

> **'When you complete the Pay Progression Proforma, you confirmed Yes for the item 'Achieved satisfactory appraisal and associated objectives'**

24. The Claimant replied on the same day to say she believed she had met the objectives and had passed her probation. An appraisal had not yet been undertaken and was now due as she had completed a year's service [545].

25. On 7 August 2018, the Claimant and Ms Mazarelo had a telephone conversation about her pay progression application. Ms Mazarelo sent a holding email saying she had not had time to complete her deliberations [544].

26. On Friday 10 August 2018 at 19.22, Ms Mazarelo emailed the Claimant in the following terms [542]:

> **'When we spoke on Tuesday. I took the opportunity to remind you that I need to be able to trust each of my team members implicitly and that when things go awry, it reflects badly on the team and as the lead I ultimately carry the can.**
>
> **I expressed my disappointment at the lack of integrity shown in completing a pay progression form to confirm that an appraisal and objectives had been completed, followed by a text to seek clarification about what the objectives actually were, the same evening. I expressed that the quality of your work when completed is good, although I am concerned about your ability to deliver to timescales and your approach.**
>
> **…**
>
> **In the circumstances, I do not feel it would be appropriate to approve your pay progression currently.'**

27. The Claimant was distressed to receive this email. In particular, she felt it caused her unnecessary stress because it was sent after working hours and overshadowed her weekend. She took advice from HR and then raised the matter with Ms Mazarelo.

One-to-one on 5 September 2018

28. On Wednesday 5 September 2018, Ms Mazarelo and the Claimant had a one-to-one meeting during which Ms Mazarelo complained that the Claimant had not completed a particular report. The Claimant insisted she had done so, and the meeting became heated. Later that day, the Claimant forwarded an email showing that she had sent the report to Ms Mazarelo on 10 May 2018 [656]. Ms Mazarelo had made a genuine mistake because although the report had been sent to her by email it was not saved in the relevant project shared file.

29. That evening, Ms Mazarelo texted the Claimant [247]:

> **'Lauren, I owe you an apology for losing my temper at the end of our 1:1 earlier, Let's talk further tomorrow.'**

30. The Claimant replied:

> **'Jenny I accept your apology but this really needs to stop now – we have to work together…'**

31. We accept Ms Mazarelo's evidence that she apologised because she had got cross with the Claimant and exhibited frustration, but she did not shout at her. That accords with our impression of Ms Mazarelo as a calm and measured person.

Approval of pay progression application

32. Ms Mazarelo signed off the Claimant's pay progression application on 24 September 2018 [135]. This was after the increment date of 31 July 2018, and the Claimant's pay was backdated to reflect this.

The Claimant's projects

33. In late 2018, the Claimant was assigned to lead on two projects.

34. The first was a re-procurement of cardiology, dermatology, gynaecology and minor surgery services (referred to as "CDGM"). Project approval was granted for this work on 1 November 2018.

35. The second was a new contract for five GP practices to provide additional services in local care homes.

36. Ms Mazarelo was the Senior Responsible Officer for both projects.

Hospital appointment on 18 December 2018

37. In December 2018, the Claimant was investigated for a heart irregularity, later diagnosed as left bundle branch block. On 18 December 2018, she attended an outpatient appointment for an ECG test. Her plan was to have the ECG test at 9am and then go into work. However, there was a delay before the appointment and her first ECG result was inconclusive. The clinician advised her to take a break to calm down and then have another one.

38. She texted Ms Mazarelo mid-morning to explain that she had had one ECG done and had been advised to wait half an hour then get it redone and re-checked. She added:

> **'Not sure how long I will be if it's okay I would like to work the rest of the day from home to get my business case and paper finished for commissioning committee and my PPE survey for Subeena for the AQP project as if I come on I will lose another hour. in travel time and have loads to get finished.'**

39. Ms Mazarelo replied:

> **'OK, but my expectation is that the Commissioning Committee report and business case will be completed and with me by close of play today for review'.**

40. Ms Mazarelo had in mind that the Claimant had two important reports due the following day which she had previously had three weeks to complete. She had not originally intended the Claimant to work from home that day but agreed to the change because the hospital appointment took longer than anticipated. Ms Mazarelo was not told in the Claimant's text messages that the reason why the second ECG was required related to the Claimant's stress levels. She responded to, and accepted, the Claimant's assurance that she would work on the reports for the rest of the day and that they would be delivered on time.

One-to-one meeting on 8 January 2019

41. At a one-to-one meeting on 8 January 2019, Ms Mazarelo raised significant concerns about a lack of progress on the CDGM project [577], which was the Claimant's biggest project. Project approval had been given in November and there had not yet been a 'kick-off' meeting. Ms Mazarelo made it clear to the Claimant that she expected to see further progress at this stage.

The Claimant's flexible working request 21 January 2019

42. Approximately two weeks later on 21 January 2019, the Claimant submitted a formal flexible working application [138]. She asked to either work from home on a Wednesday or to work compressed hours so she could take Wednesdays off. She explained this would allow her to provide support to her son who was on the autistic spectrum. She wrote:

> **'This proposal would support me with a healthy work life balance particularly when I relocate to Norfolk as this pattern would enable me to only stay away from home two nights a week as I would love to remain working at Newham CCG.'**

43. The Tribunal finds at this point the Claimant was already considering to some extent whether her job at the Respondent could be sustainable without a flexible working arrangement to lessen the impact of her long commute. She knew that if flexibility was not granted, then continuing to undertake the commute from Norfolk on a daily basis would be very difficult. However, she did want to continue working for the Respondent.

44. During a conversation later that day, Ms Mazarelo expressed disappointment that the Claimant had put in a flexible working application without discussing it with her first. She had doubts about whether the proposed arrangements could be workable, in terms of the business needs of the CCG. However, she did not say (as alleged) *"You are fully aware of my feelings in relation to this, however you have gone and done it regardless", "you know I have performance concerns"* or that the Claimant was *"like a needy child".*

45. Ms Mazarelo accepts that she did on one other occasion compare the Claimant to a needy child, in relation to the Claimant interrupting her work.

One-to-one meeting on 22 January 2019

46. On 22 January 2019, the Claimant attended a one-to-one meeting with Ms Mazarelo [141]. Ms Mazarelo raised concerns that insufficient progress was being made to complete both the Claimant's projects. She also told the Claimant she would need to make up three hours she had spent supporting a colleague at a disciplinary meeting. The Tribunal considers that request was unusual, but it was unclear whether the Claimant did in fact make up the hours.

One-to-one meeting on 28 January 2019

47. 28 January 2019 was the 'kick-off' meeting for the CDGM project. The Claimant and Ms Mazarelo also had a one-to-one meeting [596].

Decision on the Claimant's flexible working request

48. On 31 January 2019, Ms Mazarelo had a telecon with HR to seek advice on the flexible working requests made by the Claimant and one other member of staff [597]. During the call, she noted that the Claimant's son had medical appointments on Wednesday afternoons. She subsequently agreed both requests.

49. On 8 February 2019, during a one-to-one meeting, Ms Mazarelo offered the Claimant a compressed hours arrangement on a trial basis from 11 February to 8 March 2019. The nature of the arrangement was sent in a follow-up email that evening [147]:

> **'To confirm, this will result in a working pattern of:**
>
> **8.00am – 6.30pm Mondays and Thursdays**
>
> **8.00am – 5.30pm Tuesdays**
>
> **8.00am – 5.00pm Fridays**
>
> **Not at work on Wednesdays.**
>
> **Although you requested that this commence on 11 March to allow for the requisite notice period, we agreed to commence this arrangement early for a number of reasons:**
>
> **- to accommodate your current Wednesday afternoon commitment**
>
> **- to allow me to assess the impact of your compressed hours on the Primary Care team's ability to deliver its priorities and objectives**
>
> **- to determine whether your compressed hours can be accommodated on a longer term basis, given your intention to relocate to Norfolk in April/May 2019 and commute to Newham from there.**
>
> **This proposed trial period will be reviewed on Friday 8 March at 2pm – I have sent you a calendar invitation to reflect this.'**

50. The reference to the Wednesday afternoon commitment was to the Claimant's son's appointments.

Performance Action Plan on 8 February 2019

51. During the same one-to-one meeting on 8 February 2019, Ms Mazarelo shared a proposed Performance Action Plan with the Claimant [149].

52. The Claimant was surprised to receive the plan. It contained detailed and personal criticisms and observations, including of the Claimant's "failure to concentrate" at meetings and training events, the way she addressed colleagues as "babe" and "darling", the way she organised and saved project documentation and her difficulties in meeting deadlines.

53. We find the reason why Ms Mazarelo issued the Performance Action Plan was because she had genuine concerns about the Claimant's performance which had been building up for some time. She wanted to formalise her concerns in writing because the informal verbal discussions that had taken place in one-to-one meetings previously had not had sufficient effect.

54. The Performance Action Plan was unrelated to the Claimant having made a flexible working application. Ms Mazarelo's response to the flexible working application was to grant the Claimant's request on a trial basis and waive the usual notice period, taking into account the needs of her son, thereby acting to the Claimant's advantage.

55. Ms Mazarelo signed the plan but the Claimant did not.

The Claimant's grievance

56. On 10 February 2019, the Claimant submitted a harassment and bullying grievance against Ms Mazarelo in which she raised concerns about her management style and the Performance Action Plan [154].

Extension of the flexible working trial and disclosure of information

57. On 12 March 2019, Ms Mazarelo emailed the Claimant regarding an extension of the Claimant's flexible working arrangement. She copied in Satbinder Sanghera, Director of Partnerships & Governance, who was the commissioning manager for the grievance, and an HR manager, Anne Davis. It was agreed that the Claimant's flexible working trial should be extended to 5 April 2019 [527]. Ms Mazarelo noted that although the arrangement was working well for the Claimant, it had not yet been possible to fully assess the impact on the business needs of the team and the CCG.

58. In the email, Ms Mazarelo wrote, "*You advised me that you intended to bring forward your intended move to Norfolk following your son's mugging on 1 March 2019*." [527] Ms Mazarelo did not check with the Claimant before sharing this personal information about her son with other managers. She included it as she felt it was relevant to the Claimant's flexible working arrangements.

The Claimant's line management

59. On 8 April 2019, it was agreed that line management of the Claimant would be temporarily moved to Mr Ian Tritschler while her grievance was investigated [159].

60. The Claimant discussed that change with Ms Mazarelo on 14 May 2019, following which the Claimant emailed Ms Mazarelo some queries [160]. Ms Mazarelo replied confirming, amongst other things, that the Claimant's responsibility for line managing a junior staff member would be suspended for the period she was managed by Mr Tritschler [160].

61. During the period Mr Tritschler was the Claimant's interim line manager he did not take any steps to pursue the Performance Action Plan she was contesting.

The grievance investigation

62. An external grievance investigator, Mr John Moore, was appointed. He reported on 6 June 2019 [162] and his findings were discussed in a meeting with the Claimant on 20 June 2019 [222]. He did not uphold the grievance although he did acknowledge the legitimacy of some of the Claimant's concerns. We consider his investigation was reasonably thorough and robust.

63. He recommended [185]:

> **'… that JM attends some form of training about managerial skills/boundaries etc.**
>
> **Whether or not it will be possible to rebuild the working relationship between JM and LS is to be determined. The allegations made by LS will have had an impact upon JM, and the fact that the allegations have not been upheld will have an impact upon LS. Efforts will have to be made to try and build bridges and return to a stable working relationship. It is recommended that an experienced external mediator is brought in to try and reconcile the differences between JM and LS.**
>
> **Since the allegations were brought, JM has stepped away from directly line managing LS. That needs to be reviewed but until efforts have been made to reconcile the differences and mediate, as recommended at 8.3, JM's return to line managing LS may have to be delayed.**
>
> **LS's trial flexible working arrangement needs to be reviewed. Again, it may not be possible for JM to do that until the issues mentioned above have been resolved. Alternatively, that arrangement should be reviewed by whoever is currently line managing LS.'**

The grievance appeal

64. The Claimant appealed the grievance outcome on 28 June 2019 [224]. In her appeal, she mentioned she had spoken to ACAS and was considering her options.

65. An appeal hearing was conducted on 8 August 2019 by Mr Steve Collins. He wrote an appeal outcome letter to the Claimant on 16 August 2019, dismissing her appeal [245]. One recommendation made in the appeal outcome letter was:

> **'We also acknowledge, however, that further support should be offered to both parties involved, and that there were numerous complex personal circumstances. We would recommend further action and support for both Jenny and yourself beyond the quoted mediation in order to rebuild working relationship and improve working styles and the management team will work with you both to identify this.'**

Removal from CDGM project

66. Meanwhile, on 15 July 2019, the Claimant had been asked by Mr Tritschler to stand down as CDGM Project Manager [231]. This was following discussions he had with Ms Mazarelo. We find the reason why the Claimant was removed from the project was because the Respondent had genuine concerns about delays in delivery.

The Claimant's sickness absence

67. An external mediator was appointed and contacted the Claimant and Ms Mazarelo to arrange initial meetings with them separately. However, the process was paused when the Claimant went on sick leave.

68. The Claimant was absent from work due to stress from 9 August to 29 November 2019. During this time, her sickness absence was managed by Mr Chetan Vyas, Director of Quality and Safety.

69. The Claimant attended an Occupational Health appointment on 26 September 2019. The resulting report stated she was not yet well enough to return to work and [248] recommended that:

> **'… management may wish to consider undertaking a work place stress risk assessment with this lady either before or on her return to work to ensure she has the support she requires.**
>
> **I would advise that a phased return to work be considered if management could support this.**
>
> **A phased return to work usually commences at 50% of the contracted hours, this should be reflected in the duties also. This can then be gradually increased over a 4-6 week timescale as agreed with management and as the employee is able to tolerate it until they reach their contracted hours. This is at manager's discretion and should be reviewed weekly to ensure it is progressing well and the employee is coping well.**
>
> **Once this is completed I would also advise that regular 1-2-1 welfare reviews are also undertaken for continued support and to ensure they can sustain their return to work.'**

70. On 30 October 2019 the Claimant attended a sickness review meeting with Mr Vyas [253]. It was noted that she would drop to half-pay on 3 December 2019. It was further noted that the following steps would be taken:

    70.1. A further Occupational Health assessment.

    70.2. An individual stress management audit; the Claimant was to fill in her part of the template first and then meet with Mr Vyas to complete it.

    70.3. A four-week phased return starting on 50% of full hours.

71. The Claimant did fill out her part of the stress management audit template. Mr Vyas on reviewing her input took the view that it was potentially inflammatory (the Tribunal has not seen this document). It was agreed with the Claimant that a good approach to the stress risk assessment would be to address it through the

mediation process in a way that was consistent with building positive relationships.

Changes during the Claimant's sickness absence

72. While the Claimant was on leave, there was a fundamental reorganisation in the design of the Respondent's Primary Care Directorate. The Claimant was slotted into a new role as Head of Primary Care [125] (one of three, covering Newham, Tower Hamlets and Waltham Forest). Ms Mazarelo became Interim Director of Primary Care.

73. Also during this period, the Claimant's property in Norfolk was finished and her family moved back there.

74. As a result of the reorganisation, the Claimant's place of work was moved from Stratford to Mile End. This made the Claimant's commute from Norfolk even longer and more difficult. Due to lack of car parking near the new office, after she returned to work the Claimant drove to Stratford, parked there, and then took the underground to Mile End. [271]

Return to work December 2019

75. The Claimant commenced a phased return to work from 2 December 2019 [257]. On her first day back, she had a return-to-work meeting with Ms Mazarelo [259]. She was given the job description for her new slotted-in role. Ms Mazarelo's notes of the meeting record:

> **'I asked that you familiarise yourself with the agenda papers for Wednesday afternoon's GP Transformation Sub-group meeting, as this will be a meeting that you are leading going forward, i.e. reviewing the Minutes and drafting the agenda.'**

76. This meeting was a regular event and always occurred on a Wednesday. The Claimant had not previously attended it. This new aspect of her role was not consistent with the continuation of her compressed hours arrangement to take Wednesdays off.

77. On 9 December 2019 the Claimant attended an Occupational Health appointment [260]. The recommendations made in the Occupational Health were:

> **'I recommend that Ms Sibbons continues on her planned phased return, using her accumulated annual leave to extend this into the New Year, as already agreed.**
>
> **Due to her extensive commute, which has also has now had an additional 40 minute added due to the recent office move, Ms Sibbons would benefit from usage of the company agile working policy, which would allow her to work from home. I suggest that this is accommodated for at least 3 days a week.**
>
> **Again, if operationally feasible, I suggest that Ms Sibbons be moved to a different line manager. I believe this was also cited as a recommendation in the grievance mediation.**

> **I believe a stress risk assessment has already been undertaken, but Ms Sibbons may also benefit from a wellness action plan. The charity MIND has some good advice regarding these on their website.'**

78. When she returned to work, responsibility for the Claimant's line management was returned to Ms Mazarelo, albeit only for a brief period. On 10 December 2019, they had a one-to-one [269]. At that stage, Ms Mazarelo had not yet seen the Occupational Health report. It was noted that the Claimant was going to develop a wellbeing plan for her PTSD from the resource available on the MIND website. Ms Mazarelo told the Claimant that the external mediator had been notified she was back at work, and the plan was to meet with him individually again because of the time that had elapsed. The Claimant agreed that the proposed date of 20 February 2020 was suitable for her.

79. 17 December 2019, Mr Vyas wrote to the Claimant to follow up on the Occupational Health recommendations [266]. He noted:

    79.1. The phased return to work had already been agreed;

    79.2. The recommendation to work from home three days per week should be discussed with Ms Mazarelo *"to determine if this fits within business needs".*

    79.3. The intention at that time was for Ms Mazarelo to continue to line manage the Claimant.

    79.4. The Claimant was to explore the MIND wellness action plan with Ms Mazarelo.

    79.5. In relation to the stress risk assessment:

    > **'as we previously discussed the outputs from the stress audit would be woven into the mediation and I understand that the NEL CSU HR Team have asked the mediator to contact both yourself and Jenny to fix up a date.'**

The end of the Claimant's flexible working arrangement

80. When the Claimant returned to work her compressed hours arrangement was not formally reviewed, as had been envisaged when it was granted. Initially that was because from 2 December 2019 to 17 January 2020, she was working reduced hours on a phased return to work, and it would not have been appropriate for her to work intensely over compressed hours.

81. As noted above, during her phased return the Claimant was given responsibility for the GP Transformation Sub-group meeting, which happened monthly on a Wednesday. She also attended a Practice Managers Forum and the Primary Care Subcommittee, on different Wednesdays in the month.

82. On 15 January 2020, the Claimant shared the Occupational Health report with Ms Mazarelo [277], and they discussed the recommendations it contained. During that conversation the Claimant freely acknowledged that the recommendation that she should work at home on three days per week was unrealistic.

83. However, discussion of what, if any, flexible working arrangement could be agreed was left to be decided with the Claimant's new manager, Ms Shaikh, who took over her line management responsibility from Ms Mazarelo.

84. A three-way handover meeting took place between the Claimant, Ms Mazarelo and Ms Shaikh on 20 January 2020, the day the Claimant recommenced full-time hours. In Ms Shaikh's notes of the meeting, one of the agreed actions was *"Lauren not to work outside of working hours"* [280].

85. On 3 February 2020, the Claimant discussed flexible working with Ms Shaikh and asked for one day per week working at home. She did not ask for her compressed hours arrangement to be reinstated. Ms Shaikh emailed a note of their discussion to the Claimant, which stated [298]:

> **'It was discussed that a permanent fixed day a week WFH would not be happening and the current arrangement where this is discussed and agreed on a week to week basis will continue as the needs of the business need to be met.'**

86. An example of how this worked in practice was on 14 February 2020, when the Claimant emailed Ms Shaikh to ask "*can you tell me what day next week I can work from home*"? Ms Shaikh replied:

> **'I did mention that I might not be able to give you 1 day every week to work from home. Due to the issues with practices, coronavirus, people being on leave next week, and the fact that we are going to also need to have meetings around the new contract guidance I do not feel that I can give you a day next week to work from home at this moment.**
>
> **I am really trying to be understanding and have been supportive of you working from home when I feel this has been possible, but it has been difficult this week to cover all meetings, and I do not want to be in the same position next week. I hope you can understand.'**

87. At this time, a junior colleague of the Claimant's who had been offered a compressed hours arrangement at a similar time as her, continued to work compressed hours. There was one other manager in the Directorate at the Claimant's level who worked a half-day on Fridays, and that arrangement also continued.

The 2019 / 2020 pay increment

88. The Claimant had missed the usual date for a pay progression application while she was off sick. This process was dealt with after she returned. Ms Mazarelo approved and submitted the Claimant's application on 27 January 2020, with a request that pay be backdated to the increment date of 31 July 2019 [283]. Although the Claimant had not met the usual pay progression criteria, she qualified because she satisfied the alternative requirement:

> **'The employee has been on long-term sickness absence and has been assessed on her performance over 12 months prior to their current period of leave and will progress to the next increment.'**

89. The pay increment was conditional upon the Claimant meeting new objectives for the period to 31 July 2020.

The Claimant's job hunting

90. The Claimant started looking for alternative employment in January 2020 (not, as she said in paragraph 28 of her witness statement, in March).

91. The Tribunal finds that the reasons the Claimant started job-hunting were because:

    91.1. The commute from Norfolk to Mile End was not sustainable for her;

    91.2. She no longer had a guaranteed Wednesday off after she returned from sick leave; and

    91.3. The demands of a new role in a new work environment were challenging.

92. On 26 February 2020, the Claimant was invited to interview for an NHS Senior Contract Manager role [850]. She interviewed for the role on 9 March 2020.

Mediation and stress risk assessment

93. The Claimant's appointment to see the mediator on 20 February 2020 was postponed because from 17 to 28 February 2020, the Claimant was absent from work due to bronchitis [869]. A further pre-mediation meeting scheduled for 4 March 2020 was postponed because the Claimant had an emergency appointment [854]. The next appointment booked for 3 April 2020 was cancelled due to the Covid-19 lockdown; at that point it was thought to be better to rearrange it when it would be possible to speak face-to-face [856].

94. The mediation meetings were not thereafter rescheduled due to the impact of the Covid-19 lockdown. This meant that the stress risk audit, which was supposed to be addressed through the mediation process, was not implemented either.

The Claimant's line management by Ms Shaikh

95. Ms Shaikh set up weekly one-to-one meetings with the Claimant and sometimes they met twice weekly. Ms Shaikh gave the Claimant more support than would be usual for a management relationship at that level, taking into account the needs of the Claimant returning from long-term sick leave.

96. During more than one of these meetings, the Claimant mentioned that she was suffering from side-effects from medication she was taking for her PTSD. For example, on 5 March 2020, Ms Shaikh emailed the Claimant [329]:

> **'Following on from our discussion today, please do not work outside of your usual working hours. I strongly recommend that you only look at your emails in working hours because of the side effects you have said you are experiencing from your medication.'**

97. We find that the conversations that Ms Shaikh had with the Claimant about the Claimant's medication side-effects were supportive. Ms Shaikh gave good faith advice about how these matters might be managed in the workplace.

98. The Claimant's responsibility for line managing a junior member of staff was not returned to her. The reason for this to allow the Claimant to get up to speed in her new role after returning from sick leave.

99. The Tribunal has seen no evidence that Ms Shaikh sent excessive messages to the Claimant while the Claimant was on leave. We have seen messages sent out of hours, but Ms Shaikh repeatedly said the Claimant was not expected to reply to messages out of hours [e.g., 329].

100. After the Claimant's sickness absence from 17 to 28 February 2020, she asked Ms Shaikh again for a regular day per week working from home. On 2 March 2020, Ms Shaikh emailed HR to ask for advice about this request. She noted:

> **'Where possible since January I have been giving LS 0.5-1 day a week working from home, but I have been clear that this needs to be reviewed weekly depending on business needs. While we have a practice closure, a relocation, a notice of termination, 3 remedial breach notices from CQC, PCN development, and coronavirus I have said that I cannot at this point give her 1 day a week from home as this is resulting in a number of practice visits. We also have several members of the team on annual leave throughout the month. I have said I could potentially give her a ½ day working from home depending on schedules, or maybe even two ½ days, but I cannot guarantee this due to the number of practice issues requiring visits.'**

101. Ms Shaikh told us in evidence, and we accept, that the reorganisation of the CCG and the development of new Primary Care Networks during this period meant that, even before Covid-19 hit, it was a very busy and challenging time for her and her staff. She had in mind the Claimant's disability and Occupational Health recommendations but had to balance these with the need to provide sufficient cover for liaison with GP practices. The Claimant's new slotted-in role came with different commitments and responsibilities than she had had in 2019.

102. Ms Shaikh discussed these factors with the Claimant and told her that she would continue to have ad hoc days and half-days working from home but could not have a guaranteed regular day. However, this decision was soon overtaken by events. On 25 March 2020, the Respondent's staff (other than front-line staff) started working from home due to Covid-19. The Claimant was on annual leave from 16 to 27 March 2020 [869]. Thereafter, the Claimant worked from home for the remainder of her employment for the Respondent. All her interactions with Ms Shaikh were via email and telephone; it took some time for video conferencing to be introduced.

The Claimant's new job

103. On a date in late March or early April 2020 (she cannot remember the exact date), the Claimant was offered the Senior Contract Manager role she had applied for in a telephone call. She verbally accepted the offer. The new role did not require such a long commute and would allow the Claimant to mainly work from home.

104. In April 2020 the Claimant told Ms Shaikh she had found a new job. She also told other staff in the office. The Tribunal finds that by this time the Claimant fully intended to take up the new job and leave the Respondent.

105. On 6 May 2020, the Claimant received an email from her new employer confirming that her references were complete, and they were just waiting for advice regarding Occupational Health [857]. On 19 May 2020, the Claimant received a further email confirming that all her pre-employment checks were

complete and that her first day would be 3 August 2020 [860]. Her new contract of employment was attached.

106. The Claimant delayed giving formal notice of resignation to the Respondent. We find this was because she had in mind that she might choose later on to submit a claim for constructive unfair dismissal and thought (rightly or wrongly) that giving a long period of notice might undermine that claim.

Action Plan issued on 23 June 2020

107. On 23 June 2020, Ms Shaikh issued a Performance Action Plan [406] which she discussed in a one-to-one meeting with the Claimant [430]. The Tribunal finds the reason Ms Shaikh did this was because she had genuine concerns about the Claimant's performance and business delivery, and informal conversations with the Claimant had not resolved the concerns. She had delayed putting her concerns on a formal written basis when the Claimant told her about the new job, but after a period when the Claimant had still not handed in her notice, Ms Shaikh came to the conclusion that more robust management was needed.

108. On the same day, Ms Shaikh made an Occupational Health referral on the Claimant's behalf [409]. In it she wrote:

> **'Lauren has informed me that she has a disability - PTSD which affects her ability to cope with stressful situations and makes her very anxious. Lauren has said that her previous grievances have triggered her PTSD and she is tearful in most of our 1:1s whenever there is fault found with her work. I have found it challenging to support Lauren with her development…**
>
> **Lauren has also refused to engage in developing objectives Tor the past two months as she is repeatedly advising me that she will be giving her notice as she has accepted a new role . I had intended to refer Lauren to occupational health pre-covid 19 to assess how her anxiety and PTSD affects her ability to deliver this role .**
>
> **I am referring Lauren to understand whether her poor performance is related to her disability and anxiety, and if this is the case then how can we work with her to deliver her role...'**

Events leading up to the Claimant's resignation

109. Ms Shaikh and the Claimant had a one-to-one on 30 June 2020 [449]. Ms Shaikh followed up with an email titled 'Catch Up Today':

> **'Hi Lauren,**
>
> **Please see below notes from our 1:1 today.**
>
> **As per usual, happy for you to amend to reflect your thoughts on our discussion today. First of all I want to say that I really appreciate you having an honest conversation with me where you admitted the effect your medication is having on your ability to carry out your role at the moment, and it was really helpful to have you acknowledge where there had been errors and the learning points I had been trying to make. We discussed that while I understand you being defensive, this does not help with acknowledging where there are still areas for improvement. I said that I understood that this informal process will cause some anxiety, but explained this was necessary for us to monitor improvements.**

You mentioned that you were pleased where I had apologised for any miscommunications, and I said that it would be really helpful if you also acknowledged where you had made mistakes. I recognise that you prefer conversations to emails, but am also conscious that as you pointed out last week conversations can take a lot of time when you are being defensive and not willing to accept where there are some issues. It was really helpful that you acknowledged the error into your email to Shorif, rather than the blame lying with him, and you agreed that we should not be asking admin staff to work over time. As a point of learning, we both agreed that the best thing would have been for you to call me to say there had been an error, and it would take a few hours to amend. I would have then said to ask Shorif to send the emails with corrections on Monday to save him and you working outside your working hours.

We discussed the PM forum slides, and it was a really productive discussion. I explained that initially when you said to me that there was no room on the agenda for flu, asked if we could summarise the slides to a few key points, I took this as an issue that need to be solved so suggested requesting this is added as a separate item to the agenda due to its importance. You then said said [sic] to me that we could just keep the CCG update to 5 minutes and use the reminder of time for flu which was a good solution. I said to you as a reflection, that instead of spending 10 minutes discussing this, you could have sent me an email to recommend that we use the majority of the slot for flu. It was really good to have you acknowledge this, and that you should have mentioned the solution if you had one rather than presenting a problem. It was also really helpful for you to recognise that you could have also corresponded with Katherine Tew via email, rather than having a lengthy discussion as this would save your time. It was really good that you recognised that identifying any opportunity to save time is helpful, as this is not a role where we have a predictable workload, so it is always good to leave time for any last minute issues that need resolving. I think this was a vast improvement on the email exchanges and phone calls we have had in the past week where you have been too defensive to admit responsibility.

You mentioned that you were still feeling anxious, and it was really helpful to have an honest discussion about the way the medication is effecting you. You have said that you have not wanted to share this in case it was used against you. I have said that in the past when you have needed adjustments to workload due to your medication, we have not used this against you. I did say that it is difficult for me if on the one hand you are saying that you want to be given the same responsibilities as the other heads of primary care, but then on the other hand you are saying that the medication is making it difficult for you to do things that are not task focussed. I explained that if your medication is impacting on your ability to carry out your role, or to meet the areas agreed in your action plan, you are doing yourself an injustice by not telling me what your limitations are at the moment. It is also very difficult for me to adjust your workload, when you have said that you are not happy with being given the same level of responsibility as the other heads of primary care. I did ask if medication was the reason you forgot you were on leave on Friday in HPC meeting today, and I said if you know you are feeling forgetful, or finding it difficult you let know. I have said we can then discuss whether we can give you things that are more task based, or whether it would be more appropriate for you to take leave. You mentioned that you are anxious taking sick leave because of the number of days you have taken already, and I have said if you are not well enough to do your role, you still need to take sick leave.

I have said that you should spend this week thinking about what support you need to meet the areas highlighted in the action plan. I said this could be a request from you to adjust the expectations or the tasks because of your medication and anxiety. I have also said that you can tell me on a daily basis if you are not having a good day and need adjustments made. Hopefully Occupational Health will be able to help, but in the meantime you need to tell me where you need adjustments made. You have said that you would send me your objectives and we can review these next week, or when you are feeling better.

We both recognised that the past week had not been the best, but we both felt more positive from having an honest discussion today. I hope you manage to get some rest while you are off this week, and I will see you on Monday. I am happy for you to go into Beaumont House tomorrow to connect your laptop to the system. Hopefully this will help with some of the IT issues.

Regards

Leilla'

110. The email is reproduced in full because the Claimant says it was the 'last straw' that triggered her resignation. We consider this was an innocuous email and find that the Claimant did not take offence to it at the time. It was striking that during cross-examination the Claimant herself referred to it as a "nice email" (although she later added that she thought it was patronising).

111. The Claimant was on carer's leave from 1 to 3 July 2020. She was then absent from work due to anxiety from 6 July 2020 [869].

112. On 17 July 2020, the Claimant signed and returned her new employment contract to her new employer [865].

113. On 22 July 2020, the Claimant attended the Occupational Health assessment she had been referred for, which confirmed she was not fit for work [490].

114. On 27 July 2020, the Claimant resigned by a letter (delivered by email [494]) which said:

'Repudiatory Breaches of Contract amounting to Constructive Dismissal

I am writing to inform you that I am resigning from my position of Head of Primary Care with immediate effect as I consider myself constructively dismissed due to the breaches of contract outlined.

Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign in light what I consider to be multiple repudiatory breaches on the following grounds;

A. Failure to adhere to the organisations agreed outcomes of my grievance appeal dated 08 August 2019.

B. Fundamental breaches of contract amounting to Disability Discrimination under the Equalities Act 2010, Bullying & Harassment and; significantly changing the role that I am contracted to perform without my consent

C. Breaches of Trust and Confidence

D. Last Straw Doctrine

I consider the above to be fundamental and unreasonable breaches of the contract on the organisations part. As an individual I have tirelessly attempted to resolve these issues that initially started in August 2018 through internal HR policies and procedures but to no avail, and have found that the position has only deteriorated further since raising a grievance. As the effects of the breaches have taken a toll on my mental health and triggered PTSD, I can no longer be exposed to the environment that I am encountering at a place of work.

I have discussed my deteriorating health with my GP and am subsequently on additional medication and am in active treatment with NSFT which is my local mental health trust. I have been referred to, and am in treatment with NSFTs employment support service as an additional support. I have also complied with my managers' request to attend Occupational Health, this is the third time I have been referred since the breaches commenced albeit none of the recommendations reported to the organisation have been considered or implemented, in fact my flexible working arrangement was revoked without review or discussion, this was contrary to recommendations from OH and in fact was an aggravating factor.

I have spoken to ACAS and sought legal counsel, as advised by them, and will now be taking my case to an employment tribunal as I feel that I have exhausted all my options internally and do not wish to prolong sickness absence levels. At no time during my employment have I affirmed or waived any of your breaches and I have continuously advised that I am working under protest until the grievance appeal findings and Occupational Health recommendations were in place…'

115. We find that the reason the Claimant had in her mind at the time when putting in this resignation was that she had a new job starting a week later and she could not do two jobs at once. Although she was genuinely unhappy with the way she had been treated by the Respondent, the reason why she resigned was because she had found a new job which she preferred.

116. The Claimant made an ACAS notification on the same day she resigned, and her ACAS certificate was issued the following day [10]. The prompt notification was consistent with our finding that the Claimant did not hand in her notice of resignation earlier because she intended to put in a constructive unfair dismissal claim.

Submissions

117. Mr Ross provided written submissions on behalf of the Respondent, which he amplified in oral submissions. In summary, he submitted that there was no serious, improper conduct on the part of the Respondent which the Claimant resigned in response to. Rather, the Claimant resigned because she had a new job which she accepted many months before. Her resignation on 27 July 2020 suited her personal circumstances. She had by then waived any right to claim constructive dismissal. As well as flaws in the way the Claimant's disability claims were pleaded, he submitted that fundamentally there was no link between the treatment complained of and the Claimant or her son's disabilities. It was also said that the Claimant's discrimination claims had been brought out of time.

118. The Claimant told us that she believed the evidence in the bundle supported the allegations she had made and that there had been failures to implement recommendations which came out of the grievance process and from Occupational Health. She believed she had been treated differently because of her disability and noted that other staff were permitted flexibility for non-disability related reasons. She reiterated that it was not the long commute that made it difficult for her to continue to work for the Respondent, but the lack of flexibility she was afforded. She did not accept that the action plans had been supportive and averred they amounted to detrimental treatment. In relation to time limits, she said the Respondent's acts (i.e. that she complained about) had been a continual campaign and not one-off acts. In the alternative, she invited the Tribunal to extend time on the basis that during the period leading up to her claim she had been actively trying to work with the Respondent to implement the recommendations and support she needed. She concluded by saying that it had been a privilege to support the Newham community through her work for the Respondent.

The law

Direct discrimination

119. S.13(1) EqA provides:

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

120. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here disability. In some cases, it is possible to answer both questions by determining what was the 'reason why' the impugned treatment occurred.

121. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan v London Regional Transport* [1999] ICR 877 at 886).

122. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.

123. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not fall into that category.

Failure to make reasonable adjustments

124. S.20 EqA provides as relevant:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**

125. S.21 EqA provides as relevant:

> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**

126. The Equality and Human Rights Commission *Code of Practice on Employment (2011)* ('the Code of Practice') at para 6.16 emphasises that the purpose of the comparison with persons who are not disabled is to determine whether the disadvantage arises because of the disability and that, unlike direct or indirect discrimination, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.

127. In relation to the employer's actual or constructive knowledge of the employee's disability, and of the disadvantage, sch.8, Part 3, para 20(1)(b) EqA provides that:

> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> **…**
>
> **(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

128. The correct approach for the Tribunal in determining a reasonable adjustments claim is set out in *Environment Agency v Rowan* [2008] ICR 218 at [27] (the reference to sections are to sections of the Disability Discrimination Act 1995 "DDA"):

> **'In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant. ... Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.'**

129. The burden is on the Claimant to show the PCP, to demonstrate substantial disadvantage, and to make out a *prima facie* case that there is some apparently reasonable adjustment which could have been made (and that, on the face of it, there has been a breach of the duty): *Project Management Institute v Latif* [2007] IRLR 579 at [45] and [54]. If the PCP contended for was not actually applied, the claim falls at the first fence: *Brangwyn v South Warwickshire NHS Foundation Trust* [2018] EWCA Civ 2235 at [40].

130. A one-off act may be a PCP, but only if it is capable of being applied to others. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done; it is not necessary for it to have been applied to anyone else in fact (*Ishola v Transport for London* [2020] IRLR 368 CA *per* Simler LJ at [36-38]):

> **'The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee […] the act of discrimination that must be justified is not the disadvantage which a claimant suffers […] but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course […] that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.**

131. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal: *Morse v Wiltshire County Council* [1998] IRLR 352. The focus is on practical outcomes: *per* Langstaff P in *Royal Bank of Scotland v Ashton* [2011] ICR 632 at para 24:

> **'The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reason.'**

Harassment related to disability

132. Harassment related to disability is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—…**
>
> **disability…**

133. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 at [22]:

> **'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'**

134. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

135. He further held (at [13]):

> **'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing**

> **intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'**

136. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ at [12], referring to Elias LJ's observations in *Grant*, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

The burden of proof in discrimination cases

137. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

138. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

139. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a claimant is still required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

140. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Time limits in discrimination cases

141. Section 123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

142. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

143. Section123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation, or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

144. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA, where it considers it just and equitable to do so. That is a very broad discretion. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of his rights to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

145. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 per Sedley LJ at [31-32]).

Constructive dismissal

146. Section 94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. S.95(1) ERA provides that he is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').

147. If there is a constructive dismissal, s.98(1) ERA provides that it is for the employer to show that it was for one of the permissible reasons in s.98(2) ERA, or some other substantial reason. If it was, s.98(4) ERA requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

148. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract. The Claimant relies primarily on a cumulative breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards):

> **14. 'The following basic propositions of law can be derived from the authorities:**
>
> > **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
> >
> > **2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**
> >
> > **3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).**

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

> **"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."**

15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> **"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."**

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.'

149. The Court of Appeal gave further guidance in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at [55]):

> **'(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 Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

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

150. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

151. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is 'reasonable and proper cause' for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at [22- 23]).

152. A constructive dismissal may arise where the employee leaves in response to an anticipatory breach, that is a situation where the employer evinces an intention not to perform his part of the contract: *Harrison v Norwest Holst Group Administration Ltd* [1985] IRLR 240 (at [17-18]). Where there is a genuine dispute between the parties about the terms of a contract of employment, it is not an anticipatory breach of the contract for one party to do no more than argue his point of view. The mere fact that an employer is of the opinion, even mistakenly, that there is something to be discussed with his employee about the contract is a very long way from the employer taking up the attitude that he is not under any circumstances at all going to be bound by it: *Financial Techniques (Planning Services) Ltd v Hughes* [1981] IRLR 32 (at [18] and [21]).

153. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Meikle* (at [29]).

154. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at 828-829).

Conclusions

155. Our conclusions are set out as answers to the questions posed in the Agreed List of Issues. This means there is some repetition, and it has been necessary to make some cross-referencing.

Direct disability discrimination

156. Did the Respondent do the acts the Claimant alleges amount to direct discrimination? If so, did they amount to less favourable treatment because of her disability or her son's disability? Each of the allegations are addressed in turn.

156.1. Fail to take into account the Claimant's disability and her son's disability when deciding her application for flexible working.

We conclude this did not happen. The Claimant did not mention her own disability in her application for flexible working. She did mention her son's disability and the fact he had appointments on a Wednesday, and this was taken into account by Ms Mazarelo when granting the flexible working trial and waiving the notice requirement for it to begin.

However, even if there had been a failure to take disability into account, we do not think this would fit the statutory requirements of a direct discrimination claim. The Claimant is not here complaining that she was treated less favourably because of disability but, rather, saying she ought to have been treated more favourably in order to accommodate her disability. The Claimant has made other claims of this type under the 'reasonable adjustments' hearing.

156.2. Take away her compressed hours arrangements that the Claimant had when she returned to work on a phased return.

We have found this act did occur, in that the Claimant's compressed hours trial was not reinstated when she returned from sick leave.

However, we conclude that a hypothetical comparator without a disability or disabled son, returning to the Claimant's new job role, including the Wednesday meeting commitments, would have been treated in the same way. The two colleagues mentioned during the hearing who retained their flexible working arrangements had different roles from the Claimant and were not directly comparable.

The reason for the treatment was the change in the requirements of the Claimant's job and the working environment after she had returned from sick leave, not the Claimant's disability. We also note that the Claimant did not ask to work compressed hours again after returning from sick leave; rather, she was asking for a day per week working from home.

156.3. Fail to consider the results of the stress audit and conduct a risk assessment to consider the stress that the Claimant was under and the danger to her health / impact that it would have on her before deciding to remove the compressed hours.

We have found that the Claimant's stress risk audit was not implemented after she returned to work. There was no specific consideration of the stress risk audit in connection with the decision-making on compressed hours. We have found at paragraph 99 above that Ms Shaikh did have in mind the Claimant's disability and Occupational Health recommendations when considering flexible working but balanced these with the need to provide sufficient cover for liaison with GP practices.

We conclude that the Claimant was not treated less favourably than a comparator without a disability or disabled son would have been. The reason why the stress risk audit was not implemented was because there had been an agreement to deal with it as part of the mediation process which never took place. The reason why compressed hours were not reinstated is given at paragraph 154.2 above. The reason for the treatment was not the Claimant's disability or her son's disability.

156.4. Fail to consider or offer a reasonable alternative arrangement.

We have found that the Claimant was offered an alternative arrangement by Ms Shaikh, namely working from home as decided on a week-to-week basis. This was not reasonable from the Claimant's perspective as she needed regularity to plan her son's care but did represent a reasonable compromise from the Respondent's perspective.

We conclude that a comparator who was not disabled and did not have a disabled son would not have been offered a regular day a week at home either. The reason why the Claimant was not offered a set pattern of time at home was because of the needs of the business and not because of her disability or her son's disability.

156.5. Fail to consider the impact of the decision on the Claimant's wellbeing or the impact of that on her son.

We conclude that the Respondent, and in particular Ms Shaikh, did consider the impact of working arrangements on the Claimant and her son but balanced that consideration with the needs of the business.

Again, we do not think this allegation would fit the statutory requirements of a direct discrimination claim. The Claimant is not here complaining that she was treated less favourably because of disability but, rather, saying she ought to have been treated more favourably in order to accommodate her disability and her son's disability. The Claimant has made other claims of this type (in relation to her own disability) under the 'reasonable adjustments' hearing.

157. The Respondent did not directly discriminate against the Claimant.

Failure to make reasonable adjustments

158. The first question to address is whether the Respondent applied any of the pleaded PCPs? Each of the PCPs is considered in turn.

158.1. Did the Respondent apply a contractual requirement to be within the physical base of work for 37.5 hours per week?

We conclude the Respondent did not apply this PCP. In 2018, the Claimant was allowed to work from home one day a week, until her commute was reduced because she moved to Romford. From January 2019 until her period of long-term sickness absence she worked compressed hours, and therefore was not seeking to work from home. From her return to work in December 2018 until 17 January 2020, she worked part-time hours on a phased return. From January 2020 until March 2020, she was allowed to take *ad hoc* days working from home agreed on a weekly basis, granted where possible. From March 2020 onwards, the Claimant worked entirely from home.

158.2. Did the Respondent apply an expectation for many additional hours of work through very early starts, late finishes or at weekends?

We conclude the Respondent did not apply this PCP. The Claimant in practice sometimes worked longer than contractual hours, as did other managers at the Respondent. This is not unusual given the managerial level they were at. However, after the Claimant had raised that she was experiencing stress, both Ms Mazarelo and Ms Shaikh told the Claimant that she was not expected to work outside her contracted hours or to reply to emails out of hours.

158.3. Did the Respondent refuse to informally grant the flexible working requests of some staff of the Claimant's seniority/role to work from home and/or work compressed hours, depending on who their line manager was?

We conclude the Respondent did not apply this PCP. We heard no evidence that the identity of the line manager had any bearing on whether a flexible working request would be granted.

158.4. Did the Respondent implement the sickness absence management policy and associated trigger points not adhering to the NHS Handbook?

We conclude the Respondent did not apply this PCP. The Respondent applied the sickness absence policy in accordance with the applicable rules, as the Claimant accepted following correspondence on her contractual entitlement to sick pay.

158.5. Did the Respondent implement the organisational appraisal policy?

We conclude the Respondent did apply this PCP, although we were not shown the appraisal policy. We did hear evidence that pay progression applications were dependent on satisfactory completion of appraisals.

159. In relation to such PCPs as we have found were applied, did they put the Claimant at a substantial disadvantage by comparison with persons who were not disabled? The only PCP we have found was applied is the organisational appraisal policy. The Claimant says the substantial disadvantage caused by this PCP was it "*therefore meant that the claimant was penalised for sickness associated to her disability.*" We do not find this substantial disadvantage to be established. The Tribunal has heard no evidence that the Claimant's sickness absence had any bearing on her appraisals. We note that she was awarded her annual pay increment each year, and for the 2019/2020 increment an allowance was made for her period of sickness absence.

160. As we have concluded none of the PCPs raised by the Claimant applied to put her to a substantial disadvantage, the Respondent's duty to make reasonable adjustments did not arise and there was no unlawful failure by the Respondent to comply with that duty.

Harassment

161. Did the Respondent engage in unwanted conduct relating to the Claimant's disability? If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or

offensive environment for the Claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect? We have considered each allegation in turn, and then the overall cumulative effect of such allegations as are factually well-founded.

161.1. Failed to undertake performance management by Ian Tritschler.

We conclude this allegation is not well founded. Mr Tritschler did not pursue the Performance Action Plan issued to the Claimant by Ms Mazarelo. We do not consider this to have been conduct unwanted by the Claimant at the time given that the Claimant's grievance in which she objected to Ms Mazarelo's performance management, was being investigated. Mr Tritschler's approach did not relate to disability but to the fact he was an agreed interim line manager during the grievance process.

161.2. Failed to implement recommendations from both the Respondent's own investigation outcomes from the grievance and subsequent appeal process and further failed to take due consideration of medical advice and reasonable adjustments provided by OH.

We have found that some of the recommendations in the grievance and Occupational Health reports were not fully implemented. The mediation process was not completed due to sickness absence and the Covid-19 lockdown. The stress risk audit was not reviewed as it was due to be addressed in the mediation process. The Claimant was not given three days at home per week because, as the Claimant herself agreed with her managers, that was not feasible given the demands of her role. Other recommendations were implemented, including a phased return, a change of line manager, and regular one-to-one meetings.

We conclude this allegation is not well founded. We accept that where recommendations were not fully implemented this was conduct unwanted by the Claimant. However, that conduct did not relate to the Claimant's disability; we have found there were non-disability-related reasons why some of the recommendations were not put into effect. Even if we had found a link to disability, the conduct was not grave enough to reasonably have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

161.3. Denied that the Claimant is a disabled person in this litigation when the Claimant's PTSD is clearly stated in all the Occupational Health reports provided to the Respondent.

We accept Mr Ross's submission this allegation is inapt for determination by the Tribunal as it infringes the Respondent's judicial proceedings immunity. As a party to Employment Tribunal proceedings, the Respondent cannot be sued for things done in the ordinary course of the proceedings: *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435. There are limits to this immunity but making a litigation decision not to concede disability until receipt of relevant disclosure, falls well within it.

Had we determined the allegation on its merits, we would have concluded that the conduct was not grave enough to reasonably have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

161.4. Ms Mazarelo and Ms Shaikh undermined the Claimant in the ways set out in paragraph 18 of the Claimant's further and better particulars. This requires consideration of the following list of allegations.

i) Ms Mazarelo refusing the Claimant's pay progression application.

We conclude this allegation is not well-founded. Ms Mazarelo originally queried the Claimant's 2018 pay progression application because she did not agree the Claimant had met the relevant criteria, given that she had not yet had an appraisal. Ms Mazarelo's conduct in this regard did not relate to the Claimant's disability. In the end, Ms Mazarelo did approve the application and the Claimant was awarded her pay increment.

ii) Ms Mazarelo not giving the Claimant sick pay she was due under the NHS handbook and guidance.

We conclude this allegation is not well-founded. The Claimant did not have the requisite continuous service to entitle her to a longer period of sick pay. She accepted this and agreed to draw a line under the issue. Ms Mazarelo was not the decision-maker, and she pursued the matter with HR and payroll on the Claimant's behalf. The conduct did not relate to disability; the Claimant was absent for planned surgery which was not linked to her disability.

iii) Undermining the Claimant / Disproportionate contacts and unwarranted emails undermining the Claimant.

We conclude these allegations are not well-founded. We have not seen evidence to substantiate the allegation that the Claimant was disproportionately contacted. The allegation of 'undermining' is extremely vague but does not fit with the tenor of the evidence we have heard. To the contrary, we consider that the Claimant's managers tried to support her to perform well in her roles.

iv) Ms Mazarelo sending the Claimant distressing emails and texts out of hours.

We conclude this allegation is not well-founded. We have found that on the evening of Friday 10 August 2018 Ms Mazarelo sent an email that was distressing for the Claimant to receive. Beyond that, we have not seen evidence of distressing emails and texts being sent out of hours. The 10 August 2018 email was not related to disability, but to Ms Mazarelo's belief that the Claimant had made an inaccurate declaration in her pay progression application form.

v) Ms Mazarelo shouting at the Claimant and losing her temper.

We conclude this allegation is not well-founded. We have found at paragraph 31 above that on 5 September 2018, Ms Mazarelo got cross with the Claimant but that she did not shout at her. This conduct did not relate to the Claimant's disability but to Ms Mazarelo's mistaken belief that a report had not been completed.

vi) Ms Mazarelo requiring the Claimant to finish work when she was undergoing cardiac tests.

We conclude this allegation is not well-founded. At paragraph 40 above we found that Ms Mazarelo did require the Claimant to finish work on 18 December 2018, the same day she attended hospital for an ECG test. This conduct was not related to disability but to the need to meet deadlines and the fact the Claimant's text message reassured Ms Mazarelo that the work would be done.

vii) Ms Mazarelo gaslighting the Claimant by stating work had not been delivered when it had.

We conclude this allegation is not well-founded. We found at paragraph 28 above that on 5 September 2018, Ms Mazarelo made a genuine mistake about whether a report had been completed. This did not amount to 'gaslighting' and it did not relate to disability.

viii) Ms Shaikh gaslighting the Claimant by stating she was experiencing medication side-effects.

We conclude this allegation is not well-founded. As we found at paragraph 97 above, Ms Shaikh did refer to side effects of the Claimant's medication. She did this because the Claimant had raised the issue and did so in an empathetic and supportive way. The conduct did relate to the Claimant's disability as the medication was taken to treat the Claimant's symptoms of PTSD. However, we do not find that this conduct was unwanted by the Claimant at the time. The Claimant herself told Ms Shaikh that medication side-effects may impact on her work. If the conduct was unwanted, it was not grave enough to reasonably have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

ix) Refusal to acknowledge the Claimant's disability during the grievance process.

We conclude this allegation is not well-founded. We heard no evidence to substantiate the allegation that the Respondent refused to acknowledge the Claimant's disability during the grievance process. We note this did not form part of the Claimant's appeal against the grievance process or outcome.

x) Disregarding the seniority of the Claimant.

We conclude this allegation is not well-founded. We heard no evidence to substantiate the allegation that the Respondent disregarded the Claimant's seniority. The Claimant asked Ms Mazarelo questions in cross-examination about Ms Mazarelo approving the secondment of a direct report of the Claimant's in December 2018. It is not clear whether those questions were asked in connection with this allegation. The matter was unrelated to the Claimant's disability.

xi) Demoting the Claimant by removing tasks and duties from her without discussion or due cause.

We conclude this allegation is not well-founded. We found at paragraph 66 above that the CDGM project was removed from the Claimant. The Respondent had due cause to reallocate this project because it was behind schedule, and this was discussed with the Claimant. The decision was not related to her disability but to the needs of the business. We note the Claimant herself does not argue that her disability was any part of the reason for the project falling behind schedule.

xii) Excluding the Claimant from information vital to her delivering her role.

We conclude this allegation is not well-founded. We heard no evidence to substantiate the allegation that the Respondent excluded the Claimant from information vital to delivering her role. The Claimant did not ask any questions about this allegation of the Respondent's witnesses.

xiii) Not allowing her to deliver her role as to her job description.

We conclude this allegation is not well-founded. The allegation is very vague but does not fit with the tenor of the evidence we have heard. To the contrary, we consider that the Respondent's managers tried to support the Claimant to deliver her role in accordance with her job description.

xiv) Stripping the Claimant of line management responsibilities.

We conclude this allegation is not well-founded. The Claimant's responsibility for line managing a junior member of staff was removed when her own line management temporarily moved to Mr Tritschler. It was not returned to her when she came back to work following a period of sickness absence. The latter decision was related to the Claimant's disability because it was done to allow the Claimant to get up to speed again on her return from sick leave. We do not accept this conduct was unwanted by the Claimant at the time; it was a supportive measure which the Claimant did not complain about at the time. Even if the conduct was unwanted, it was not grave enough to reasonably have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

xv) Contacting the Claimant on her mobile during sickness and annual leave.

We conclude this allegation is not well-founded. We accept that the Respondent did contact the Claimant while she was on leave, although we have seen no evidence of excessive or unjustified contact. Such conduct was not related to the Claimant's disability but to the Respondent's managers keeping in touch about work-related matters. Even if the conduct was unwanted, it was not grave enough to reasonably have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

xvi) Stating the Claimant was being performance managed without evidence to substantiate performance concerns.

We conclude this allegation is not well-founded. The Claimant was performance-managed and that conduct was unwanted by her. However, the Respondent did have evidence to substantiate performance concerns, including the significant delay to the CDGM project. These concerns were raised by three successive managers, Ms Mazarelo, Mr Tritschler (who was involved in the decision to remove the CDGM project) and Ms Shaikh. Their conduct was not related to disability but to their genuine performance concerns. We note the Claimant herself does not argue that her disability caused poor performance; her case is that the performance concerns were not justified. Even if the conduct did relate to disability, it was not grave enough to reasonably have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

xvii) Only deciding there were performance concerns about the Claimant when she submitted an application for flexible working and raised a grievance.

We conclude this allegation is not well-founded. At paragraph 41 above we found that Ms Mazarelo raised significant concerns with the Claimant on 8 January 2019. That was before she submitted a flexible working application or put in her grievance.

xviii) Defamation of the Claimant's character.

We conclude this allegation is not well-founded. We heard no evidence to substantiate the allegation that the Respondent defamed the Claimant. The Claimant did not ask any questions about this allegation of the Respondent's witnesses.

xix) Refusal to work with the Claimant in addressing matters as they were raised.

We conclude this allegation is not well-founded. The Respondent's managers tried to work with the Claimant to address matters as they were raised. Ms Mazarelo met with the Claimant regularly and Ms Shaikh met with the Claimant once or twice a week.

161.5. Ms Mazarelo shouted at the Claimant and lost her temper with her, harassed her while she was undergoing cardiac tests, gaslighting her and refused to acknowledge her disability in the grievance process.

See subparagraph (v) above.

161.6. Ms Shaikh sent disproportionate amounts of texts and emails undermining the Claimant, disregarded her seniority, contacted her on her personal mobile when she was off sick or annual leave and disingenuously issued the Claimant with a performance plan.

See subparagraphs (iii), (x), (xv) and (xvi) above.

161.7. Ms Mazarelo and Ms Shaikh refused to work with the Claimant to address the matters as they were raised.

See subparagprah (xix) above.

161.8. Demoted the Claimant by removing tasks and duties from her without discussion or due cause.

See subparagraph (xi) above.

161.9. Excluded the Claimant from information that was vital to the delivery of her job.

See subparagraph (xii) above.

161.10. Substantially changed the Claimant's role and stripped her of line management and tasks whilst telling her that she was doing the same role.

See subparagraphs (xi) and (xiv) above.

161.11. Had issues with the Claimant's pay progression as detailed in the grievance outcome report.

See subparagraph (i) above.

162. In relation to such unwanted conduct related to disability that we have found did occur, did that conduct cumulatively have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect? Overall, we consider that the actions the Respondent took in relation to the Claimant's disability, including removing her line management responsibilities and Ms Shaikh discussing medication side-effects with her, were supportive actions. None of the Respondent's actions reached the threshold of harassment.

Time limit for the discrimination claims

163. We have concluded that the Respondent did not directly discriminate against the Claimant, fail to make reasonable adjustments for her disability, or harass her. Therefore, the question of time limits is academic. We note that all events before 28 April 2020 were brought before the 3-month primary time limit, extended by the early conciliation period, and are potentially out of time. None of our factual findings would support a conclusion that there was a continuing act of discrimination. In light of our conclusions on the substantive merits of the claims, we would not have considered it just and equitable to extend the ordinary time limit.

Constructive unfair dismissal

164. Did the Respondent breach the Claimant's contract of employment? The Claimant says the Respondent breached clauses 11, 15 and 19 of her contract, the term regarding hours of work and the implied term of mutual trust and confidence. In relation to the alleged breach of trust and confidence, the question is whether the Respondent without reasonable cause acted in a way that was calculated or likely to destroy or seriously damage trust and confidence.

165. The conduct the Claimant relies on is as follows:

165.1. The incidents relating to direct disability discrimination, discrimination by way of association with a disabled person and harassment set out in paragraphs 9 to 32 of the Claimant's further and better particulars.

We have concluded that the Respondent did not directly discriminate against the Claimant, fail to make reasonable adjustments for her disability, or harass her, and therefore did not breach her contract of employment by discriminatory conduct.

165.2. The Respondent failing to remedy or implement recommendations from the grievance and appeal and failing to adequately respond to her grievance and choosing not to answer some points or disclose some documents.

See paragraph 161.2 above. We have found that the grievance recommendations were not fully implemented at the time when the Claimant resigned. This was not a breach of any of the express terms of her contract. Neither in the circumstances was this conduct serious enough to meet the threshold for a breach of the implied term of trust and confidence. The Claimant's sickness absence and the Covid-19 lockdown interrupted the implementation of mediation and the stress risk audit. As the Claimant herself acknowledged, the recommendation that she work from home three days per week was not feasible.

We have not found that there was any failure to adequately respond to the Claimant's grievance. At paragraph 62 above we found the grievance investigation to be reasonably thorough and robust. The Claimant did not say during the hearing what points she thought were neglected or which documents had not been disclosed.

165.3. Ms Shaikh acting in a disingenuous way when issuing the Claimant with a performance plan which the Claimant alleges was because of her discussing medication with Ms Shaikh the day before.

We have not found that Ms Shaikh acted disingenuously. As we found at paragraph 107 above, she issued the Claimant with a Performance Action Plan because she had genuine performance concerns. It was not done because the Claimant had discussed medication side-effects with her.

165.4. Ms Mazarelo breaking her trust by disclosing personal matters in an email copied to HR and the chair of the grievance hearing about her son's mugging.

As noted at paragraph 58 above, Ms Mazarelo did disclose the fact of the Claimant's son's mugging in an email on 12 March 2019. This was not a breach of any of the express terms of the Claimant's contract. We have considered whether the act breached the implied term of trust and confidence. We consider that it was an unfortunate but not malicious disclosure of personal information without the Claimant's consent. It was not calculated to, and it was not serious enough to be likely to, destroy or seriously damage trust and confidence.

166. Looking at the conduct complained of as a whole, we conclude that there was no fundamental breach of contract. Although the Respondent did not act perfectly in

every respect, it did not act without due cause in a way that was calculated or likely to destroy or seriously damage trust and confidence. Neither was there any breach of the express terms of the Claimant's contract of employment.

167. Did the Claimant resign in response to that fundamental breach? We found at paragraph115 above that the Claimant resigned because she had a new job to go to which she preferred. The reasons why she applied for the new job are set out at paragraph 91 above. She did not resign in response to a breach of contract.

168. Did the Claimant waive the right to resign? We found at paragraph 104 above that the Claimant fully intended to leave the Respondent by April 2020. She did not give notice of resignation but thereafter continued to work for the Respondent until resigning without notice on 27 July 2020. We conclude she affirmed her employment contract with the Respondent by not giving notice and continuing to work. She says her resignation was triggered by an email on 30 June 2020, which amounted to a 'last straw'. However, at paragraph 110 above we found the 'nice' email was innocuous and the Claimant did not take offence to it at the time.

169. Therefore, the Claimant was not constructively dismissed, and her employment was terminated by her resignation. Her claim for unfair dismissal fails.

Employment Judge Barrett
Dated: 24 February 2022

IN EAST LONDON EMPLOYMENT TRIBUNAL **CASE NUMBER: 3202180/2020**

B E T W E E N

MRS L SIBBONS

Claimant

- and -

NHS NORTH EAST LONDON CCG

Respondent

LIST OF ISSUES

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1 Jurisdiction

1.1 Have the Claimant's claims been issued in time?

1.2 If not, in relation to:

1.2.1 The discrimination allegations: do the allegations form part of a continuing act under section 123(3)(a) of the Equality Act 2010, or would it be just and equitable for the Tribunal to extend the time for submission of these parts of the claims under section 123(1)(b) of the Equality Act 2010?

1.2.2 The constructive dismissal allegations: was it reasonably practicable for the Claimant to have brought the claims in time and, if not, would it be reasonable for the Tribunal to extend the time limit for submission of these parts of the claims?

2 Constructive Unfair Dismissal

2.1 What term of the Claimant's contract is alleged to have been fundamentally breached leading to the Claimant's resignation?

The Claimant alleges that the following terms were breached by the Respondent:

(a) *Section 11 – Duties (this includes the claimant not being permitted by line management to deliver within the autonomy of her job description or seniority level)*
(b) *Section 15 – Grievance Procedure*
(c) *Section 19 – Valuing Diversity*
(d) *The Respondent is also in breach of hours to be worked, applying the terms and conditions of employment in a reasonable way*
(e) *Breach of trust*

2.2 Had the Respondent committed a repudiatory breach of those terms?

The Claimant alleges that the following acts (either individually or combined) constituted a fundamental breach of contract entitling the Claimant to resign:

(a) *The incidents relating to direct disability discrimination, discrimination by way of association with a disabled person and harassment set out in paragraphs 9 to 32 of the Claimant's further and better particulars;*
(b) *The Respondent failing to remedy or implement recommendations from the grievance and appeal and failing to adequately respond to her grievance and choosing not to answer some points or disclose some documents;*
(c) *Ms Shaikh acting in a disingenuous way when issuing the Claimant with a performance plan which the Claimant alleges was because of her discussing medication with Ms Shaikh the day before;*
(d) *Ms Mazarelo breaking her trust by disclosing personal matters in an email copied to HR and the chair of the grievance hearing about her son's mugging ~~and using information obtained in a confidential meeting convened under the guise of being open and honest to formulate an unwarranted performance plan issued to the Claimant the following day~~; and*
(e) *An email from the Respondent (described as the "final straw") after which the Claimant accepted another job offer.*

2.3 Was the Claimant entitled to resign, in all the circumstances, in response to such breach(es)?

2.4 If so, did the Claimant resign in response to that fundamental breach or did the Claimant waive the right to resign?

2.5 If the Claimant was constructively dismissed, was the dismissal in any case fair?

2.6 Was the reason or principal reason for dismissal the Claimant's disability or her association with a disabled person?

3 Disability

3.1 Did the Claimant have a disability within the meaning of the Equality Act 2010 ("EqA") at the relevant time(s)?

The Claimant has identified the disability she is relying on as "PTSD".

The Respondent accepts that the Claimant was disabled by reason of this condition and that it had knowledge of such disability at the relevant time(s).

3.2 Was the Claimant's son a disabled person within the meaning of s6 EqA 2010 at the relevant time(s)?

The Claimant relies on her son's "anxiety and depression" as his conditions amounting to disabilities.

The Respondent accepts that the Claimant's son was disabled by reason of this condition and that it had knowledge of such disability at the relevant time(s).

4 Direct discrimination and discrimination by association (s13 EqA)

4.1 What alleged acts or omissions of the Respondent does the Claimant relying on as less favourable treatment?

The Claimant alleges that the Respondent:

(a) Failed to take into account the Claimant's disability and her son's disability when deciding her application for flexible working;

(b) Took away the compressed hours arrangement that the Claimant had when she returned to work on a phased return;

(c) Failed to consider the results of the stress audit and conduct a risk assessment to consider the stress that the Claimant was under and the danger to her health/impact that it would have on her before deciding to remove the compressed hours;

(d) Failed to consider or offer a reasonable alternative arrangement; and

(e) Failed to consider the impact of the decision on the claimant's mental wellbeing or impact of that on her son.

The Respondent denies that (a), (c), (d) and (e) above occurred and maintains that it did take into account the Claimant's disability and impact on her and her son's needs when dealing with her flexible working request and a stress audit assessment was undertaken in line with OH recommendation. The Respondent does not accept that (b) occurred and maintains that it at all times implemented OH recommendations for working arrangements in respect of the Claimant's phased return to work.

4.2 If there has been less favourable treatment, was the reason for such treatment the Claimant's disability or her association with a disabled person?

For the avoidance of doubt, the Respondent's position is that none of the alleged failures or acts are issues of direct discrimination, or discrimination by association, as it cannot be said that the Respondent did or failed to do any of them (which is denied) because of the Claimant's disability or her association with a disabled person.

4.3 Who does the Claimant rely on as her comparator in respect of each alleged act of discrimination?

The Claimant relies on a hypothetical person not suffering from PTSD and/or associated with somebody suffering from anxiety and depression.

4.4 Has the Claimant proven facts from which the Tribunal could draw an inference of discrimination on the grounds of disability by reference to the above comparator(s), notwithstanding the Respondent's explanation?

4.5 If so, can the Respondent show reasons that are not in fact discriminatory for the relevant acts and/or omissions?

5 Failure to make reasonable adjustments (s20 and 21 EqA)

5.1 What provision, criterion or practice ("PCP") has been applied by the Respondent on which the Claimant relies?

The Claimant alleges that the following amount to PCPs;

(a) The contractual requirement to be within the physical base of work for 37.5 hours per week;
(b) The expectation to work many additional hours either through very early starts, late finishes or at weekends;
(c) Notwithstanding the flexible working policy, refusing to informally grant the flexible working requests of some staff of the Claimant's seniority/role to work from home and/or work compressed hours, depending on who their line manager was;
(d) Implementing the sickness absence management policy and associated trigger points not adhering to the NHS Handbook; and
(e) Implementing the organisational appraisal policy.

5.2 What substantial disadvantage did the above PCPs place the Claimant at by comparison with persons who were not disabled at the relevant time?

The Claimant's position is that the above PCPs put her at a substantial disadvantage because:

(a) In respect of PCPs (a) and (b) this created difficulty in having a rigid requirement to be in office for all of her contractual hours and for the additional unpaid hours that were imposed at short notice as a disabled person and the parent of a child with a disability meaning her medical needs were not taken into consideration (such as attending therapy and/or other appointments, or the effects of medication) in addition the claimant states she could not adequately care for her son nor meet his emotional needs due to the inflexibility;
(b) In respect of PCP (c) The inflexibility caused undue stress and anxiety to the claimant more so than a no would have meant to someone who was not disabled due to a. aggravating the disability itself by causing additional unnecessary stress and b. the impact of additional travel

and medication effects and the distress that it caused her son as his main care giver gave rise to additional stress and anxiety

(c) In respect of PCP (d) the effect was that absence periods were incurred when under the policy they should have been considered to be as a result of her disability; and

(d) In respect of PCP (e) therefore meant that the claimant was penalised for sickness associated to her disability.

The Respondent does not accept that the Claimant was substantially disadvantaged by comparison with persons who were not disabled and puts the Claimant to strict proof that these were, in fact, substantial disadvantages which she suffered because of her PTSD.

5.3 Did the Respondent know, or ought it have been reasonably expected to know, at the relevant time, that the Claimant was likely to be placed at a substantial disadvantage in the way set out above?

The Respondent does not admit that it knew or could reasonably have been expected to know of these alleged substantial disadvantages.

5.4 What adjustments is it alleged that the Respondent should have made?

The Claimant suggests that a reasonable adjustment would have been to:

(a) Work with the Claimant to agree an alternative working pattern that met the reasonable needs of both the business and the Claimant;

(b) Provide the Claimant with clear direction as to what her role was instead of deciding what the Claimant could do in view of her disability without discussing with the Claimant;

(c) Consider the NHS Handbook guidance on managing disability sickness;

(d) Be kind and empathetic and work collaboratively with the Claimant not against her;

(e) Work within the parameters of the ACAS code of conduct, Nolan principles and the NHS Managers Code of Conduct; and

(f) Be an ambassador and live by the organisation's values and policies.

5.5 Would these adjustments in fact have removed or overcome the above substantial disadvantage and would they have been reasonable in the circumstances?

The Respondent submits that it did work with the Claimant to agree on an alternative working pattern and the Claimant herself accepted where her preferred pattern was not possible. Further, the Respondent had weekly 1 to 1 sessions with the Claimant, then increased to twice weekly (over and above usual custom for employees at her level) in order to clarify her role and workload and identify suitable pieces of work to match her needs and preferences. For the avoidance of doubt, the Respondent submits that it at all times considered relevant NHS guidance, Acas Code, principles and Code of Conduct as well as its values and policies when working collaboratively and empathetically with the Claimant to support her in her role.

6 Harassment

6.1 Did the Respondent engage in unwanted conduct relating to the Claimant's disability?

The Claimant alleges that the Respondent:

(a) Failed to undertake performance management by Ian Tritschler;

(b) Failed to implement recommendations from both the Respondent's own investigation outcomes from the grievance and subsequent appeal process and further failed to take due consideration of medical advice and reasonable adjustments provided by OH;

(c) Denied that the Claimant is a disabled person in this litigation when the Claimant's PTSD is clearly stated in all the OH reports provided to the Respondent;

(d) Ms Mazarelo and Ms Shaikh undermined the Claimant in the ways set out in paragraph 18 of the Claimant's further and better particulars;

(e) Ms Mazarelo shouted at the Claimant and lost her temper with her, harassed her while she was undergoing cardiac tests, gaslighting her and refused to acknowledge her disability in the grievance process;

(f) Ms Shaikh sent disproportionate amounts of texts and emails undermining the Claimant, disregarded her seniority, contacted her on her personal mobile when she was off sick or annual leave, only

decided that there were performance concerns when the Claimant submitted an application for flexible working and disingenuously issued the Claimant with a performance plan;

(g) Ms Mazarelo and Ms Shaikh refused to work with the Claimant to address the matters as they were raised;

(h) Demoted the Claimant by removing tasks and duties from her without discussion or due cause;

(i) Excluded the Claimant from information that was vital to the delivery of her job;

(j) Substantially changed the Claimant's role and stripped her of line management and tasks whilst telling her that she was doing the same role; and

(k) Had issues with the Claimant's pay progression as detailed in the grievance outcome report.

6.2 If the Respondent did any or all of those things, did such action or inaction amount to unwanted conduct related to the Claimant's disability?

6.3 If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect?

7 Remedies

7.1 In the event that the Claimant's claims succeed, what remedy should she be awarded?

7.2 The Claimant is seeking the following:

a) Basic award;
b) Compensatory award;
c) Injury to feelings;
d) Loss of pension benefits; and
e) Interest.

7.3 In the event that the Claimant's claim for constructive dismissal succeeds, should any compensation be reduced by reason of her own conduct?

7.4 Should any uplift or reduction be applied due to either party's failure to comply with the ACAS Code of Practice?

Bevan Brittan LLP

9 September 2021