EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss Hannah Murphy	AND	LFH Hotels Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 28, 29 and 30 March 2022
In Chambers 31 March 2022

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms R Hewitt-Gray
Ms L Simpson

Representation

For the Claimant: Miss S Murphy, Claimant's Mother
For the Respondent: Mr C Adjei of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:
1. The correct name of the respondent is LFH Hotels Ltd and the record is amended accordingly; and
2.The claimant's claims are all dismissed.

RESERVED REASONS

1. In this case the claimant Miss Hannah Murphy, who resigned her employment, claims that she has been unfairly constructively dismissed, and that she was discriminated against because of a protected characteristic, namely her disability. The claim is for direct discrimination, harassment, and victimisation. The respondent concedes that the claimant is disabled, but it denies that the claimant was constructively dismissed, and denies all allegations of discrimination.

2. We have heard from the claimant, and from her sister Miss Molly Murphy on her behalf. For the respondent we have heard from Mrs Caroline Harrison, Miss Storm Moore, Mrs Michelle Chilton, Mr Michael Robinson and Mr Byron Fiddler. We also accepted and were asked to consider statements from Ms Amanda Rees on behalf of the claimant, and from Mr Alman Naustion on behalf of the respondent, but we can only attach limited weight to their evidence because they were not present at this hearing to be questioned on it. With respect to Mr Naustion, he was unable to attend because of family and work commitments, but he had volunteered to give evidence via video link. An application to do so was refused because the claimant objected, but we note that Mr Naustion was prepared to answer any questions in reply to his signed statement.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We had a number of concerns about the credibility of the claimant and those supporting her, which are explained at the end of our findings of fact. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The Facts:
5. The respondent owns and operates five hotels in the UK. The events relevant to this Tribunal hearing took place in and around one of these five hotels, namely the Fowey Hall Hotel in Cornwall, where the claimant worked.
6. The claimant commenced employment with the respondent on 8 September 2018 when she was aged 15. She was employed as a room attendant in the Housekeeping Department on a zero hours contract. Her job involved cleaning bedrooms, bathrooms and public areas and to help to ensure all facilities functioned correctly. She resigned her employment on 26 March 2021.
7. At all material times the claimant suffered from a mental impairment which had been diagnosed as Autistic Spectrum Disorder, ADHD, and Anxiety Disorder. This was a long-term condition in the sense that it had lasted for more than 12 months. It had an adverse effect on the claimant's normal day-to-day activities, which included concentration, and that effect was substantial in the sense that it was more than minor or trivial.
8. The claimant was paid at least in accordance with the national minimum wage provisions which was £4.25 per hour at the beginning of her employment when the national rate at the time for under 18's was £4.20 per hour. In October 2020 following her 18th birthday her pay was increased to £6.45 which was the relevant hourly rate for 18 to 20-year-olds at that time.
9. The claimant's immediate line manager was Miss Storm Moore, from whom we have heard. Her line manager in turn was Mr Michael Robinson, the Deputy Head Housekeeper, from whom we have also heard. Miss Moore accepts that the claimant's sister Miss Molly Murphy had told her that the claimant was "on the spectrum", but says that she had not noticed that the claimant had any sort of condition and did not think of her as having a disability. The claimant makes a number of complaints of direct disability discrimination against Miss Moore, which are explained in more detail below. The events as they unfolded, and the attempts by the respondent to resolve the matter, were as follows.
10. The claimant suggests for the purposes of her victimisation claim that she complained about Miss Moore to Mr Robinson in September 2020. In fact, the complaint in question was an email dated 2 October 2020 from the claimant's mother Miss Sharon Murphy to Ms Dulce Marquese, who was then the General Manager at the hotel. This email is headed "disability discrimination" and asserts: "It has been brought to my attention that my daughter Hannah Murphy is facing discrimination in her department since the employment of two new members of staff, the Deputy Head Housekeeper and a member of his team Storm … Storm has called her disabled not only to her, but to other members of staff which the deputy was aware of, yet allowed this to continue by placing her with Storm when there are clearly other team members who could be

placed with her. I believe that her mental health is being taken as not only a form of bullying but also of abuse." It was referred to as a "formal letter of complaint".

11. This was referred to the respondent's Group HR Manager namely Mrs Caroline Harrison, from whom we have heard. In the first place she tried to resolve the grievance informally, in accordance with the relevant Grievance Procedure. On 6 October 2020 Mrs Harrison met with the claimant and Miss Moore. Miss Moore indicated that she had asked the claimant why she was wearing a face mask when she had earlier said that she was exempt from doing so. The claimant alleged that Ms Moore had called her "disabled" and "special" for not wearing a mask. The claimant asserted that Laura Symonds, another room attendant who worked with the claimant, had witnessed this happening. The claimant agreed that the respondent should deal the matter informally and also raised a complaint about her pay because she was under the impression that other members of the Housekeeping Team were paid more than she was. Mrs Harrison then spoke with Laura Symonds, who denied that she had witnessed Miss Moore calling the claimant "disabled" and "special".
12. Mrs Harrison was then unwell, and Ms Marquese continued the investigation. She interviewed two other members of the housekeeping team Zoe Varcoe and Chloe Dingle, and also met with the claimant's sister Miss Molly Murphy. On 16 October 2020 Zoe and Chloe suggested that Ms Moore had called the claimant "disabled" and "special" and that the claimant was made to feel uncomfortable and was criticised by her. She also did not like the way Miss Moore spoke to her which was "like a baby". At a separate interview Miss Molly Murphy made exactly the same points. It looks as if the minutes of each meeting have been copied and pasted from one to the other.
13. The claimant's mother then commenced the Early Conciliation procedure with ACAS on 22 October 2020 (Day A) and emailed Ms Marquese to that effect, and she complained about the process of the investigation. Ms Marquese decided at that stage to deal with the claimant's complaints as a formal grievance. The matter was passed to Mrs Mel Brown, a Sales and Marketing Manager from another hotel owned by the respondent, and she held a grievance meeting with the claimant on 30 October 2020. She also reviewed the statements of Miss Moore, Zoe and Chloe. At that stage the claimant and Chloe were friends, and Chloe was representing the claimant at that meeting. Chloe then denied that she had heard Miss Moore call the claimant "disabled" or "special", and subsequently Zoe also retracted her earlier statement to that effect.
14. Mrs Brown rejected the claimant's grievance by letter dated 3 November 2020. She dealt with the three specific issues raised in that formal grievance. The first was that Miss Moore had called her "disabled" and "special" which she considered to be discriminatory; secondly that there was a discrepancy with wages which was also alleged to be discriminatory; and also that the management team had lied to the claimant concerning the wages of the other team members.
15. The first allegation was rejected because Miss Moore had denied the comments, and the claimant's witnesses in support that were said to have been there at the time, namely Zoe and Chloe, did not substantiate the claimant's claim. Mrs Brown decided that there was no evidence to support the claimant's claim.
16. With regard to the pay differential with other members of staff in the housekeeping department, the claimant had complained about colleagues Ellie Sweggs and Charlotte Pennington. The respondent had investigated the matter and had decided to pay Ellie a slightly higher rate because she had previous experience of housekeeping in a holiday park. The claimant asserts that this experience was limited to one or two weeks only, and that the claimant had more experience because she had started her employment with the respondent, but this was the reason given by the respondent on recruiting Ellie. With regard to Charlotte, she had joined the respondent some two weeks before her 18th birthday, and for this reason the respondent had put her straight onto the national minimum wage applicable to 18-year-olds in order to avoid having to amend her pay scale. She was therefore she was paid the same as the claimant, namely the relevant national minimum wage. Mrs Brown rejected the allegation that the claimant had been paid a lower rate because of her disability.

17. The third allegation was that the management team had lied to the claimant concerning the wages of other team members. The claimant asserted that she had been deceived when she was told that everyone was on the correct wage for their age. Having reviewed all the evidence Mrs Brown concluded that there was no evidence to suggest that the claimant had been lied to or that there had been a deliberate cover-up of the wage differences. Her view was that the claimant had misinterpreted various comments.
18. The grievance was therefore rejected, and the claimant was offered the right of appeal. The claimant did appeal, and this was heard by Mrs Michelle Chilton, from whom we have heard, who at that stage was the General Manager of one of the respondent's other hotels. She clarified that the claimant had authorised her to communicate with her mother, who then confirmed the grounds of appeal. In effect the claimant disagreed with the grievance outcome about the wages and alleged that investigation statements had not been used, or alternatively not asked for, in relation to the allegations against Miss Moore. There was also a debate as to who should represent the claimant at the appeal hearing, and Mrs Chilton agreed that her mother could accompany her. Following an appeal hearing Mrs Chilton then decided to review all the evidence, but during this process the claimant emailed her on 2 December 2020 to say that she had decided to escalate her grievance to a "tribunal hearing" but that if she replied with a favourable outcome then she would cancel that hearing.
19. Mrs Chilton decided to uphold the original decision and she decided to reject the appeal. In the first place no one had witnessed the alleged incident between Miss Moore and the claimant and there was no evidence to support the claimant's assertions. Mrs Chilton concluded that there were no statements which should have been taken that had not been, nor that any statements which had been taken were rejected or not used. There was simply no evidence to support the claimant's complaint. Given that the claimant was no longer working with Miss Moore she concluded the matter had been resolved.
20. Secondly, with regard to hours, Charlotte Ellie and the claimant were now all of the same age group and were paid the same hourly rate in line with the national minimum wage for that age. Charlotte had been put on that rate two weeks before reaching the age of 18 as an administrative convenience, and Ellie have been paid a higher rate on joining because of her previous experience. Mrs Chilton rejected the allegation that the claimant had been paid, or was being paid, a lower wage because of her disability. Thirdly she also rejected the allegation that any of the respondent's managers who had investigated the matter been dishonest with the claimant on the issue of wages because there was simply no evidence to support that allegation.
21. Miss Moore also gave evidence to us at this hearing in connection with her recollection of these events. We found Miss Moore's evidence to be consistent and credible, particularly because she made concessions which might have embarrassed her when she felt this to be true. For instance, she accepted that as a South African there was something of a cultural difference and she could be blunt and impolite. She stated: I am South African, and I don't mince my words which I accept can come across as a bit rude sometimes to people in the UK". She accepted that she had on one occasion whistled at the claimant to get her attention, rather than to shout her name, but that this was nothing to do with her medical condition. When the claimant asked her not to do it again, she did not do so. Miss Moore denied ever saying that the claimant did not need to wear a mask because she was "disabled" or "special". She accepts that in June 2020 when the claimant had raised the complaint from a customer, she told her that the matter was in hand but later reflected that she might have sounded a bit abrupt. She spoke to a colleague Laura Symonds and Laura agreed that sometimes her language appeared to be harsh and abrupt. After that she made a conscious effort to be more gentle in tone towards all of her colleagues, including the claimant. Miss Moore also accepts that in about August 2020 she did tell the claimant that she had "never worked with someone like her before" but this was nothing to do with any disability. They were having a conversation about how she (Miss Moore) might come

across to people and she apologised to the claimant for being blunt. She denies ever having witnessed the claimant having a panic attack.

22. The claimant now raises a number of allegations arising from these circumstances. The first two were alleged fundamental breaches of contract. In the first place the claimant alleges that the respondent allowed Miss Moore to continue to bully her and did not take her allegations seriously. The claimant has confirmed that these allegations of bullying replicate the first seven allegations of direct disability discrimination, and we deal with each of these in turn. The first is that Miss Moore spoke to her in a derogatory manner. We reject that allegation. Miss Moore denies it and we note that the claimant did not raise it in the context of her grievance when she claimed that Miss Moore had treated her inappropriately in respect of the mask comment.
23. Secondly, the claimant complains that Miss Moore whistled at her. This was true, but we accept Miss Moore's evidence that she did it on one occasion and when the claimant asked not to do it again, she did not do so. Again, the claimant did not raise it during her grievance. To the extent that the allegation is that Miss Moore repeatedly whistled inappropriately at the claimant, and that in some way this was related to her disability, we reject that allegation.
24. Thirdly, the claimant alleges that Miss Moore spoke to her "like a baby". Miss Moore denies this but does agree that she softened her tone, not only with the claimant, but to improve communication with all colleagues. The claimant was unable in cross-examination to provide any specific examples of being spoken to like a baby. We reject this allegation.
25. Fourthly, the claimant asserts that Miss Moore did not listen to her about the guest complaint. Miss Moore denies acting inappropriately. Laura Symonds witnessed the event and concluded that it was a normal exchange between two colleagues who were "uncooperative with each other's issues" at that time. She does not state that Miss Moore acted inappropriately to the claimant, and the claimant's complaint is not supported by Miss Symonds. We reject that allegation.
26. Fifthly, the claimant asserts that Miss Moore said to Miss Symonds that she did not know how to talk to the claimant. Miss Moore denies making the statement and says it is not the sort of language she would use. There is no evidence that Miss Moore did make this comment, and we reject it.
27. Next, we deal with the comments relating to the mask. The claimant was vague about these allegations which she variously claimed were made in June 2020, or July or August 2020, or more latterly the end of September or October 2020. The claimant did not raise any immediate complaint (she first did so on 2 October 2020) which is inconsistent with her assertions that the comments were bullying by Miss Moore. We accept Miss Moore's evidence that she did not call the claimant "disabled" or "special" but did ask if she had any disabilities which made her exempt from wearing a mask. Miss Moore later apologised for asking about personal information. There is no evidence Miss Moore asked any such questions in a derogatory or mocking way. Despite the claimant asserting that these comments were witnessed by Zoe and Chloe, when they were interviewed during the grievance process, they denied it. The claimant now complains that Chloe's statement was altered but there is no evidence that this happened, and we reject that assertion. For these reasons on balance we prefer Miss Moore's evidence that she did not make the comments which the claimant alleges, and we reject that allegation.
28. The next allegation is that Miss Moore had said to the claimant that "she had never worked with someone like her". Miss Moore admits that she did say this, but it was in the context of the claimant having frequently misinterpreted what she had said and she had apologised to her for being blunt. The claimant did not raise this at any stage as part of her grievance and we reject the assertion that this was in any way bullying by Miss Moore.
29. The next allegation is that Miss Moore had said to the claimant "I forgot how to talk to you". Miss Moore accepts that she said this comment, but in the context of being

mindful of her tone so as not to cause the claimant or other colleagues any upset. We find that this was in effect an apology, and the claimant did not raise any complaint of this during her grievance process. The claimant accepted in cross-examination that she was unsure whether this would amount to bullying in any event. We reject the assertion that there was anything inappropriate in connection with this comment.

30. The next assertion relates to an alleged panic attack. The claimant has provided no medical evidence that she suffered a panic attack nor given the reason for that alleged attack. The claimant does not assert that Miss Moore said or did anything which triggered the alleged panic attack, and it was never put to Mr Robinson when he gave his evidence that the claimant might suffer a panic attack if he required her to work in the same area as Miss Moore. There is simply no evidence that Mr Robinson knew that the claimant might suffer a panic attack if he asked her to work alongside Miss Moore again, nor that any of the respondent's managers might have acted inappropriately in doing so.
31. The next assertion is that during the claimant's formal grievance complaint witness statements were taken but not used, and Chloe Dingle's evidence had been changed. The claimant has clarified in this hearing that she refers to the statement of her sister Miss Molly Murphy which was taken but not used. However, there is nothing in her statement which is relevant to the mask comments, or the complaint about unequal wages which formed the basis of the claimant's grievance. This is why Mrs Brown did not need to refer to it in her grievance outcome letter. We have already rejected the assertion that Chloe Dingle's evidence was in some way changed by the respondent.
32. The final allegation of direct disability discrimination is that the claimant was paid a lower hourly rate than two of her colleagues Ellie Sweggs and Charlotte Pennington. For the reasons set out above, we accept that Ellie commenced employment on a slightly higher rate because of her perceived experience elsewhere (even if this was limited), and that Charlotte was merely paid a higher rate for two weeks until she became entitled to the national minimum wage at age 18. This was for administrative convenience so as not to have to change the payroll. We are satisfied that the various employees were paid the appropriate rate, and that there was no differential which was in any way related to the claimant's disability, and further we are satisfied that the respondent's managers did not lie to the claimant during their investigations and conclusions in this respect.
33. The above allegations are replicated as alleged fundamental breaches of contract, and allegations of direct disability discrimination. The claimant also alleges these further fundamental breaches of contract during this timescale. The first is that the respondent did not take the claimant's allegations seriously. It is clear to us that the evidence supports the contrary conclusion, namely that the respondent did take the allegations seriously. The claimant's first grievance was investigated fully and properly by Mrs Brown, and there was a further appeal conducted independently by Mrs Chilton. All those that were said to have witnessed the comments relating to the mask were interviewed. The claimant accepted that after she had asserted that she had suffered a panic attack the claimant was no longer required to work alongside Miss Moore. We reject the assertion that the respondent did not take the claimant's complaint seriously.
34. The claimant also asserts that the respondent failed to follow the ACAS Code of Practice with regard to her first grievance and more specifically that when the matter was first raised the respondent commenced an investigation; secondly that Ms Marquese commenced the investigation herself after she had asked Mrs Harrison to do it, but Mrs Harrison was unwell; and thirdly that the finding with regard to the pay difference was untrue. We find that it was appropriate and reasonable for the respondent to have commenced the investigation when it did, and for Ms Marquese to have resumed responsibility for it when Mrs Harrison was ill. Similarly, we find that the respondent was entitled to reach the conclusions that it did with regard to the pay differences. We reject the assertion that there was any breach of the ACAS Code of Practice in this respect, or that any of these aspects were in any way a fundamental breach of the implied term of trust and confidence.

35. Following the claimant's first complaint and then grievance from 2 October 2020, the claimant was allocated her normal hours. On 5 November 2020 the hotel was closed because of the national lockdown during the Covid-19 pandemic and the claimant was then absent on furlough leave. ACAS issued the Early Conciliation certificate on 12 November 2020 (Day B) and the claimant issued these proceedings whilst still an employee on 3 December 2020. On the same day the hotel reopened following the closure.
36. It was at this stage that Chloe Dingle submitted a six-page letter of complaint about the claimant and her family citing various instances of unpleasant treatment and threats made by them against her and her boyfriend. It seems that there was a spectacular falling out between the claimant and her family and Miss Dingle and those close to her which continued to fester during the remainder of the claimant's employment, and beyond. Both parties appear to have complained to the Police about the unlawful conduct of the others. The respondent discussed the letter of complaint with Miss Dingle who seemed more concerned about the claimant's sister than the claimant, and she decided against pursuing a formal complaint against the claimant because they had been friends. The matter was therefore not investigated further by the respondent at Miss Dingle's request.
37. The claimant now asserts that this letter was somehow manufactured by the respondent who had created "fake allegations" against her. The respondent denies this. The claimant cannot say which of the respondent's employees is said to have manufactured this letter. There is not a shred of evidence to support that serious allegation and we have no hesitation in rejecting it.
38. Mr Naustion was the respondent's Head Housekeeper and he arranged the rota for the Housekeeping Team. When the hotel was in lockdown after 5 November 2020, he decided to require everyone in the Housekeeping Team to undertake training. He wanted to improve the quality of cleaning in the hotel during the pandemic. He decided to appoint small groups to undertake the training to ensure social distancing and one group was the claimant, and her sister Molly and niece Lilly. On 23 November 2020 Miss Molly Murphy emailed Mr Naustion to explain that her mother had tested positive for Covid-19, and that although the claimant was testing negative, she did live with her mother. He therefore decided to postpone the training, but he advised that the training could be rearranged for 2 December 2020. However, just before this date another manager tested positive, and that training was cancelled as well.
39. The hotel then reopened on 3 December 2020 and Mr Naustion decided which members of staff to call back from the Housekeeping Team. He did not need all of them, and because the claimant had not completed her training, she was not called back. Mr Naustion subsequently informed Mr Fiddler (during a subsequent grievance appeal for which see further below) that he perceived that the claimant was sometimes unable to complete a full rota of rooms to be cleaned without assistance, which was another reason why she was not allocated hours. The claimant now asserts that she was denied these hours because of her earlier complaint against Mr Robinson in September 2020 (which in fact was the email complaining of disability discrimination on 2 October 2020). We accept the respondent's evidence that Mr Naustion did not fail to allocate hours to the claimant because of this earlier complaint. Indeed, the very opposite happened, because he continued to do so between 2 October 2020 and the hotel going into lockdown on 5 November 2020. It was only when the hotel reopened, at which stage the claimant had not completed her training, that he decided not to recall her, effectively for three reasons: first, he did not need all the housekeeping team; secondly, she had not completed training; and thirdly, he perceived that on occasions she needed assistance to complete her duties.
40. It is clear to us that the email sent by Miss Molly Murphy on 23 November 2020, explaining that the claimant was living with her mother who had tested positive, which is why the training was cancelled, is inconsistent with the allegation now pursued by the claimant that she was not allocated hours because of her earlier complaint. Miss Molly Murphy then gave evidence to us to the effect that the email in question was not

hers, and that the email system had been “hacked” and accused the respondent of failing to take appropriate steps to establish the culprit. Despite denying the veracity of that email, Miss Molly Murphy did not deny receiving and acting on subsequent emails in that chain of emails. We find her suggestion to the effect that her emails had been hacked to seek to establish that there was no good reason for cancelling the claimant’s training (and thus not to allocate her hours) to be wholly incredible, and we have no hesitation in rejecting it.

41. In any event the claimant raised a second formal grievance by email dated 9 December 2020 on the basis that she had not been called back to work “without any valid reasons”. She alleged that the reason was because of her tribunal proceedings asserting discrimination. Mr Naustion dealt with that grievance, and he met with the claimant on 30 December 2020. The claimant was accompanied by a work colleague. Mr Naustion explained why the training had been cancelled and that was why the claimant had not been put on the rota. The claimant was adamant that Mr Michael Robinson had made the decisions relating to the rota, but Mr Naustion confirmed that it was his decision and confirmed why he had not called the claimant back from furlough. In addition he explained that there were other employees across the Housekeeping Team who had not been called back and they remained on furlough leave.
42. Mr Naustion rejected the claimant’s grievance. The claimant appealed that decision and the appeal was dealt with by Mr Byron Fiddler, from whom we have heard, who was the General Manager at one of the respondent’s other hotels. He interviewed Mr Naustion, who confirmed to him that he had not called the claimant back to work for three reasons: not all of the Housekeeping Team were required, and other members of staff apart from the claimant still remained on furlough leave; the claimant had not completed the updated training, which had been cancelled for Covid-19 related reasons; and on occasions he perceived that the claimant might need assistance to complete her full rota of cleaning duties.
43. On 11 February 2021 Mr Fiddler held a grievance appeal meeting with the claimant who was represented by her mother. Following his investigations Mr Fiddler rejected the appeal against this grievance. He was satisfied that Mr Naustion had made the relevant decisions, not Mr Robinson, and he was satisfied with the explanation as to why the claimant had not been called back to work. He rejected the assertion that the claimant’s previous complaint against Mr Robinson was in any way a factor in the decision. Mr Fiddler communicated his decision with an explanation by letter dated 2 March 2021.
44. Meanwhile in January 2021 the claimant’s mother received an offensive card which included comments to the effect that it was hoped she would die from Covid, and that the claimant was “a retard”. The claimant asserts that this is harassment by the respondent related to her disability. However, the claimant accepted in cross-examination that it was speculation that this card had been sent by the respondent and that there was simply no evidence to support that contention. We have no hesitation in rejecting the assertion that this card was sent by anyone associated with the respondent.
45. The claimant then raised her third grievance on 6 February 2021. Mrs Harrison was appointed to chair the grievance meeting, which was arranged on 11 February 2021. There were three grounds for the grievance: (i) the first was that she had received the malicious and offensive card referred to above which was said to have been sent by Mr Michael Robinson or Chloe Dingle; (ii) Chloe Dingle was bullying her online and had influenced the whole team to stop talking to her; and (iii) her personal data had been compromised because the respondent must have given Mr Robinson or Chloe Dingle her address to send the card.
46. The claimant attended the grievance meeting with Mrs Harrison and was accompanied by her mother. With regard to the first complaint, Mrs Harrison confirmed that there was no connection between the respondent and the card, and it was a matter which the claimant might wish to refer to the Police. With regard to the second aspect the

claimant was upset because Chloe and other members of the Housekeeping Team had stopped communicating with her on social media outside of work, but she admitted that she had sent unkind messages to Chloe and that her falling out with Chloe had seemed to have triggered this. With regard to the data breach, the claimant believed that someone had obtained her address from the respondent. Mrs Harrison explained that the relevant data was kept secure but the claimant suggested that Mr Robinson had hacked Molly's personal email address.

47. Mrs Harrison then made investigations with both the general manager, and the deputy manager regarding the card. She spoke to Mr Robinson and with Chloe and also interviewed other members of the Housekeeping Team. Nobody knew anything about the card, and no one was aware of any bullying towards the claimant. The claimant through her sister subsequently made a subject access request to seek information on Mr Robinson's handwriting. In conclusion Mrs Harrison decided that there was absolutely no evidence to support any of the claimant's grievances. She dismissed the grievance and sent a letter confirming that decision with reasons on 2 March 2021.
48. The claimant also complains that Mrs Harrison failed to disclose during this grievance process that she was receiving complaints about her (the claimant) from Chloe Dingle. This relates to the letter of complaint which Chloe had submitted in December 2020 and which is referred to above. However, Chloe Dingle had confirmed to Mrs Harrison that she did not wish to pursue the matter any further against the claimant because they were friends. It seems that Chloe had been much more upset about the bullying and harassing behaviour of Miss Molly Murphy which had resulted in a disciplinary investigation against Molly. Mrs Harrison did not mention this to claimant during this third grievance because she simply did not think it was relevant. We agree with that conclusion.
49. During this time, from the end of January 2021, the dispute between the claimant and her family and Chloe continued, and the Police were called on a number of occasions. The claimant now asserts that Mrs Harrison of the respondent refused to cooperate with a Police investigation into harassment allegations made by her, and that this amounts to a fundamental breach of the implied term of trust and confidence. We accept Mrs Harrison's evidence that no stage did the Police speak to her or anyone else at the respondent about the allegations made by the claimant, and the suggestion that she failed to cooperate with the Police investigation is untrue.
50. Another alleged fundamental breach of the implied term of trust and confidence is that the respondent had made a decision about the claimant's return to work before she had the opportunity to appeal the second grievance outcome. The claimant refers to a letter which was sent to her by the respondent's solicitors by way of a costs warning in reply to an application by the claimant to amend her claim. That letter was based on the position following the determination of the second grievance. We accept Mr Fiddler's evidence that his consideration of the grievance appeal was not in any way predetermined, and that he simply did not know about this solicitors' costs warning letter until the claimant's mother raised it in the grievance appeal meeting. In any event during cross-examination the claimant did not understand the relevance of the costs warning letter to this allegation, and it could not have been any part of the reasons for her subsequently resigning her employment.
51. The final alleged fundamental breach of the implied term of trust and confidence relates to a training day on 25 March 2021 when the manager, assistant manager and Chloe Dingle are said to have stared at the claimant. However, the claimant does not assert that those who allegedly stared at her did so in an aggressive or hostile manner, and the manager in question, (Mr Walley) and the Deputy General Manager (Ms Sarentino) had not featured at any stage in any allegations of bullying raised by the claimant. She simply cannot have had any reasonable belief that they intended to be aggressive or unpleasant. It may have been the case that Chloe Dingle stared at her, given their hostile stance towards each other, but the claimant accepted that she had acted unpleasantly towards Miss Dingle, and even if this did happen, we cannot find that it

was action by the respondent which amounts to a fundamental breach of the implied term of trust and confidence.

52. On 26 March 2021 the claimant then emailed to resign her employment. She stated in that letter: “After recent events and reading emails sent to you from Chloe Dingle regarding myself and my family and not to be given the opportunity to defend ourselves against these allegations that Chloe Dingle falsely reported and I feel that was influenced on my complaint with regards to Chloe Dingle. I hand my notice in with regret, I strongly believe that if I leave the harassment against my family will stop, as Fowey Hall Hotel has failed to protect me under the employees rights I feel that the company has left me with no option but to hand in my notice.” The claimant then sent another email on 29 March 2021 confirming her resignation with effect from 26 March 2021 stating: “You should be aware I am resigning in response to repeated breaches of my contract by my employer and I consider myself constructively dismissed. You rejected my grievance on 6 February 2021 which sets out the basis you have seriously breached contract. As you have not upheld numerous complaints from myself regarding this situation I now consider my position as room attendant at Fowey Hall Hotel is untenable and my working conditions intolerable leaving me no option but to resign …”
53. Mrs Harrison replied to the effect that the respondent did not wish the claimant to resign and that they were prepared to continue to explore the claimant’s concerns at an informal meeting or during a formal grievance process. That offer was not accepted, and the claimant’s employment came to an end. On 22 April 2021 the claimant then applied to amend her existing tribunal proceedings to include a claim for constructive unfair dismissal and the respondent did not object to that application.
54. It seems that the general unpleasantness, harassment and other unlawful behaviour between the claimant and her family and Chloe Dingle and her connections continued. In about May 2021 the claimant asserts that she was attacked in the street by a cousin of Miss Dingle, and that this somehow amounts to harassment related to her disability committed by the respondent. There is simply no evidence that this event, which took place after work hours and not on the respondent’s premises, is in any way connected to the actions of the respondent, and the claimant accepted as much during cross-examination.
55. In about June or July 2021 some pornographic photographs were sent to the claimant and her family. The claimant now alleges that these were sent by either Mr Robinson or Chloe Dingle. In his evidence Mr Robinson denied ever having done so. The claimant now asserts that this amounts to harassment by the respondent which is related to her disability. There is no evidence to support the contention that this offensive communication was sent by or on behalf of the respondent, or that it was in any way connected to the respondent. The claimant accepted in cross-examination that she did not have evidence to support that claim. We have no hesitation in rejecting the assertion that the respondent was in any way responsible for this letter.
56. Also in about June or July 2021 a letter was received at the claimant’s home on Fowey Hall headed notepaper which was expressed to be a work reference for Molly Murphy. It was offensive in tone and abusive about Molly and “her retarded sister” which was taken to be a reference to the claimant. It was purported to have been signed by Caroline Harrison. Mrs Harrison denies ever having seen it. The claimant now asserts that this was sent by the respondent and that it amounts to harassment related to her disability. There is no evidence to support the contention that this offensive mock reference was sent by or on behalf of the respondent. The claimant accepted in cross-examination that she did not have evidence to support that claim. We have no hesitation in rejecting the assertion that the respondent was in any way responsible for this letter.
57. <u>Credibility:</u>
58. As noted above, the claimant gave evidence, as did her sister Miss Molly Murphy, and the claimant was represented by her mother Ms Sharon Murphy who made a number of assertions during the questioning of the respondent’s witnesses. We have a number

of concerns as to their credibility arising from the evidence of the claimant and Miss Molly Murphy, and the assertions made jointly against the respondent.

59. The first example is the six-page letter of complaint raised by Chloe Dingle on 9 December 2020. The claimant's first claim of harassment related to disability is the respondent "making fake allegations of threats", in other words suggesting that the respondent has dishonestly manufactured this letter in which Chloe complains of being threatened by the claimant and her sister. There is simply no evidence whatsoever to support this serious allegation.
60. There is one clear example of the claimant refusing to accept a contemporaneous document when it was adverse to the interests of the claim presented to this tribunal. The claimant's victimisation claim is on the basis that her complaint led to Mr Robinson's decision not to allocate her hours of work. In fact, it was Mr Naustion who made that decision, but in any event, it was because the claimant had not completed her training, which had been cancelled during November 2020. This decision was taken because Miss Molly Murphy had emailed Mr Naustion on 23 November 2020 to the effect that her mother Ms Sharon Murphy had tested positive for Covid-19, and although Hannah was negative, she lived with her mother. Mr Naustion cancelled the claimant's training for this reason. Miss Molly Murphy then gave evidence to the effect that the email in question was not hers, and that the email system had been "hacked" and accused the respondent of failing to take appropriate steps to establish the culprit. Despite denying the veracity of that email, Miss Molly Murphy did not deny receiving and acting on subsequent emails in that chain of emails. Her suggestion to the effect that her emails had been hacked to seek to establish that there was no good reason for cancelling the claimant's training was wholly incredible.
61. Another example is the vitriolic campaign against Mr Robinson which he explained in his evidence. This included threats against him and his family by Miss Molly Murphy and Miss Sharon Murphy. This included verbally accusing him of being a paedophile. Mr Robinson reported the matter to the Police and instructed solicitors. He said that he did not pursue the matter because the campaign of harassment from the Murphy family had ended in May 2021. Bizarrely Miss Sharon Murphy then accused him of being a liar in this respect, on the grounds that her daughter had sent further emails to him after this date. She did not deny that she and Miss Molly Murphy had been involved in this unlawful campaign of harassment against Mr Robinson.
62. The claimant and her family also continued to repeat their allegations that the respondent had sent the letter to Miss Sharon Murphy in January 2021 referring to the claimant as "a retard"; a cousin of Chloe Dingle attacking the claimant and her family in May 2021; either Michael Robinson or Chloe Dingle sending pornographic photographs to the claimant's mother in the post in June or July 2021; and Mrs Caroline Harrison sending an abusive mock reference letter in June or July 2021. There was not a shred of evidence that any of the people working for the respondent had been involved in any way in arranging or falsifying these events.
63. For all of these reasons where there was a conflict of evidence between the claimant and those supporting her and either the respondent's witnesses and/or the contemporaneous documents, we preferred the evidence of the respondent, which in general terms was supported throughout by those contemporaneous documents.
64. Having established the above facts, we now apply the law.
65. <u>The Issues to be Determined:</u>
66. The issues to be determined by this tribunal were set out in a Case Management Order dated 5 November 2021 and confirmed in a subsequent Case Management Order dated 17 February 2022. We deal with each of these issues in turn.
67. <u>Disability Discrimination:</u>
68. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, harassment, and victimisation.

69. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
70. As for the claim for direct disability discrimination, under section 13(1) of the EqA 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.
71. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
72. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
73. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
74. We have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Cordell v Foreign and Commonwealth Office [2012] ICR 280; [Direct – High Quality Lifestyles Ltd v Watts [2006] IRLR 850; We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
75. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
76. The Claimant's Disability:
77. At all material times the claimant suffered from a mental impairment which had been diagnosed as Autistic Spectrum Disorder, ADHD, and Anxiety Disorder. This was a long-term condition in the sense that it had lasted for more than 12 months. It had an adverse effect on the claimant's normal day-to-day activities, which included concentration, and that effect was substantial in the sense that it was more than minor or trivial. The respondent has conceded that the claimant was a disabled person at all material times for the purposes of this claim, and we so find.
78. Direct Discrimination:
79. The allegations of direct discrimination because of the claimant's disability are as follows, and we deal with each of these in turn:
    i. (from June 2020 onwards) being spoken to in a derogatory manner by Storm Moore, in particular whistling to the claimant for attention and speaking to a like a baby; and
    ii. (in June 2020) when a guest made a complaint to the claimant the claimant tried to talk to Storm Moore about this but she was not listened to; and

iii. (in June 2020, on the same day as an altercation with Storm Moore) Storm Moore telling Laura Symmonds that she did not know how to talk to the claimant; and
iv. (in June 2020) Storm Moore telling the claimant that she did not need to wear a mask because she was "disabled" and "special"; and
v. (in August 2020) Storm Moore telling the claimant that she had never worked with someone like her; and
vi. (in August or September 2020) after the claimant had had a few days off work, Storm Moore said hello to everyone and said to the claimant "I forgot how to talk to you"; and
vii. (in September 2020) the respondent put the claimant in an area to work with Storm Moore which caused the claimant to have a panic attack; and
viii. (in December 2020) when the claimant put in a formal complaint, witness statements were taken but not used in the grievance meeting, and the statement of one employee, Chloe Dingle, had been changed; and
ix. paying the claimant a lower hourly rate than two of her colleagues, namely Ellie Sweggs and Charlotte Pennington.

80. For the reasons set out in our findings of fact above, with the exception of allegations (i) in part (relating to whistling); (v), and (vi), we do not accept that any of these allegations has been substantiated, and they have all been rejected. With regard to (i) in part (relating to whistling); (v), and (vi), there is simply no evidence that this conduct was related to the claimant's disability, nor that it was in any way less favourable treatment when compared with the claimant's non-disabled colleagues.
81. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been treated in the same less favourable manner. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. 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 act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.
82. In this case the claimant has not proven any facts upon which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.
83. Harassment Related to Disability:
84. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).

85. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.
86. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunal's 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." Similarly, Langstaff P emphasised in Betsi at para 12: "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 ..."
87. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."
88. The allegations of harassment are as follows, and we deal with each of these in turn:
    i. (in December 2020) making fake allegations of threats to Ms Chloe Dingle from the claimant; and
    ii. (in January 2021) making death threats to her mother and calling the claimant "a retard" in a letter to the claimant purporting to be from the respondent; and
    iii. (in May 2021) being attacked in the street by a cousin of Ms Chloe Dingle; and
    iv. (in June/July 2021) pornographic photographs sent in the post by either Mr Michael Robinson or Ms Chloe Dingle; and
    v. (in June/July 2021) receiving an abusive letter allegedly sent by Caroline Harrison.
89. For the reasons explained in our findings of fact above we have no hesitation in rejecting the allegations that any of these matters were caused by or involved the respondent. There is simply no evidence of the same. The claimant has simply not established that the respondent committed any acts of harassment which were related to the claimant's disability. We have no hesitation in rejecting this claim.
90. Victimisation:
91. The claimant's claim for victimisation relies on one protected act, as follows: "namely in September 2020 making a complaint to the respondent about one of its employees

Mr Michael Robinson". The respondent does not concede that this was a protected act for the purposes of section 27 EqA.

92. In fact, the complaint in question was the email on 2 October 2020 from the claimant's mother to the then general manager Dulce Marquese about the then Deputy Head Housekeeper Mr Michael Robinson. That email is headed "disability discrimination" and alleges that the claimant is facing discrimination in her department because of her "unseen disability" and amongst other things accuses Mr Robinson of continuing to place her with Miss Storm Moore with the result that her mental health was affected. The email also referred to "workplace disability discrimination" and explained that it was a "formal letter of complaint".
93. We are satisfied that this email effectively alleges that Mr Robinson and/or Miss Moore have contravened the disability discrimination provisions of the EqA, and for that reason we find that it satisfies section 27(2)(d) of the EqA, and accordingly it was a protected act.
94. The detrimental or less favourable treatment relied upon for the purposes of the victimisation claim is as follows: "namely not giving the claimant any hours". This refers to the period after 2 December 2020. For the reasons explained in our findings of fact above, we have found that Mr Naustion drew up the rota for staff after the hotel reopened on 3 December 2020. He was unable to invite all staff in the housekeeping team back to work following their furlough leave because of the reduction in business. In addition, he wanted to ensure that all those returning had completed the training which had been introduced. The claimant had been unable to attend the training which had been rescheduled, and this is the reason he did not put the claimant on the rota. In addition, he explained to Mr Fiddler in the course of the second grievance investigation meeting, that although the claimant's work was good, he was unsure that she was always able to complete all of her room assignments without assistance from someone else. These are the reasons that Mr Naustion did not offer the claimant any further work at that time.
95. The correct legal test to the causation or "reason why" question is whether the protected act had a significant influence on the outcome - see Warburton v Chief Constable of Northamptonshire Police [2022] EAT, applying Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL; Nagarajan v London Regional Transport [2000] 1 AC 501; Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 and Page v Lord Chancellor [2021] ICR 912 CA. We do not accept that the claimant's mother's email complaint on 2 October 2020, which was the protected act, had any significant influence on Mr Naustion's decision not to offer the claimant any hours after 3 December 2020. It is worth recording that the claimant continued to receive her normal hours after the protected act relied upon on 2 October 2020, and before the hotel went to the lockdown again on 5 November 2020. There was simply no causative link between the protected act relied upon, and the failure by Mr Naustion to offer the claimant any more hours after 3 December 2020.
96. For these reasons we dismiss the claimant's claim for victimisation under section 27 EqA.
97. We now turn to the claimant's final claim, that of unfair constructive dismissal, but we make the point that in this context we have already found that the respondent did not commit any unlawful discrimination.
98. Unfair Constructive Dismissal:
99. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
100. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's

undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

101. We have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; and Upton-Hansen Architects ("UHA") v Gyftaki UKEAT/0278/18/RN.

102. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

103. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

104. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

105. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.

106. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and

Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

107. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."

108. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).

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

110. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

111. The alleged fundamental breaches of contract relied upon by the claimant are as follows, and we deal with each of these in turn:

    i. the respondent continued to allow Storm Moore to bully the claimant and did not take the allegations seriously; and
    ii. the respondent did not follow the ACAS Code of Practice with regard to the first grievance raised by the claimant on 19 October 2020 in respect of pay, and specifically (i) when the claimant first raised the issue with Dulcie Marquesse and Caroline Harrison, the respondent responded by beginning an investigation; (ii) Dulcie Marquesse the claimant's manager had asked Caroline Harrison to carry out an initial informal investigation into the complaint however, as Caroline Harrison was unwell, Dulcie Marquesse commenced this investigation

herself; (iii) the grievance outcome finding that the pay difference was due in part to a difference in experience was untrue; and

iii. the respondent did not follow the ACAS Code of Practice with regard to the third grievance raised by the claimant on 8 February 2021 in respect of harassment allegations. Specifically, the hearing was conducted by Caroline Harrison who did not disclose to the claimant that she was getting complaints about the claimant from another employee Chloe Dingle; and

iv. the respondent refused to cooperate with a Police investigation into harassment allegations made by the claimant; and

v. the respondent had already made a decision about the claimant's return to work before she had an opportunity to appeal the second grievance outcome; and

vi. when the claimant attended a training day on 25 March 2021, the manager, assistant manager, and another employee Chloe Dingle stared at the claimant.

112. For the reasons explained in our findings of fact above we do not accept that these assertions are true and we cannot find that the respondent without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. There was no breach of the claimant's contract of employment, fundamental or otherwise. In the absence of any breach of contract, the claimant's resignation cannot be construed as her dismissal. We find that the claimant resigned her employment and was not dismissed. Accordingly, we dismiss her claim of unfair constructive dismissal.

113. In conclusion therefore the claimant's claims are all dismissed.

114. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 56; a concise identification of the relevant law is at paragraphs 67 to 75, 84 to 87 and 99 – 110; and how that law has been applied to those findings in order to decide the issues is at paragraphs 79 to 82, 88 and 89, 91 to 97 and 111 to 113.

Employment Judge N J Roper
Dated: 31 March 2022

Judgment sent to parties:12 April 2022

FOR THE TRIBUNAL OFFICE