THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Parker	**v**	**Central and North West London NHS Foundation Trust**

Heard at: London Central **On**: 10-14 and 17-19 January 2022

Before: **Employment Judge Glennie**
Ms Z Darmas
Mr A Adolphus

Representation:
Claimant: In person
Respondent: Mr P Livingston (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the complaints in this matter are all dismissed.

REASONS

1. By her claim to the Tribunal the Claimant, Ms Parker, made complaints of constructive unfair dismissal, harassment related to disability, discrimination because of something arising from disability, indirect disability discrimination, failure to make reasonable adjustments, flexible working detriment, and failure to pay notice pay (breach of contract). The Respondent, Central and North West London NHS Foundation Trust, resists those complaints.

2. There being no objection from the parties, the hearing proceeded entirely remotely, with all evidence and submissions being given via video (CVP).

3. The Tribunal is unanimous in the reasons that follow. The Tribunal gave an oral judgment and reasons on the final day of the hearing. The Employment Judge explained that the oral reasons would address the

issues in the case but, because of restrictions of time and the desirability of giving the parties the judgment and reasons within the time allocated for the hearing, would not involve a full chronology, extracts from documents, or citation of statutory provisions, all of which would appear in any written reasons produced. The Claimant subsequently requested written reasons.

The issues

4. There was a dispute about the issues, which the Tribunal heard and determined at the outset of the hearing. Following a preliminary hearing in April 2021 a list of issues was produced. In relation to the constructive dismissal complaint, the Claimant wished to include 4 additional allegations of breaches of the implied term as to trust and confidence. Mr Livingston opposed the inclusion of these, essentially on the grounds that there was already a large number of issues to be examined and that the list should not be expanded further.

5. The Tribunal decided that the additional allegations should be included. There would be no prejudice to the Respondent, who was aware of them, and the additional material to be considered would not be excessive.

6. The Tribunal comments that the allegations within the issues were not presented in wholly chronological order. In the main body of our findings of fact we have endeavoured to keep to the chronology. In our conclusions we have reverted to the order shown in the list of issues for ease of reference.

7. The issues to be determined were therefore as follows.

8. **Constructive unfair dismissal.**

   8.1 Did the Respondent breach the Claimant's contract, entitling the Claimant to resign?

   8.2 In particular did the Respondent, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damaged trust and confidence.

   8.3 The Claimant relies, among other matters, on the following alleged breaches of the implied term of trust and confidence:

      8.3.1 The Claimant's line manager, Bernadette Lecointe employed and line managed her children within the same team at the same office.

      8.3.2 The Claimant did not receive a proper local induction or sufficient training.

      8.3.3 Failure to provide support following the Claimant's mother's death.

8.3.4 Failure to provide support in relation to the workload.

8.3.5 Failure to provide regular supervision and one-to-ones in line with contract and policy.

8.3.6 Failure to implement outcomes from Occupational Health, even though repeated on three occasions.

8.3.7 Failure to comply with policy regarding stress management in the workplace.

8.3.8 Failing to consider the Claimant's flexible working request in accordance with legislation and policy.

8.3.9 Failure to demonstrate fairness in decisions regarding the Claimant's professional development training request and annual leave requests

8.3.10 Failure to respect the Claimant's rights to confidentiality in personal matters.

8.3.11 Subjecting the Claimant to excessive micromanagement, failing to grant the Claimant autonomy, and consistently undermining the Claimant in her role as a line manager.

8.3.12 Failing to honour an agreement made in appraisal by consistently denying the Claimant the necessary equipment in order to perform her role within the context of the agreement made.

8.4 Did the above occur.

8.5 If so, did the above conduct amount to a breach of the implied term of trust and confidence, either individually or cumulatively.

8.6 Did the Claimant waive or affirm any of the alleged breaches of the implied term of trust and confidence.

8.7 Did the Claimant resign in response to the alleged breaches of the implied term of trust and confidence

8.8 Insofar as the Tribunal finds that there has been a dismissal, was this an unfair dismissal. The Respondent will argue that the reason for the dismissal was some other substantial reason and that the Respondent acted reasonably in all the circumstances.

8.9 Insofar as the Tribunal finds that a dismissal was unfair:

8.9.1 Did the Claimant follow the ACAS code of practice on disciplinary and grievance procedures and if not, should any award be reduced as a result.

8.9.2 Did the Respondent follow the ACAS code of practice on disciplinary and grievance procedures and if not, should any award be increased as a result.

9. **Disability discrimination**

9.1 It is accepted that the Claimant was disabled by reason of anxiety and depression for the duration of the relevant period.

9.2 Was the Respondent aware, or should the Respondent reasonably have been aware, at the material times, that the Claimant was disabled within the meaning of the Equality Act 2010.

10. **Harassment section 26 Equality Act 2010**

10.1 Did the Respondent subject the Claimant to unwanted conduct. The Claimant relies upon the following alleged unwanted conduct:

10.1.1 A comment in an email dated January 2019 (which was not seen by the Claimant until after the termination of her employment) which states “away with the fairies” and other comments within that email to which the Claimant was not privy at that time.

10.1.2 Being placed on performance monitoring during the appraisal on 14 March 2019 by Bernadette Lecointe, the Claimant having barely had any one-to-one meetings or supervision since joining the Respondent in January 2018 and with the Claimant unaware of any performance issues.

10.1.3 Agi Glynn advising the Claimant that she was told to “step back” in a WhatsApp message on 13 April 2019.

10.1.4 Commencing sickness absence monitoring on 2 August 2019.

10.1.5 Email from Paul Trevatt sent on 5 September 2019 advising “definitely for discussion tomorrow” regarding the Claimant.

10.1.6 An improvement notice issued by Paul Trevatt to the Claimant on 25 September 2019 advising “I felt that your conduct fell short of the expectation of your role and that the behaviour you displayed toward me was inappropriate and was not in keeping with the Trust's values”.

10.1.7 On various dates Agi Glynn and a nurse named Ewa speaking in a foreign language next to the Claimant either to exclude her or to speak disparagingly about her.

10.1.8 Comments made on 5 June 2019 by Bernadette Lecointe "she doesn't have a clue she's useless"; by Agi Glynn "if she said you're useless how can I be expected to have respect for you as my line manager after she spoke that way to me about you"; and the lack of response from Nick Bell.

10.2 If the alleged conduct occurred, was the conduct unwanted.

10.3 If so, was the conduct related to the Claimant's disability.

10.4 If so, did it have the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating, or offensive environment for her.

10.5 Was it reasonable for the conduct to have that effect.

11. **Discrimination because of something arising from disability – section 15 Equality Act 2010.**

11.1 Did the provision of a formal management report by Bernadette Lecointe on 29 April 2020 in response to the Claimant's appeal against the rejection of her flexible working request amount to unfavourable treatment.

11.2 If so, was that treatment because of something arising in consequence of the Claimant's disability. The something arising in consequence of disability is alleged to be her performance, behaviours and high level of sickness. Did these arise in consequence of her disability.

11.3 If so, was the treatment a proportionate means of achieving a legitimate aim. The legitimate aim relied on by the Respondent was to ensure the consistent application of its appeal process.

12. **Indirect discrimination section 19 Equality Act 2010.**

12.1 Did the Respondent operate a relevant provision, criterion or practice (PCP). The Claimant relies upon the following alleged PCPs:

12.1.1 Staff were required to ensure absence levels were in accordance with the respondents sickness absence policy.

12.1.2 The Bradford formula.

13. Did the Respondent apply that PCP to the Claimant.

14. Did the Respondent apply that PCP to persons without the Claimant's disability.

15. Did the PCP put people with the Claimant's disability at a particular disadvantage as compared to persons without the Claimant's disability. The disadvantage relied upon by the Claimant is being placed on sickness monitoring in September 2019.

16. Did the PCP put the Claimant at that disadvantage.

17. Was the PCP a proportionate means of achieving a legitimate aim. The legitimate aims relied on by the Respondent are:

    17.1 The fair application of its attendance management policies.

    17.2 The need to have the work done.

    17.3 Proper use of public funds.

18. **Failure to make reasonable adjustments section 20 Equality Act 2010**

19. Did the Respondent operate a relevant PCP. The Claimant relies on the following alleged PCPs:

    19.1 Staff were required to ensure absence levels were in accordance with the Respondent's sickness absence policy.

    19.2 The Bradford formula.

    19.3 The application of the Respondent's flexible working policy.

20. Did the Respondent apply the PCP to the Claimant.

21. Did or would the Respondent apply this PCP to other employees in materially the same circumstances as the Claimant who did not share the Claimant's disability.

22. Did the application of the PCP place the Claimant at a substantial disadvantage compared to employees who did not share the Claimant's disability. The Claimant relies upon the following alleged substantial disadvantages:

    22.1 PCPs 1 and 2: the Claimant was placed on sickness monitoring in September 2019.

    22.2 PCP 3: failure to agree to the flexible working request.

23. Did the Respondent fail to take such steps as it was reasonable for it to have to take to avoid the substantial disadvantage.

24. **Jurisdiction (time limits)**

25. Are any of the Claimant's claims for disability discrimination out of time. In particular:

    25.1 Do any of the claims relate to matters that occurred prior to 12 February 2020.

    25.2 If so, are those acts part of conduct extending over a period such as to come within the limitation period.

    25.3 If the claims are out of time, would it be just and equitable for the Tribunal to extend time to hear them.

26. **Flexible working detriment – section 47E Employment Rights Act 1996.**

27. Was the Claimant subjected to any of the following:

    27.1 On 29 April 2020 Bernadette Lecointe stating "Maria has high levels of sickness and I don't believe these are travel or work related" and other statements contained within the manager's report for appeal hearing.

    27.2 On 22 April 2020 Nick Bell advising "happy to sort out your zoom access so you can access it next time" (no action taken).

    27.3 On 30 April 2020 Wayne Bailey advising "I am not sure why your zoom isn't working, yes call IT".

    27.4 On 4 May 2020 Katy Millard advising "I urge you to attend zoom meeting", "I see no zoom details have been supplied" (shortly before appeal was scheduled).

    27.5 On 4 May 2020 Lou Lou Carr sends to the Claimant a zoom meeting invitation without the Claimant having access to zoom.

    27.6 On 27 March 2020 Leanne O'Sullivan stated "on this subject, I was not pleased with the comment Maria made to me yesterday when she came in briefly, 'I've just come to get some stuff, I've been told all admin are to work from home apart from you'".

    27.7 On 3 April 2020 Bernadette Lecointe stating spitefully "now you will have to find space to put the folders and in fact may have to go into the office to sort them out" (whilst Claimant was suffering post viral fatigue and during a pandemic where government advice was to stay at home), and "I would normally have queried this so perhaps I imagined I asked you".

27.8 On 24 April 2020 attempts at implementing a simple spreadsheet were cruelly misinterpreted

27.9 Email exchange between Leanne O'Sullivan and Bernadette Lecointe on 27 April 2020 relating to coming into the office (undermining Claimant's role)

27.10 Letter from Leanne O'Sullivan to Bernadette Lecointe in response to her request dated 28 April 2020, setting out concerns in relation to the working relationship with the Claimant.

27.11 30 April 2020 email from Bernadette Lecointe to a member of the team who had required assistance, and also her colleague in the same office advising that "Maria should be able to do this".

27.12 14 May 2020 email from Paul Trevatt to the Claimant "should you continue to act in this manner this will be escalated through senior HR and further action taken."

28. If so, in relation to each:

28.1 Did this amount to a detriment.

28.2 If so, was the Claimant subjected to this detriment because she had:

28.2.1 Made or proposed to make application for flexible working under section 80F Employment Rights Act 1996; or

28.2.2 Alleged the existence of any circumstances which would constitute a ground for a claim to the Employment Tribunal under section 80H Employment Rights Act 1996.

29. **Non payment of notice pay**.

30. The Claimant contends that she was entitled to 8 weeks notice pay rather than the 4 weeks that she received, because she had to terminate her employment early in order to start alternative employment.

31. The Tribunal structured its consideration and determination of the issues by dealing with the issue of knowledge of disability in the first instance, and then addressing the chronology of events and the particular allegations of breach of the implied term of trust and confidence, harassment, discrimination, failure to make reasonable adjustments, and flexible working detriments.

32. The Tribunal heard evidence from:

32.1 The Claimant, Ms Maria Parker.

32.2 Ms Bernadette Lecointe, Admin Manager, the Claimant's line manager.

32.3 Ms Agnieszka Glynn (known as "Agi"), Admin Support, line managed by the Claimant.

32.4 Dr Sarah Yardley, Consultant in Palliative Care.

32.5 Ms Leanne O'Sullivan, Triage Admin.

32.6 Mr Wayne Bailey, Associate HR Business Partner.

32.7 Mr Nick Bell, Clinical Operations Support Manager, Ms Lecointe's line manager.

32.8 Mr Paul Trevatt, at the time Clinical Service Manager, Mr Bell's line manager.

32.9 Ms Katy Millard, London Community Services Director.

33. There was a bundle of documents prepared by the Respondent and which was used as the main bundle for the hearing. Page numbers in these reasons refer to that bundle unless otherwise indicated. The Claimant did not agree with the bundle, not so much with regard to its content as to the order in which certain documents were presented, and had prepared her own appendix with documents presented in the order which she considered was correct. Page references to the Claimant's appendix of documents will be given with the prefix A.

34. The Respondent is an NHS Trust. The Claimant commenced work for the Respondent on 2 January 2018. Her role was that of a band 5 Administrator / PA within the Respondent's Islington palliative care service. The Claimant was one of two band 5 employees in the admin team, there also being 3 employed at band 4 and additional bank staff on occasions as needed (band 5 being senior to band 4). Her line manager was Ms Lecointe and she line managed Ms Glynn.

Knowledge of disability

35. Knowledge of disability is directly relevant to the complaints of discrimination because of something arising from disability and failure to make reasonable adjustments, by virtue of the following provisions of the Equality Act 2010:

15 (1)……..

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

Schedule 8:

20 (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 –

(a)…….
(b)……that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to…….

36. Knowledge of disability is not directly relevant to a complaint of harassment in the same way, but can be a relevant consideration when the Tribunal assesses whether conduct complained of was related to disability.

37. As is apparent from the statutory provisions cited above, knowledge may be actual or constructive, the latter being that which an employer could reasonably be expected to know. Both provisions place the burden on the employer to show that it did not have knowledge of the disability.

38. In the present case there was no suggestion that the Respondent had actual knowledge of the Claimant's disability, and the issue in this respect was as to constructive knowledge. The question whether the Respondent could reasonably have been expected to know of the disability has to be considered in the light of such enquiries as they should reasonably be expected to undertake.

39. The Claimant relied on a number of points in support of her contention that the Respondent had constructive knowledge of her disability. The first was her sickness absence record, which included absences for colds and viruses, and for two accidents. There were no absences attributed to anxiety or depression. One of the accidents involved her stubbing her toe while in or getting into a car, and the other being recorded as either being pulled over by her dog or tripping over her dog (it not being material to the issues in the case precisely what happened on that occasion).

40. The Claimant suggested that an individual's immune system could be compromised by depression and anxiety such that they suffered more illnesses than would otherwise be the case, and that similarly those conditions could render the individual more accident-prone. There was no evidence to support these propositions, and the Tribunal did not consider that it could take judicial notice of them: they are not self-evident or established. The Tribunal concluded that these were not matters that would put the Respondent on enquiry as to whether the Claimant might have a disability.

41. Second, to the extent that the Claimant would accept that there were issues about her conduct and performance, she argued that they could be taken as indicators of disability. The particular matters concerned were that it was observed that she tended to be distracted; that she could be disorganised; and that she was delegating work to other people where that was not necessary or appropriate. The Tribunal found that these were matters that could very well arise without there being any disability or

underlying condition, and that these would not be sufficient to put an employer on enquiry as to whether there might be a disability.

42. The Tribunal took a similar view of the point that Dr Yardley said that she observed that on occasions the Claimant seemed to be unhappy, and in particular unhappy with her work. That again is something that can very well arise without there being any disability or underlying condition, and the Tribunal did not consider that this would put an employer on enquiry as the existence of a disability.

43. There were 3 Occupational Health (OH) reports generated during the Claimant's employment, dated 21 March 2019, 13 September 2019 and 16 April 2020. The first of these, at page 564, included the observation that the Claimant was found to be fit to carry out the normal duties of her work, and stated that there were no serious health problems affecting her. The report said that the Claimant had been experiencing difficulty concentrating and that she had been unable to grieve the loss of her mother (an aspect of the case that will arise later in another context). The report stated that a stress risk assessment regarding work issues should be carried out (another aspect that will arise for consideration later) and identified that the Claimant was experiencing moderate anxiety.

44. The report of 13 September 2019 at page 711, compiled by a different OH adviser, also stated that the Claimant was fit to work and to perform the full range of her duties. The report stated that there was an underlying condition and that this was controlled by medication, but said no more about the nature of that condition. The report again referred to work factors that were having a negative effect on the Claimant and said that the stress risk assessment previously carried out should be revisited (there being a separate issue about whether or not that assessment was in fact carried out, or completed).

45. The third OH report, dated 16 April 2020, at page 870 arose from a referral accompanied by the Claimant's sickness absence record. The OH adviser had also carried out a separate assessment of the Claimant, at page 1159, which was not seen by anyone on behalf of the Respondent at the time. That assessment was sent to the Claimant under cover of an email at page A70, in which the adviser said that she had scored quite highly for anxiety and depression, and asked whether she had experienced any suicidal thoughts (which she had not).

46. Returning to the OH report itself, this recorded that there were no serious problems and did not refer to any underlying condition (although the Tribunal considered that there was no reason for anyone reading the report to assume that the condition mentioned in the second report had resolved or gone away). This third report repeated the advice in the second about revisiting the stress risk assessment.

47. The Tribunal considered that, taken as a whole, these reports would lead the reasonable employer to conclude that there was no medical explanation

for performance or other difficulties in relation to the Claimant's work. They would know that there was an underlying health condition, but there was nothing in the reports that would tell those reading them that there was or might be a disability. The Tribunal considered that managers reading OH reports could reasonably expect the advisers producing them to identify at least the possibility of a disability if they considered this to be the case.

48. The Tribunal also noted that, at a one-to-one meeting on 19 August 2019 between the Claimant and Ms Lecointe, documented at page 1207, a note was made of the existence of an underlying condition, although it is evident that nothing was said about what this was.

49. So far as the knowledge of OH advisers is concerned, the Court of Appeal in **Hartman v South Essex Mental Health and Community Care NHS Trust [2005] EWCA Civ 06** stated that, in general, OH information is confidential to the OH advisers and cannot be revealed to an individual's managers without their consent. This is reflected in the Respondent's policies in the present case. Thus, knowledge on the part of OH advisers cannot generally be imputed to the employer even if (and in any event there was no evidence that this was the case) what the OH advisers were told should have put them on notice that the employee might have a disability.

50. The Tribunal has therefore concluded that none of the matters relied upon by the Claimant were such as to give rise to constructive knowledge of her disability on the part of the Respondent. We also considered whether, taking all of these into account, the wider picture should have put the Respondent on enquiry as to the existence of a disability. We concluded that it was not of such a nature: the overall picture was of an employee who was fit for all the duties of her role, who had some performance issues, who had a record of sickness absences for minor illnesses and accidents, and who might be experiencing some work-related stress.

51. The Tribunal therefore concluded that the Respondent had shown that it could not reasonably have been expected to know that the Claimant had the disability.

Chronology of events complained of and findings of fact

52. The Claimant relied on a number of matters which occurred relatively early in her employment as breaches of the implied term of trust and confidence.

53. There was a dispute about whether the Claimant received adequate induction training on joining the Respondent. The Claimant attended the Respondent's corporate induction, but the issue was about local induction. The Claimant's case was that she received no induction into the local office. Ms Lecointe's evidence was that the Claimant received on the job training from Ms Glynn and Ms Lecointe's son (a bank worker) in particular. In her oral evidence the Claimant agreed that she had not asked for any other induction, and when asked by the Tribunal what training should have been given but was not, she referred to statistics and the use of the same,

and who did what in the department. The Tribunal found that the use of statistics was the subject of ongoing change throughout the Claimant's employment, and that the question of who did what in the department was something that could be learned about on the job.

54. The Tribunal found that there was no local induction carried out in a formal sense. While it might have been an improvement to have provided such, the Tribunal did not consider that any deficiency in this regard was serious. Nor was it realistic to maintain, as the Claimant did, that this formed part of the reason for her resignation in May 2020.

55. The Claimant also complained that Ms Lecointe's 2 adult children were engaged as bank staff who worked with the team on occasions and that this amounted to nepotism, which she maintained should not occur. The Tribunal did not consider that this in any way involved a disadvantage to the Claimant, as their engagement as bank staff did not adversely affect her.

56. The Claimant's mother died unexpectedly on 6 March 2018. The Claimant's case was that she was offered no support at this time. In her witness statement the Claimant said that she was "expected to just continue as if nothing had happened". She also complained of an email at pages 495 to 496, which she first read on receiving it as part of the disclosure of documents in the case, which referred in this connection to her "quiet and private nature".

57. The Claimant had 5 days leave at the time of her bereavement. When asked what should have been done by way of providing support, the Claimant suggested that she should have been offered further leave, and that she should have been referred to OH. It is the case, however, that the Claimant did not ask for additional leave or indicate that she needed any further help.

58. In the circumstances, the Tribunal found that it was not correct to say that the Respondent had failed to support the Claimant. We also concluded that it was not realistic to maintain that any perceived lack of support can have been a part of the reason for the Claimant's resignation over a year later: furthermore the email cannot have been a reason for the resignation as the Claimant was unaware of it until after she had resigned.

59. The Claimant also maintained that, from the outset of her employment, the workload was excessive and that there was a lack of support, in particular from Ms Lecointe, in this regard. The Respondent's evidence, in summary, was that there was indeed a heavy workload, but that this was affecting the whole team.

60. Specifically, there was an email exchange at page 509 on 17 April 2018 where the Claimant asked for a member of the bank staff to assist her and Ms Lecointe explained why this could not be done. Another email at page 514 on 16 July 2018 showed Ms Lecointe acknowledging that the Claimant

was on her own and saying that she and the one other person in the office (in fact her daughter) would help if they could. Somewhat later, on 10 April 2019, when the Claimant sent an mail asking Ms Lecointe to man the phones for a while, Ms Lecointe replied at page 604 “no problem I will man the phones. It does seem that we are fire fighting but we can only do what we can do”.

61. When asked about these matters in cross examination, the Claimant said that these were in reality disguised refusals of help because the apparent offers were accompanied by observations about the workload being borne by Ms Lecointe and others. The Tribunal found that this was not the case and that the offers were genuine, albeit subject to the restrictions imposed by the workload that Ms Lecointe and others were themselves experiencing.

62. On pages 1187 to 1188 there were notes of one-to-one meetings in October and November 2018 where the Claimant raised the heavy workload. In her evidence Ms Lecointe said that the workload was indeed heavy for everyone. The Tribunal accepted that this was the case: it is generally recognised that this is so within the health service. The Tribunal accepted that there was no scope for the Respondent to redistribute work from the Claimant to other members of the team, as all were working at full capacity.

63. A further complaint made by the Claimant, the failure to provide regular supervision and one-to-one meetings, was, as she agreed, confined to the first ten months of her employment. Later there clearly were documented one-to-one meetings with Ms Lecointe. There was a dispute about whether it was right to say that there had not been one-to-one meetings before October 2018. It is the case that none were documented before October 2018, and the Tribunal concluded that there was at least a change in terms of the degree of formality in Ms Lecointe’s management of the Claimant. In any event, however, the Tribunal found that a lack or perceived lack of one-to-ones in the period January to October 2018, which was rectified for the later period of employment, could not realistically be a part of the reason why the Claimant resigned in May 2020.

64. The Claimant also made two complaints relating to health matters. One was a failure to implement OH recommendations. The Claimant also complained of a related failure to implement policy regarding stress management.

65. As stated above, there were three OH reports. In the first of those there was a recommendation that a stress risk assessment be carried out. The Claimant’s evidence about this was that it may have been the case that this process had been started, but she said that it certainly was not finished or acted upon. The Respondent’s position was that this assessment was carried out at this stage. The Tribunal found, as a matter of probability, that the Claimant was correct about this aspect. There was no document of the sort that came into existence after the third OH report, and if the process

had gone further than a discussion, one would expect to see such a document. It is true that, in the second OH report, the adviser refers to revisiting the first assessment, but the Tribunal did not find that this meant that an assessment had been carried out and completed. It was equally possible that this statement rested on an assumption by the adviser that the assessment had been completed, given that it had been recommended in the previous report.

66. The Claimant's evidence was that after the second report in September 2019 she met Ms Lecointe to discuss stress risks, but nothing came of this meeting. Again it seemed to the Tribunal that the Claimant's recollection of this was probably correct, because there was no document and no evidence of any steps being taken as a result of such an assessment.

67. After the third report in April 2020 a formal risk assessment was carried out, as documented at pages 441 to 445. As matters turned out, this was within 2 weeks of the Claimant's resignation, but this document was completed and to the extent that no action was taken on it, the Tribunal found it likely that this was because it was overtaken by the Claimant's resignation.

68. The Tribunal will explain its conclusions about this aspect in relation to the complaint of constructive unfair dismissal later in these reasons.

69. There were 4 other matters that the Claimant relied on as breaches of the implied term of trust and confidence and which did not relate to specific incidents or were complaints of matters that took place over a period of time. The first of these was a failure to demonstrate fairness in decisions regarding the Claimant's professional development, training requests, and annual leave requests.

70. There were two requests for training in issue. In respect of one of these, Ms Lecointe declined this because she considered that the training was not relevant to the Claimant's role. Ms Lecointe's evidence was that she declined the second because she did not consider that it was viable for Ms Glynn and the Claimant to be absent from the office at the same time, and that as Ms Glynn had already been signed up to that particular course, the Claimant's request could not be accommodated.

71. The Tribunal found that these were reasonable management responses to the situations and did not amount to breaches of the implied term. Furthermore these occurred in June 2019 and could not realistically be part of the reason for the Claimant's resignation in May 2020.

72. So far as annual leave is concerned, this was not a complaint that annual leave was refused, but rather about an email that Ms Lecointe sent in response to the Claimant booking annual leave for herself at dates close to the statutory bank holidays. In this Ms Lecointe said that although there was a first come first served system, the Claimant should check with her colleagues about their leave requirements around those particular times. The Tribunal considered that the realistic interpretation of this was that she

should try to coordinate her leave with that of her colleagues. The Tribunal considered that this was a fairly ordinary exchange on a management matter and was not a breach of the implied term. Furthermore, if for any reason it should be regarded as a breach of the implied term, this occurred in October 2019 and so a considerable time before the Claimant's resignation in May 2020. In the Tribunal's judgment, this could not realistically form part of the reason for the resignation.

73. There was a generally expressed complaint of failure to respect the Claimant's rights to confidentiality in personal matters. This relates to 2 emails that only came to the Claimant's attention after her resignation, and so cannot have formed any part of the reason why she resigned.

74. The third general allegation was that of subjecting the Claimant to excessive micromanagement, failing to grant her autonomy, and consistently undermining her in her role as a line manager. The Claimant's evidence on this, in essence, was that everything had to be done the way Ms Lecointe required, and she gave examples including an exchange about access to the shared drive, spreadsheets issues, and another issue about forms being provided to the office where the Claimant stated that there should be 100 copies of a particular form and where Ms Lecointe said that 50 would suffice. Again, the Tribunal found that these were ordinary matters of management and that they did not amount to breaches of the implied term.

75. The fourth generally expressed matter was that of failing to honour an agreement made in an appraisal by consistently denying the Claimant the necessary equipment for her role. This related to a laptop and an issue that arose in 2019, at which time it was not envisaged that the Claimant would be working from home to any substantial degree, although that might occur occasionally. The Respondent's position was that in those circumstances it was not possible to provide the Claimant with her own laptop and that if the occasion arose she could ask to borrow a laptop to use at home, or could make use of a dongle to use on whatever device she might have available at home. Again, the Tribunal found that these were reasonable management decisions and not a breach of the implied term. Furthermore, these matters also occurred in 2019 and could not realistically form part of the reason for resigning in May 2020.

76. Returning to specific incidents and setting these out now chronologically, Dr Yardley stated that by January 2019 there were concerns about the Claimant's performance, a result of which she sent an email on 28 January 2019 at pages 531 to 534 to members of the senior clinical team. This email recorded a comment (Dr Yardley could not now remember who had made it) that the Claimant was "away with the fairies". The Claimant was unaware of this at the time, but saw the email when it was disclosed in the course of the current proceedings. She relied on this comment as an act of harassment.

77. On 14 March 2019 Ms LeCointe held an appraisal meeting with the Claimant, the outcome of which was that she was placed on performance monitoring. In paragraph 17 of her witness statement Ms Lecointe gave as an example of the performance concerns that had arisen before that date the Claimant just getting on with her work when people came into the office rather than showing an interest in what they were saying. In paragraph 22, Ms Lecointe referred to Ms Glynn and Ms O'Sullivan having to help the Claimant with her work when they had their own to do, and the Claimant not updating spreadsheets at the end of the month as required.

78. The Claimant stated that at the time of this appraisal, she did not refer to anxiety or depression as possible factors as she did not then have any idea that she was not performing, or that her condition could affect her performance.

79. The Tribunal accepted that Ms Lecointe's concerns were genuine, and that her placing the Claimant on performance monitoring was a result of those concerns.

80. Another matter complained of as amounting to harassment was that on 13 April 2019 the Claimant and Ms Glynn exchanged WhatsApp messages at page 608. The Claimant wrote: "hi Agi, sorry I was being bossy yesterday, didn't mean to be horrible, just stressed I guess……" Ms Glynn replied: "don't worry, you just did what you were told to do, I guess. I was told to step back, which I have, but it didn't serve me well did it? I much prefer being proactive, then there's no need for you to be bossy. Don't worry, we're all stressed to breaking point, so very understandable…"

81. In cross-examination the Claimant said that she was "taken aback" by the reference to stepping back, although she did not ask Ms Glynn what she meant by this. Ms Glynn's explanation was that Ms Lecointe had asked her to step back because team members were coming to her rather than to the Claimant, and that the Claimant should have more of a chance to show her capabilities. The Tribunal found that this exchange was of little consequence: it was a fairly ordinary interaction between colleagues reflecting on a situation where they had perhaps been a little annoyed with each other.

82. On 5 June 2019 a further incident occurred which the Claimant complained of as amounting to harassment. The Claimant's account was that she overheard a telephone conversation between Ms Glynn and Ms Lecointe in which the latter said that the Claimant did not have a clue. Ms Glynn later told the Claimant that Ms Lecointe had said that she was useless and added "if she said you're useless how can I have respect for you as my line manager if she spoke that were you to me about you".

83. Ms Glynn's account was that she spoke to Ms Lecointe on her mobile and she understood that the Claimant believed that she had heard Ms Lecointe say that she was useless. Ms Glynn continued that the Claimant subsequently asked "how would you respect me as your line manager now

when my own line manager speaks about me to you like that" (effectively the same words that the Claimant attributed to her).

84. Still on 5 June 2019 the Claimant sent an email to Ms Lecointe complaining that the latter had said that she did not have a clue about the rota in question. In reply, at page 628, Ms Lecointe apologised for her tone. The matter was also referred to at an appraisal meeting between Ms Lecointe and the Claimant on 14 June 2019. The Claimant said that Ms Glynn had told her that Ms Lecointe had said that she was really useless. Ms Lecointe said that she wouldn't have used those terms, but that if she had, she apologised.

85. Although there are differences of detail about what occurred on this occasion, the Tribunal found that these differences were of no real significance. It was it was evident that the essential facts of this complaint were made out.

86. A further aspect of this complaint was that Mr Bell did not intervene when he learned about the matter. He accepted that it would have been better if he had done so and had asked the parties to speak to each other. Although his understanding was that Ms Lecointe had apologised, he agreed that he should have followed that up in order to check that the Claimant was satisfied with that. The Tribunal accepted that it was an oversight on his part that he did not do so.

87. On 2 August 2019 the Respondent commenced a process of sickness absence monitoring with regard to the Claimant. This involved the use of the Bradford Score, a well-known system for identifying and monitoring persistent short-terms absences in particular. The Tribunal found that this sort of monitoring is a fairly ordinary feature of working relationships and that it was not surprising that the Respondent chose to monitor the Claimant's absences, given the number of them over the relevant period. The Tribunal found that the Respondent was doing no more than following a procedure that they had in place for the purpose of monitoring and managing sickness absences. The Tribunal has already indicated that the nature of the reasons for the absences were not such as to be obviously linked to any condition of depression and anxiety.

88. On 5 September 2019 Mr Trevatt sent an email to a colleague (not to the Claimant) referring to the Claimant and using the words "definitely for discussion tomorrow". Again, this is not an email that the Claimant saw at the time, having become aware of it on disclosure in the present case. That said, the Tribunal considered that the words "definitely for discussion tomorrow" were a fairly ordinary sort of communication.

89. On 25 September 2019 Mr Trevatt issued an improvement notice at pages 716-7 to the Claimant. By way of background to this, Mr Trevatt said in his witness statement in general terms that the Claimant was challenging to Ms Lecointe and that there was friction between her and Ms Glynn and Ms O'Sullivan. On 5 September 2019 Mr Trevatt had an email exchange with

the Claimant about arranging some meetings. He was not content with her response, this leading to the email containing the words “definitely for discussion tomorrow” referred to above.

90. After this, Mr Trevatt’s evidence was that he passed the Claimant in the corridor later that day and “good morning” to her. She did not reply: he said the same thing again and she ignored him. The Claimant agreed that on this occasion she had not responded to Mr Trevatt. When cross-examined about this she said that this was partly because by then it was afternoon; and she added “there had also been provocation”.

91. Mr Trevatt and the Claimant had a meeting on 16 September 2019. It was common ground that this concerned the issues about arranging meetings and not responding to Mr Trevatt. The latter said that the Claimant’s behaviour at the meeting was one of passive aggression and agitation. The Claimant denied speaking angrily to Mr Trevatt.

92. Mr Trevatt consulted HR about these matters and was advised against giving a formal warning, the suggestion being made that instead he could issue an improvement notice. Mr Trevatt saw the Claimant again on 25 September 2019. It is common ground that the Claimant apologised at this meeting. On 26 September 2019 Mr Trevatt issued an improvement notice at pages 716 to 717. The Claimant did not complain about this. In cross-examination she said that she accepted the notice because she was tired of fighting, and agreed that she heard no more about the matter.

93. There was also a general allegation of harassment to the effect that Ms Glynn and a colleague named Ewa spoke a foreign language (in fact Polish) in the Claimant’s presence with a view either to excluding her or to speaking disparagingly about her.

94. There was some degree of dispute of fact about this issue. Ms Glynn's evidence was that this happened once when she was speaking in Polish to a colleague in the corridor. The Claimant arrived and overheard them speaking, whereupon they switched to English. The Claimant subsequently took the matter up with Ms Glynn, who thought it best to apologise although she did not believe she had done anything wrong. The Claimant’s evidence was that there was not just a single occasion when something like this occurred. She recalled a particular occasion when all three were sitting together and Ms Glynn and Ewa spoke in Polish, she believed so as to talk about her.

95. The Tribunal concluded that it would be difficult for Ms Glynn and Ewa to have rigorously avoided speaking Polish to the extent suggested, and the probability was that the Claimant overheard them speaking Polish on more than one occasion. The Tribunal also found, however, that the reason why they spoke Polish on occasions was that this was their joint first language, and was not for any reason connected with the Claimant. There was no evidence to suggest that they were talking about her or trying to exclude her.

96. In March to May 2020 there was a series of events which the Claimant complained of as amounting to detriments suffered because she had made a flexible working application. The application, at pages 780 to 781, was made on 30 January 2020. In it, the Claimant asked to work from home two days per week, and cited the following as reasons for this application:

    96.1 She was experiencing travel anxiety as a result of accidents she had suffered, such that it would be beneficial to reduce the stress of a lengthy and unreliable commute.

    96.2 The stressful environment in the office had caused physical ill health.

    96.3 The Claimant had obligations to provide care for a family member (her brother).

    96.4 There would be less exposure of the Claimant to viruses on public transport.

    96.5 The Claimant's work / life balance would be improved, meaning that she would be more productive.

97. Ms Lecointe consulted others, including Mr Trevatt, about the request. She and the Claimant met on 21 February 2020. Ms Lecointe said that she could not support the request, but suggested varying the Claimant's hours to 8:00 AM to 4:00 PM with a view to avoiding the busiest times on public transport and enabling her to get home earlier in order to support her brother. Ms Lecointe wrote on 28 February 2020 at pages 826 to 828 confirming the outcome, which was that the request was refused, subject to the suggestion about the change in hours for each working day.

98. Ms Lacointe accepted that there had been a degree of delay in dealing with the request, as the Respondent's policy provides that a meeting should take place within 14 days of the request: the meeting was therefore just over a week late. She said that she had not been able to address it sooner because in addition to the usual pressures of work, she was also having to deal with the early stages of what proved to be the COVID-19 pandemic. The Tribunal accepted Ms Lecointe's evidence on this point.

99. The Claimant appealed against the refusal on 16 March 2020 at pages 833 to 835. The appeal was referred to Ms Millard. The Claimant made two main points about the appeal. One was that Ms Lecointe was angered by it as it amounted to a challenge to her decision. Ms Lecointe denied this, saying that the Claimant was entitled to make a request for flexible working. The a Tribunal found it improbable that Ms Lecointe was seriously annoyed or angry about the appeal.

100. The second point was that there was a delay in dealing with the appeal, such that it remained unresolved by the time of the Claimant's resignation. In that regard, Ms Millard sent a letter at pages 952-953 on 27 April 2020

inviting the Claimant to an appeal hearing by zoom on 4 May 2020. The Respondent's policy provides that the appeal meeting should take place within 21 days of the notice of appeal: the meeting was therefore about 4 weeks late. The Tribunal observed that by this time, the first lockdown was in place and the Claimant was working from home in any event.

101. The Claimant complained of a number of events which occurred between Ms Lecointe giving her the outcome of the flexible working application and the date set for the appeal hearing. The Claimant relied on these as flexible working detriments. The chronology of these as set out in the list of issues was particularly jumbled and the Tribunal will give the identification letters for each allegation in the paragraphs that follow.

102. Item F arose on 27 March 2020. On that date Ms O'Sullivan sent an email to Ms Lecointe at pages 842 to 843 on the subject of being asked to come into the office when others were working wholly or partly from home. The email included the observation that Ms O'Sullivan was not pleased with the comment made by the Claimant when she had briefly come to the office in terms of "I've just come in to get some stuff, I've been told all admin are to work from home apart from you".

103. In cross-examination the Claimant put it to Ms O'Sullivan that her reason for writing this was to stir up trouble for the Claimant because she was after her job. The Tribunal found that the most likely explanation for Ms O'Sullivan writing what she did was, as she said, because she did not like what the Claimant had said to her. In either event, this was not connected with the Claimant's flexible working request. In addition, the Tribunal accepted Ms O'Sullivan's evidence that she did not know about that request at the time.

104. Allegation G concerned an email which Ms Lecointe sent to the Claimant on 3 April 2020 which included the following with reference to some boxes of folders that had been delivered to the office: "now you will have to find space to put the folders and in fact may have to go into the office to sort them out". This followed a disagreement between the Claimant and Ms Lecointe over how many folders to order, and a complaint by Ms Glynn that a large number of these had arrived and had created a tripping hazard in the office.

105. The Tribunal found that Ms Lecointe wrote what she did for the simple reason that she was not pleased with the number of folders that had been ordered and because it was necessary for someone to go and sort them out.

106. Items B, C, D and E all concerned the arrangements for of the appeal hearing which was to take place by Zoom. Since these are all related, the Tribunal will deal with them together rather than keeping to the strict chronology. The Claimant's case was that she did not at this time have access to Zoom and in this context complained of the following email communications:

106.1 Item B: on 22 April 2020 Mr Bell writing “happy to sort out your Zoom access so you can access it next time” and Mr Bell then not sorting it out.

106.2 Item C: on 30 April 2020 Mr Bailey writing “I am not sure why your Zoom isn't working, yes call it” and IT advising that Zoom was not supported by the Respondent.

106.3 Item D: on 4 May 2020 Ms Millard writing “I urge you to attend the Zoom meeting” and “I see no Zoom details have been supplied”, this shortly before the appeal was to take place.

106.4 Item E: also on 4 May 2020 another colleague Ms Carr sending the Claimant a Zoom meeting invitation without the Claimant having access to Zoom.

107. The Tribunal found that all of these were genuine attempts to enable the Claimant to attend the Zoom meeting and that the reason why the individuals wrote what they did was that they wanted to facilitate the Claimant’s attendance. The Tribunal found it implausible that all of these were trying to “get at” the Claimant in some way, or that they were doing so as a reaction to her having made the flexible working request. There was no reason why all of these individuals should have reacted adversely to the making of that request.

108. Item H was a complaint that on 24 April 2020 the Claimant's attempts to implement a spreadsheet for logging requests for stationery were “cruelly misinterpreted”. The relevant email exchange was at pages 909 to 911 and took place between the Claimant, Dr Stirling and a clinician, Ms Sallnow. On the face of this exchange the Claimant was proposing to use the spreadsheet and Dr Stirling replied that although this was “a great suggestion”, she doubted that the clinical staff would have the time to implement it. Ms Sallnow agreed.

109. The Tribunal considered that this exchange should be taken at face value. There was nothing to suggest that it was in anyway connected with the Claimant’s flexible working request, or that the two individuals involved knew about that request, or were concerned about it.

110. Item I involved the Claimant, Ms O'Sullivan and Ms Lecointe in an email exchange of 27 April 2020 at pages 965 to 970. In summary, the Claimant asked Ms O'Sullivan if she would go into the office to print some documents. Ms O'Sullivan replied that she was going in the following day in any event and asked whether that would be soon enough. Ms Lecointe intervened to say that the following day would suffice and suggesting that about 50 forms should be printed. The Claimant indicated 100 forms and Ms Lecointe stated that printing 100 copies would not be a good use of Ms O’Sullivan's time. (This incident has already been referred to earlier in these reasons as an aspect of the complaint of micromanagement).

111. The Tribunal found that this was an ordinary management intervention by Ms Lecointe on a routine matter. There was no reason to believe, as the Claimant suggested, that Ms Lecointe's intention was to undermine her.

112. Item J concerned a complaint made by Ms O'Sullivan on 28 April 2020 at page 954, following being asked by Ms Lecointe about her working relationship with the Claimant. Ms O'Sullivan referred to the issue about documents the previous day and to the comment recorded on 27 March 2020. More generally, Ms O'Sullivan said that she had experienced constant poor behaviour since December 2019 from the Claimant and that the working relationship had become untenable. She said that there had been multiple instances where the Claimant had upset her or made her feel uncomfortable at work.

113. The Tribunal has already found that Ms O'Sullivan did not know about the Claimant's flexible working request at this time. We found that the relationship between Ms O'Sullivan and the Claimant was problematical and that it was for this reason that Ms Lecointe asked for Ms O'Sullivan's thoughts, and the latter gave them.

114. Item A concerned Ms Lecointe's report for the appeal hearing dated 29 April 2020. In particular, the Claimant complained of the observation that she had high levels of sickness and "I don't believe these are travel or work related". This appeared in what Ms Lecointe described as her working notes of her response, at pages 977, which she sent to Mr Bailey and which he (unknown to Ms Lecointe) sent to the Claimant. The final version of the response, at pages 978-980, did not contain this passage.

115. Whether the working notes or the final version of the report were under consideration, the Tribunal considered that this was a straightforward account of matters that Ms Lecointe wanted to put forward in relation to the Claimant's appeal and could not realistically be regarded as constituting any form of detriment to the Claimant. The Tribunal considered that there was no reason why Ms Lecointe might or should have thought that the colds, viruses and accidents which had caused the Claimant to be absent sick were related to work or travel.

116. In item K the Claimant identified as a detriment the comment "Maria should be able to do this" in an email on 30 April 2020 at page 996 from Ms Lecointe to a colleague. The context of this was that a clinician had asked for access to the shared drive; the Claimant had suggested that she should contact the IT department; Ms Lecointe considered that doing so was not a good use of the clinician's time and that it would be better for the Claimant to make contact; but then subsequently dealt with it herself.

117. All of this again appeared to the Tribunal to be a fairly ordinary working situation in which Ms Lecointe ultimately decided to take action herself because this was, as she saw it, an administrative matter. The Tribunal did not consider that there was any connection between this and the Claimant's

flexible working request, nor could it realistically be regarded as constituting any form of detriment to her.

118. The Tribunal will deal with the final alleged detriment, item L, after describing the events of 4 May 2020, the date set for the appeal hearing to be conducted by Ms Millard. On the morning of 4 May 2020, before the time set for the appeal hearing, Ms Millard received an email from the Claimant to which was attached a letter which read as follows:

"To whomever it may concern and appeal panel.

"Dear appeal panel,

"After attempts in my appeal documentation from being heard and taken into consideration by my manager. I feel I have been left no option but to resign. (I attach an email my manager sent on Friday, please read the email trail to locate the original email from her) This is the final straw for me.

"I feel this has been coming for quite a long time as over time and on reflection particularly whilst working on my appeal and response to my managers response, I have come to the realisation that Bernie Lecointe has been doing her utmost to get rid of me, to make things so difficult for me, I expressed once to her that I felt like coming to work was like going into battle. I cannot continue to work efficiently and affectively in tis toxic environment and will be considering taking this to tribunal because I feel the trust has failed me, failed in its duty of care, which has been detrimental to both my physical, and mental health and wellbeing. I request that I may take "gardening leave" with immediate effect in order to seek out alternative employment and in order to prepare my case for tribunal. If I have to serve out my notice I will continue to work hard for the benefit of the patients and the nursing team as I have always done and whom I have the utmost respect for, but I can no longer give my all, I am physically and mentally exhausted by this onslaught upon me.

"Aside from this and following attempts to access Zoom for the appeal meeting I was invited to and initially asking Nick Bell, who had offered help when I couldn't access a meeting previously with no response, and then asking IT, specifically [an individual] whom I asked for help who explained to me they've been told "they do not support Zoom", I have no faith in the process of appeal, it seems to have been handled very haphazardly, from start to end, and although I think I have a very good chance of a positive outcome for me. I can't trust the process and I no longer feel that to work from home two days of the week will be enough to alleviate my stress, I will still have suffer because she will make sure of it.

"Yours sincerely
Maria Parker"

119. There was at page 1009 a document dated 1 May 2020 which was similar to parts of the 4 May letter. The Claimant thought that this might have been an earlier draft which she had inadvertently disclosed: the Tribunal did not consider it to be of great significance to the issues.

120. Ms Millard replied to the Claimant's letter at page 1028 asking her to attend the appeal hearing nonetheless. Ms Millard wrote again on the same day at pages 1019 to 1020 asking the Claimant to reflect on whether resigning was the right thing for her to do, and whether she would like to proceed with the appeal. Ms Millard also stated that the Respondent would not allow gardening leave for the purposes identified by the Claimant.

121. Ms Millard further stated in her evidence that, had the appeal proceeded, she probably would have allowed it, to the extent of granting a trial period of the flexible working that the Claimant had requested.

122. An aspect that was brought out in cross-examination was the chronology of the Claimant's search for alternative employment. Page 883 was a letter dated 21 April 2020 from Barking, Havering and Redbridge University Hospitals NHS Trust ("Barking") confirming the offer of employment as a Patient Pathway Co-ordinator – Medical Secretary, commencing on 1 June 2020. The letter contained an IT username for the Claimant.

123. The Claimant agreed that she had accepted the role with Barking, probably within a few days of 21 April 2020. She agreed that the role was located much closer to her home, in Romford, although she pointed out that it was a Band 4 position. The Claimant said that she had not made a firm decision, but needed something to fall back on.

124. Mr Livingston put it to the Claimant that she had asked for gardening leave to seek alternative employment when she had already obtained this, with a starting date within her notice period. The Claimant replied that having an offer did not mean that she had the position, and that even if she had accepted it, she might not ultimately have taken it up.

125. The Claimant continued working during her notice period until 29 May 2020 (Friday), when she ceased work. In an online survey at page 1103 explaining her departure, the Claimant wrote: "I was not able to continue working my notice period that is why I am leaving today. My manager is coming back on Monday and I would not want anything to do with her" and "I have found another job at a lower band……."

126. Mr Livingston put it to the Claimant that she was lying in this document and that the real reason why she left at this point in her notice period was that her new job was due to start on 1 June 2020 (Monday). The Claimant replied that she accepted that she had a job starting on 1 June, but that if she had not had a job, she would not have wanted to face her manager.

127. The Tribunal considered that the true significance of this was not so much whether the Claimant had lied in this document, or had given a misleading

reason for asking for garden leave, but that it showed that it was unequivocally her own decision to cut the notice period short, and that at least a substantial part of the reason for this was the need to start her new job.

128. There remains item L of the matters relied on as flexible working detriments. On 14 May 2020, while the Claimant was working during her notice period, she sent an email to Mr Bell, copied to the admin team, in which she included the observation: "you will be aware I've had no option but to resign because of Bernie's treatment of me and the lack of support from senior managers when I've tried to escalate, so I wish the admin team all the best…."

129. Mr Trevatt replied on the same day as follows:

"Following your resignation I am writing to you formally to ask you to stop openly criticising Bernie and other senior members of the admin team (or ay other members of the service for that matter). While is indeed sad and unfortunate that you are leaving this does not give you license to act in this way.

"Should you continue to act in this manner this will be escalated through senior HR and further action taken."

130. The Tribunal found that the reason why Mr Trevatt sent this email was, in accordance with his evidence, the straightforward one that he considered that this should not be happening and that he wanted it to stop. This was not, the Tribunal found, in any way connected with the fact that the Claimant had made a flexible working application.

The applicable law and conclusions

131. The Tribunal has already given its conclusions on the issue as to the Respondent's knowledge of the Claimant's disability. Returning to the list of issues, we will now give our remaining conclusions on the issues in the order in which they appear in the list. Many of the relevant findings have already been recorded above, and in those cases the Tribunal will give only a summary at this stage.

Constructive unfair dismissal

132. The first question is whether a breach, or breaches, of the implied term occurred. The Tribunal reached the following conclusions on this point, set out using the identifying letters in the list of issues:

(a) Did not amount to a breach as the engagement of Ms Lecointe's children did not adversely affect the Claimant.

(b) Did not amount to a breach because any deficiency was not serious.

(c) Did not amount to a breach as the allegation of failing to support the Claimant was not made out.

(d) Did not amount to a breach as the team generally was experiencing a heavy workload and genuine offers of help were made when possible.

(e) For the purposes of this analysis, the Tribunal assumes that there was a breach with regard to one-to-one meetings before October 2019.

(f) The Tribunal found that there was a breach in not acting on the original recommendation of carrying out (to completion) a risk assessment and on the recommendation in the second report that the original assessment be revisited. In the Tribunal's judgement, such a failure was likely to seriously damage trust and confidence. As recorded above, a risk assessment was carried out after the third OH report, as it transpired about 2 weeks before the Claimant resigned. The Tribunal found that there was no further breach at this point.

(g) The Tribunal's conclusion is essentially the same as under (f).

(h) The only complaint about the process of considering the flexible working request (as opposed to the outcome of it) was that both the original consideration and the appeal exceeded the timeframe provided in the Respondent's policy. The delays in question were not excessive (around 1 week and 4 weeks respectively) and the Claimant did not complain about delay as such at the time. As the Claimant must have realised, the Respondent was having to contend with the additional pressures of the pandemic. Furthermore, by the time of the appeal, the situation was less urgent, as the Claimant was working from home in any event. The Tribunal concluded that the delays did not amount to a breach of the implied term. To the extent that the Claimant complained of the outcome, the Tribunal found that this did not amount to a breach: Ms Lecointe had considered the request and given her reasons for refusing it, while offering to adjust the Claimant's hours. The fact that Ms Millard probably would have allowed the appeal did not mean, in the Tribunal's judgement, that the original decision was "wrong" to an extent that would seriously damage trust and confidence.

(i) The Tribunal has already explained its conclusion that this did not amount to a breach of the implied term.

(j) Given that the Claimant was not aware of the emails until after her resignation, it is not necessary to determine the academic issue of whether they would have amounted to breaches of the implied term.

(k) The Tribunal has already expressed its conclusion that this did not amount to a breach of the implied term.

(l) The same is the case for this issue.

133. At this point, the Tribunal paused to consider whether, viewing the matter in the round, the totality of the matters complained of could amount to a breach of the implied term, even if individual matters of complaint did not. We concluded that this was not the case, and that essentially the overall picture was no different from that obtained from an examination of its individual elements.

134. The next question is whether the Claimant waived or affirmed any of the alleged breaches. The Tribunal has addressed all of the alleged breaches, in case it is wrong in any of its conclusions about whether there were breaches.

135. The Tribunal reached the following conclusions on this issue, and for economy of expression will use the term "waived" to indicate waiver of a breach and affirmation of the contract. Alleged breach (a) applied throughout the Claimant's employment: she waived any breach by continuing in her employment in the knowledge that this was occurring. Alleged breaches (b), (c), (d), (e), (i) and (l) all occurred in 2018 or 2019: the Claimant waived any breach by continuing in her employment in the knowledge that they had occurred.

136. The Tribunal has found breaches under (f) and (g). We also found that the Claimant waived those breaches by taking part in the risk assessment in April 2020, thereby manifesting an intention to continue in her employment in spite of the earlier failures.

137. Waiver cannot arise in relation to alleged breach (j) as the Claimant was unaware of it. There would be no basis for finding that the Claimant waived alleged breaches (h) and (k), or any breach under (f) or (g) relating to the third OH report and the risk assessment that was carried out.

138. In relation to the reason or reasons for the Claimant's resignation, the Tribunal found that these were as expressed in her resignation letter. In essence, these were that the Claimant felt that she could no longer work with Ms Lecointe in particular; that she had lost faith in the appeal process; and that she no longer felt that working from home 2 days per week would be sufficient to alleviate her stress.

139. So far as the alleged breaches are concerned, the Tribunal has already expressed the conclusion that (b), (c), (d), (e), (i) and (l) cannot realistically have formed part of the reason for the resignation, given the lapse of time. We find that these were not in fact reasons, or part of the reason, for the Claimant's resignation. The Tribunal concluded that the same was true of the breaches found under (f) and (g), given the Claimant's willingness to participate in the risk assessment in April 2020. The Claimant did not refer to alleged breach (a) in her resignation letter. The Tribunal found that this was not in her mind when she resigned, and that this was not a part of the reason for that. Alleged breach (j) cannot have been a reason for the resignation, as the Claimant was unaware of it.

140. The same cannot be said of any breach that occurred (contrary to the Tribunal's primary finding) in relation to the third OH report under (f) and (g), or in relation to alleged breaches (h) and (k).

141. The result of all of the above is that there was not a constructive dismissal, as the Tribunal has found either that there was no breach; or that the breaches that it has found were waived; or that the breaches that it has found did not form part of the reason for the resignation.

142. In the interests of proportionality the Tribunal did not deal with the remaining issues that would arise if there had been a constructive dismissal.

Equality Act claims

143. The Tribunal reminded itself of the provisions about the burden of proof in section 136 of the Equality Act, as follows:

(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.

144. In **Efobi v Royal Mail Group Limited [2021] ICR 1263** the Supreme Court confirmed that the effect of this provision was the same as that of the equivalent provisions in the earlier anti-discrimination legislation. This meant that the two stage approach described by the Court of Appeal in **Madarassy v Nomura [2007] ICR 867** remained valid. In giving the Supreme Court's judgment, Lord Leggatt indorsed what Lord Hope said in **Hewage v Grampian Health Board [2012] ICR 1054** to the effect that it is important not to make too much of the role of the burden of proof provisions, such that:

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

145. In the present case, the Tribunal found itself in the situation identified by Lord Hope, and was able to make positive findings on the relevant evidential issues.

Harassment

146. Section 26 of the Equality Act contains the following provisions about harassment:

(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.

(2) ……

(3) ……

(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.

147. The Tribunal assumed in the Claimant's favour that all of the conduct that she complained of was unwanted by her.

148. With regard to the issue as to whether the conduct was related to disability, the Tribunal reminded itself of its conclusions concerning knowledge of disability. In particular, we took account of our finding that issues about the Claimant's performance or conduct were not sufficient to put the Respondent on enquiry as to the existence of a disability. Furthermore, there was no evidence that any aspects of the Claimant's performance or conduct were in fact related to her disability.

149. Given these matters, where in the paragraphs that follow the Tribunal states a conclusion that the conduct complained of was related to the Claimant's performance or conduct, it should be understood that this means that the Tribunal has concluded that the conduct complained of was not related to the Claimant's disability.

150. Having said that, the Tribunal will, in order to avoid repetition, set out its conclusions about whether the unwanted conduct was related to disability, and whether it had the prohibited purpose or effect together in relation to each item of conduct. The Tribunal will use the shorthand expressions "purpose of harassing" and "effect of harassing" in place of repeating the full statutory provisions set out above.

151. The Tribunal found that item (a) ("away with the fairies" comment) had the effect of harassing the Claimant. It is a dismissive and hurtful comment which we found had the effect of violating the Claimant's dignity when she read it. The Tribunal found, however, that this comment was related to the Claimant's performance, and not to her disability. It was recorded as an answer to Dr Yardley's enquiries about the Claimant's performance. Although the maker of the statement was not called to give evidence, or

even identified, the Tribunal considered that, in context, the expression meant that the person concerned thought that the Claimant was disorganised or vague. It did not have any connotations of anxiety or depression. Furthermore, there was no evidence to suggest that the person who made the comment, whoever they were, knew or ought to have known that the Claimant was disabled, which also assisted the Tribunal in concluding that this was not related to disability.

152. Item (b) (performance monitoring) did not, the Tribunal found, have the purpose or effect of harassing the Claimant. Ms Lecointe's purpose in instituting this was to address the concerns about the Claimant's performance. In relation to the effect of this, the Tribunal found that the concerns were genuine and that the Claimant perceived these as unjustified. It was not, however, reasonable for this to have the effect of harassing the Claimant, as an employer is entitled to address performance concerns. The Tribunal's finding that it was not reasonable for this to have the effect of harassing the Claimant is not on its own fatal to the complaint; but considering the matter as a whole, we concluded that this did not have the effect of harassing her. Furthermore, the decision to place the Claimant on performance monitoring was related to performance issues, and not to disability.

153. The Tribunal found that item (c) ("step back" comment) did not have the purpose or effect of harassing the Claimant. It was difficult to see how it might: it was an entirely ordinary and inoffensive comment. The Tribunal also found that it was not related to disability: it was related to Ms Glynn's reflection on a situation which had arisen when she (as she saw it) had acted on the advice that she should "step back".

154. Item (d) (sickness absence monitoring) did not, the Tribunal found, have the purpose or effect of harassing the Claimant. The purpose of instituting it was to monitor and manage the Claimant's sickness absence. As with the issue about performance monitoring, the Tribunal found that the Respondent's concerns were genuine, and that it was not reasonable for the monitoring to have the effect of harassing the Claimant. She considered that this was unjustified or unnecessary, but taking the matter as a whole, this did not have the effect of harassing her. It was a reasonable step for the Respondent to take in the circumstances. Additionally, this was not related to disability, as the absences were not on the face of the matter related to disability, nor is there any evidence to show that in fact they were so related.

155. The Tribunal concluded that Mr Trevatt's comment "definitely for discussion tomorrow" was made with the purpose of indicating a wish to discuss the relevant matters, and not with the purpose of harassing the Claimant. Whatever the Claimant's feelings on reading it, this was a routine communication, and it was not reasonable for it to have the effect of harassing her. Viewed in the round, the Tribunal concluded that it did not have that effect. Furthermore, the comment was related to the Claimant's performance, and not to her disability.

156. Item (f) concerned the improvement notice issued by Mr Trevatt. The Tribunal concluded that he issued this with the purpose of addressing his dissatisfaction with the Claimant's conduct towards him, and not with the purpose of harassing her. The Claimant's apology at the subsequent meeting suggests that, whatever she may think about the matter now, she then recognised that her behaviour had been inappropriate. The Tribunal therefore found that this did not have the effect of harassing the Claimant; and if it be necessary, that it was not reasonable for it to do so. Furthermore, this was related to the Claimant's conduct, and not to her disability.

157. The Tribunal's findings about item (g) (speaking Polish) mean that this was not done with the purpose of harassing the Claimant. Her perception was that Ms Glynn and Ewa were, or might be, talking about her, or trying to exclude her. The Tribunal understood how the Claimant might come to think that, given the difficulties that she experienced in the working environment, although Ms Glynn's apology suggests that she might have considered that her impression was mistaken. Looking at the matter as a whole, and bearing in mind the question whether it was reasonable for the conduct to have the effect of harassing the Claimant, the Tribunal concluded that it did not have that effect. It was entirely clear, however, that the conduct was not related to disability, even if (as was the Claimant's case) it was done in order to exclude her or talk about her. There was no reason to believe that Ms Glynn or Ewa even suspected that the Claimant might be disabled, or knew anything that suggested that she might be.

158. The Tribunal found that item (h) ("doesn't have a clue / useless" comments) had the effect of harassing the Claimant. This was an unnecessarily harsh way of expressing performance concerns. It was related, however, to the Claimant's performance, and not to her disability. Mr Bell's failure to follow up the issue was, as the Tribunal found, a fairly mundane oversight on his part which did not have the purpose of harassing the Claimant. We found that it was not reasonable for this to have the effect of harassing her and that, looked at as a whole, it did not have that effect. Ultimately, it was not a serious matter. In any event, this was not related to disability: it was related to Mr Bell overlooking the matter.

159. The result of all of the above is that the complaints of harassment are all unsuccessful.

Discrimination arising from disability

160. The Tribunal has already found that the Respondent has made out the defence provided by section 15(2) of the Equality Act. The Tribunal found that the complaint additionally failed under section 15(1), which provides as follows:

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

161. The first issue in this regard was whether the provision of Ms Lecointe's management report in response to the Claimant's appeal against her decision on the flexible working request amounted to unfavourable treatment. The Tribunal has already expressed he conclusion that this could not realistically be regarded as constituting any form of detriment to the Claimant. We therefore found that it did not amount to unfavourable treatment within section 15(1)(a).

162. The "something arising" relied upon was the Claimant's performance, behaviours and high level of sickness. For the reasons previously given, the Tribunal found that these did not arise in consequence of the Claimant's disability.

163. Finally on this aspect, the legitimate aim relied upon by the Respondent was the consistent application of the appeals process. There were two versions of Ms Lecointe's report, but whether one or the other or both are considered, the Tribunal found that the provision of the management response to an appeal was part of the legitimate aim of achieving the consistent application of the appeal process, and that what we have found to be Ms Lecointe's straightforward account was a proportionate means of achieving this.

Indirect discrimination

164. Section 19 of the Equality Act provides as follows:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) It puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

165. The Claimant relied on two PCPs, namely that staff were required to ensure absence levels were in accordance with the Respondent's sickness absence policy, and the use of the Bradford formula in connection with this.

The Respondent accepted that these PCPs were applied to the Claimant and to persons without the Claimant's disability.

166. The next question is whether those PCPs, individually or together, put persons with the Claimant's disability at a disadvantage when compared with others. There was no evidence before the Tribunal to the effect that persons with a disability arising from anxiety and depression were more likely than others to have sickness absences, or greater levels of sickness absence, than others. The Tribunal also considered that this was not a proposition of which we could take judicial notice: it is not obvious or established. For similar reasons, we found that there was no evidence that it placed the Claimant at a disadvantage.

167. The Tribunal also found that the aims relied upon by the Respondent (the fair application of its attendance management policies, getting the work done, and making proper use of public funds) were legitimate. We also found that the sickness absence policy, and the use of the Bradford formula in connection with it, were proportionate means of achieving this. The Bradford formula is used extensively in the Health Service and elsewhere, in particular in the monitoring and assessment of frequent short term absences. The Tribunal was satisfied that it did not amount to any form of over-reaction to the Claimant's absences.

Failure to make reasonable adjustments

168. The Tribunal has already found that the duty to make reasonable adjustments did not arise because the Respondent did not know, and could not reasonably be expected to know, that the Claimant had a disability.

169. In relation to the other issues that would arise, section 20(3)of the Equality Act provides that the duty imposes

…..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.

170. The Claimant relied on three PCPs. Two of these were the same as those relied on in relation to indirect discrimination. For the reasons given in relation to that head of complaint, the Tribunal concluded that those PCPs did not put the Claimant at a substantial disadvantage in comparison with persons who are not disabled.

171. The third PCP was the application of the flexible working policy. The Tribunal found that there was no evidence, and no reason to believe, that the application of this policy placed the Claimant at a disadvantage by reason of her disability. In particular, there was no evidence that her disability meant that her request was more likely to be declined, or was liable to be treated differently to other requests.

Time limits

172. Having determined all of the complaints under the Equality Act on their merits, and having in mind the interests of proportionality and in particular that of concluding the hearing within the time allocated, the Tribunal did not address the issues as to time limits.

Flexible Working detriment

173. Section 47E of the Employment Rights Act 1996 provides as follows:

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee –

(a) Made or proposed to make an application under section 80F,
(b) ……
(c) Brought proceedings against the employer under section 80H, or
(d) Alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.

174. As with the individual allegations of harassment, the Tribunal will summarise its findings as to whether there was a detriment, and whether it was done on the ground (a) or (c), with reference to each allegation. The Claimant put her case at the hearing under section (1)(a), without referring specifically to paragraph (c). The Tribunal considered that only the final alleged detriment fell for consideration under the latter provision, as by that time the Claimant had made reference to a potential tribunal claim in her resignation letter.

175. The Tribunal has already explained its finding that item (a) did not mount to a detriment. The Tribunal also found that the reason why Ms Lecointe provided her report was that it was part of the appeal process that she should do so: this was not done on the ground that the Claimant had made the application.

176. The Tribunal will again take items (b), (c), (d) and (e) together. The finding that these were all genuine attempts to enable the Claimant to attend the Zoom meeting means that these were not detriments, and that they were not done on the ground that the Claimant had made the application.

177. The Tribunal found that, while the Claimant disliked Ms O'Sullivan's comment that was the subject of item (f), this comment was not sufficiently significant to amount to a detriment. Ms O'Sullivan was doing no more than reporting that she was not pleased with what the Claimant had said. We have already explained why this cannot have been done on the ground that the Claimant had made the application.

178. The Tribunal also considered that item (g) (Ms Lecointe's email about the folders) was not sufficiently significant to amount to a detriment. Our

finding about why Ms Lecointe wrote what she did excludes this being done on the ground that the Claimant had made the application.

179. The Tribunal has found that item (h) (the exchange about spreadsheets) was an ordinary exchange about a work matter: we found that it did not amount to a detriment. Our findings also mean that it was not done on the ground that the Claimant had made the request.

180. With regard to item (i) (printing 50 or 100 copies of documents), the Tribunal has found that this was an ordinary management intervention: it was not therefore a detriment. We also found that Ms Lecointe intervened because she believed that the following day would suffice and that 50 copies would be enough, and not on the ground that the Claimant had made the application.

181. Ms O'Sullivan's complaint (item (j)) could, in the Tribunal's judgement, amount to a detriment, although it seemed to us that making a definitive finding about that would involve going into issues about whether the complaints were bona fide and/or justified. The Tribunal has already explained, however, why it was that this was not done on the ground that the Claimant had made the application.

182. The Tribunal has already explained its conclusions that item (k) ("Maria should be able to do this") did not amount to a detriment and was not done on the ground that the Claimant had made the application.

183. The Tribunal did not consider that Mr Trevatt's instruction or request that the Claimant should cease criticising Ms Lecointe and others amounted to a detriment. We found it reasonable that he did this, given that the Claimant remined in employment within the team. Furthermore, our finding as to why he did this excludes this being done on the ground that the Claimant had made the application, or had alleged circumstances which would constitute grounds for a claim under section 80H (if her reference to a tribunal claim should be so interpreted).

184. The complaints of flexible working detriment are therefore unsuccessful.

Notice pay

185. The Claimant was working out her notice period of 8 weeks when, 4 weeks into that period, she left the Respondent's employment. The Tribunal has found that it was her decision to do so, and that substantially her reason for leaving at that point was in order to start a new job. In the circumstances, we found no basis for a complaint about non-payment for the balance of the notice period. The Claimant herself had breached the contract by leaving during the notice period.

Employment Judge Glennie

Dated: ……20 April 2022……..……..

Judgment sent to the parties on:

21/04/2022..

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For the Tribunal Office