



EMPLOYMENT TRIBUNALS

Claimant: Mrs B Bennett

Respondent: City of Bradford Metropolitan District Council

On: 7, 8 and 9 June 2022 (public, via CVP)
24 June 2022 (in Chambers)

Before: Employment Judge McAvoy News
Ms N Downey, Lay Member
Mr K Lannaman, Lay Member

Heard at: Leeds Employment Tribunal

Appearances:

For the Claimant: In person

For the Respondent: Mr R McLean, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim for discrimination by failure to make reasonable adjustments is not well-founded and is dismissed.
2. The Claimant's claim for constructive unfair dismissal is well-founded and succeeds.

REASONS

Form of hearing

3. This was a remote hearing which was not objected to by the parties. The hearing took place via CVP, the Tribunal's video conferencing platform.

Issues

4. During the case management preliminary hearing conducted by Employment Judge Shulman on 29 September 2021, it was agreed that the Claimant's claims were for constructive unfair dismissal and disability discrimination by failure to make reasonable adjustments. During today's hearing, it was confirmed that we would initially determine liability and, should it be necessary and should we have sufficient time, we would then deal with remedy.

Disability discrimination (failure to make reasonable adjustments)

5. Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Respondent accepted that the Claimant was given a medical diagnosis of bile acid malabsorption on 30 January 2020. The Respondent conceded that the same qualified as a disability from 31 January 2021 onwards. Therefore, in respect of any allegations of discrimination preceding 30 January 2021, the Tribunal will decide:
 - a. Did she have bile acid malabsorption?;
 - b. Did it have a substantial adverse effect on her ability to carry out day-to-day activities?; and
 - c. Were the effects of the impairment long-term?
6. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? The Respondent confirmed that it had knowledge of such condition from 29 September 2020.
7. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: a practice of following a procedure which meant that it did not listen to nor communicate adequately with the Claimant. The Claimant confirmed that she believed that this procedure was in place between September 2020 and April 2021.
8. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was placed in an environment with her disability having a dramatic adverse effect as well as feeling fearful. Her disability results in the Claimant fouling herself uncontrollably. This is exacerbated when the Claimant is placed under stress and anxiety.
9. Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at that disadvantage?
10. What steps could have been taken to avoid the disadvantage? The Claimant suggested that an appropriate risk assessment highlighting the Claimant's problems with a view to satisfactory resolution should have been undertaken

and this was the adjustment sought. Although this was not recorded in the list of issues following the case management hearing, the Claimant confirmed at the outset of this hearing that the resolution sought was redeployment out of residential services. The Respondent objected to this being considered on the basis that this was not in the list of issues and that it would have called additional evidence to the hearing had it known this was an issue. We disagreed with the Respondent's position. The thrust of the Claimant's claim was that she wanted to be redeployed outside of residential services. She referred to the same as a reasonable adjustment in her claim form. The list of issues does not replace the claim form. The Respondent ought to have been aware that this was an issue in the case. Indeed, at paragraph 19 of its response to the Claimant's claim it stated: "*It is not clear which conditions the Claimant relies upon to pursue her reasonable adjustments claim of a transfer out of a residential care home setting...*" In any event, it had addressed the issue regarding redeployment in its witness evidence. The Respondent was permitted to ask supplemental questions of its witnesses to address any outstanding issues in this regard. One of the Respondent's witnesses was from the HR department and was able to give evidence about the Respondent's redeployment processes. Therefore, the steps that could be taken to avoid the disadvantage were: an appropriate risk assessment highlighting the Claimant's problems with a view to satisfactory resolution, which may have included the transfer of the Claimant out of residential services, should have been undertaken and this was the adjustment sought.

11. Was it reasonable for the Respondent to have to take those steps and when?

12. Did the Respondent fail to take those steps?

Constructive unfair dismissal

13. For the purposes of the constructive unfair dismissal claim, the sole issue was whether, in accordance with section 95(1)(c) of the Employment Rights Act 1996 (the "ERA") the Claimant terminated the contract under which she was employed in circumstances in which she was entitled to do so by reason of the Respondent's conduct. In this regard the Claimant relied upon a breach of the implied term of trust and confidence.

14. This requires determination of the following:

1. Did the Respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent? Did it have reasonable and proper cause for doing so?;
2. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end;

3. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation; and
 4. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that she chose to keep the contract alive even after the breach.
15. During the above-mentioned case management hearing, it was recorded that the Claimant's complaint was that the Respondent had "treated her badly". It was acknowledged at the outset of the hearing that this required some further particularisation, for us to be able to make meaningful findings and conclusions during this hearing. We observed that the Claimant had set out in her claim the breaches of the implied term of trust and confidence which she sought to rely upon, and it was agreed at the outset of the hearing that these were as follows:
1. Allowing the Claimant to be assaulted by Child X on 26 June 2019 and 22 July 2019;
 2. Failing to protect the Claimant by not removing X from the home in which the Claimant was, at the time, managing. In this regard, the Respondent had failed to comply with the Health and Safety at Work Act;
 3. Failing to comply with the Respondent's stress policy by not putting in place a stress management plan;
 4. Failing to uphold and/or address issues raised in the Claimant's grievances and grievance appeal;
 5. Failing to provide the outcome to the grievances and grievance appeal within a reasonable period;
 6. Sending the outcome to her second grievance to her at 2.05am;
 7. Discriminating against her by failing to make reasonable adjustments;
 8. Threatening her with dismissal; and
 9. Seeking to deal with the capability process before concluding the second grievance.
16. Within her claim, the Claimant had complained that the Respondent had failed to comply with their policies and procedures. In this regard the Claimant asked us to specifically consider their failure to comply with the violence and aggression at work guidelines. The Respondent objected on the grounds that this was not within the list of issues, nor the claim and they had not attended the hearing with the evidence needed to defend this claim. We agreed with the Respondent and refused the Claimant's request.

17. The Respondent conceded that, if the Claimant was constructively dismissed, it had not advanced a fair reason for her dismissal, considering those prescribed by sections 98(1) or (2) of the ERA. Nor was it making a positive case in respect to section 98(4) of the ERA. Consequently, it was acknowledged that if the Claimant was found to have been constructively dismissed, such dismissal would be unfair.

Evidence

18. The Claimant served a witness statement and was cross examined on that statement.
19. The Respondent served witness statements for Laura Bennett (Manager of a Residential Home and the manager responsible for managing the Claimant's sickness absence for most of the relevant period of time), Julie Cowell (Senior HRBP) and James Dwan (Acting Manager in Children's Residential Services). Each of these witnesses were cross examined on their statements and, with the exception of Mr Dwan (of whom no questions were asked), answered questions from the panel on their statements.
20. We also had sight of a large bundle of documents. I informed the parties that we would only be reading those documents that were specifically brought to our attention during the evidence, which the parties acknowledged. Specifically, I highlighted that the bundle contained a 'without prejudice' letter from the Claimant's former solicitor to the Respondent. The Claimant confirmed that privilege in respect to this letter was waived and therefore we read that document.
21. Having considered the evidence, both oral and documentary, we make the following findings of fact on the balance of probabilities.

Findings of fact

Background

22. The Claimant commenced employment with the Respondent on 15 April 2002 as a Trainee Residential Practitioner at a children's home. That employment terminated on 26 April 2021 following the Claimant's resignation.
23. At the time of her resignation, the Claimant was employed as the Assistant Unit Manager for Hollybank Residential Care Home and had been in this role since 2 June 2014. She had been the Acting Manager for two residential homes for periods of time, including for Hollybank. The Claimant had worked in residential services for almost 20 years before she resigned.
24. The Respondent is the Metropolitan District Council for Bradford. It is a local authority and, as part of its statutory duties of care towards young people, provides residential care to vulnerable and troubled young persons in Bradford.

Relevant policies

25. The Respondent's grievance procedure [204-215] states that if an employee wishes to raise a formal grievance they should complete the grievance form and give it to their manager or, if applicable, the next most senior manager. A meeting to discuss the grievance must be arranged without unreasonable delay and usually within five working days of receipt of the grievance form. The agreed outcome or management decision, together with the reasons, will be given to the employee at the final meeting and confirmed in writing within five working days of that meeting. The employee must be advised about their right of appeal. An appeal hearing must be arranged without unreasonable delay and normally within 20 working days of receipt of the grounds of appeal. The decision must be provided within five working days of the appeal hearing.
26. The Respondent's sickness absence management procedure [186-203] defines long term ill health as four weeks continuous sickness absence. This states that if the medical opinion of the Employee Health & Wellbeing Service, the Respondent's occupational health service ("OH"), is that an employee is disabled, the manager must consider making reasonable adjustments, which could be physical/equipment/suitable support, to allow the employee to return to their substantive post and carry out a risk assessment prior to their return to work. It says if it is not possible to make reasonable adjustments to the employee's substantive post or if the medical opinion is that the employee is unfit to return to their substantive post, the Respondent must consider whether there is any suitable alternative employment available.
27. It gives the circumstances in which it will be appropriate to convene a capability hearing as follows:

Managing Attendance Framework

- 8.8 A capability hearing for long term ill health cases will be convened on the basis of an up to date report from an Employee Health adviser/physician which states that:-
- A An employee is permanently incapable of discharging efficiently the duties of their employment, or any other comparable employment by reason of ill health or infirmity of mind or body.
OR
 - B An employee is permanently incapable of discharging efficiently the duties of their employment but is capable of discharging efficiently the duties of any other comparable employment and attempts at redeployment have been unsuccessful.
OR
 - C An employee remains incapable of discharging efficiently the duties of their employment but there is no prognosis as to when the employee will be fit enough to return to work, the point has been reached where the employees absence can no longer be sustained and attempts at redeployment have been unsuccessful.
OR
 - D It cannot be confirmed that the employee will be able to provide reliable service.

28. The running order for the capability hearing is as follows:

Managing Attendance Framework

APPENDIX 3: CAPABILITY HEARING RUNNING ORDER

The following running order for the capability hearing is designed to ensure that the hearing is conducted in a sympathetic, compassionate and orderly way to enable full information to be provided by both sides and for the Nominated Officer to seek sufficient information to make a fair and reasonable decision.

However, it is recognised that on occasions the running order may be varied according to the circumstances of the case.

- (i) The nominated officer will explain the running order.
- (ii) The manager will set out the case for the termination of employment including the evidence upon which this is based and the action taken, including redeployment if appropriate, to address the matter. Witnesses may be called, if necessary.
- (iii) The employee and/or their representative will have the opportunity to ask questions of the manager.
- (iv) The employee and/or their representative will explain why their employment should not be terminated and provide any evidence in support of their position. Witnesses may be called, if necessary.
- (v) The manager will have the opportunity to ask questions of the employee.
- (vi) The nominated officer is entitled to ask questions of any party at any point.
- (vii) The nominated officer will fully consider all the evidence presented and provide the decision verbally, normally at the conclusion of the hearing.
- (viii) The decision, together with the reasons, will be confirmed in writing within 5 working days of the hearing, including the right of appeal.

Redeployment

29. The Respondent's evidence was that there are two situations in which an employee may be redeployed, as follows:

- a. The employee is displaced from their existing post and is at risk of redundancy. This did not apply to the Claimant; or
- b. Medical redeployment which would only be progressed based on a medical recommendation that the employee is medically unfit to continue to undertake the duties of the post in which they are employed [192]. In evidence, Ms Cowell was emphatic that the Respondent would rely on OH advice when considering such decisions. However, she said the Respondent would not blindly follow such advice and, if it did not make sense, the manager responsible for the employee's absence would ordinarily clarify any aspects of the OH advice which they were unsure about before proceeding with any decisions based on it. She acknowledged that they would not necessarily be made aware of everything that was discussed during the appointment with OH as it may not be appropriate for certain information to be shared with them. She explained that medical redeployment would ordinarily be considered as part of a formal capability process. She also explained that she had been aware of situations where employees had been redeployed out of

residential services into another part of the Respondent on medical grounds following advice from OH.

30. The Respondent also explained that it has a Recruitment and Redeployment Unit. Employees in the above situations will be referred to such unit for support in finding a suitable post. Employees in these scenarios are given priority access to available posts. The Respondent's sickness absence management procedure [200] deals with ill health redeployment as follows:

APPENDIX 5: ILL HEALTH REDEPLOYMENT

Ill health redeployment is triggered when an up to date medical report from a Council Occupational Adviser/Physician states that an employee is:-

1. Permanently unfit to carry out the duties of their post but may be capable of carrying out either a) a comparable job, or b) other work if the employee is prepared to consider it.
2. Long term sick, but not permanently incapable of carrying out their job.
3. Deemed disabled as defined by the Equality Act 2010 and where reasonable adjustments cannot be made sufficient to enable the employee to continue in post, but where a comparable post (with or without reasonable adjustments) may prove suitable.

The employment of employees in the above circumstances will be at risk. The Council therefore has an obligation to make reasonable efforts to seek suitable alternative employment for such employees before making any decision on their employment.

Once management are informed by the Employee Health & Wellbeing Service that an employee falls into one of the 3 definitions, the management of the ill health absence will be informed and guided by an Ill health case conference process (IHCC).

31. The policy then refers to a process which follows involving an ill health case conference and a redeployment meeting.

Credibility of the evidence

32. In making our findings of fact, we have had to consider the evidence presented to us during this hearing: both oral and documentary.
33. There were many issues raised in respect of which we only had the oral evidence of the Claimant. We did not have the oral evidence of the relevant individuals from the Respondent. These are considered in detail below.
34. There were also situations in which we had to make findings based on the conflicting oral evidence of witnesses who attended this hearing. These are considered in detail below.
35. At this point it is worth noting that we considered the Claimant to have given credible evidence throughout this hearing. She was well prepared and knowledgeable about the factual aspects of her case. She answered questions concisely. She made concessions. If she did not know the answer to a question, she accepted that. We considered her account of the events to be truthful.

36. We have addressed our perception of the Respondent's witnesses' evidence at the relevant parts of these Reasons.

Hollybank

37. The homes in the Respondent's residential services are of differing sizes. However, the number of children living in such homes has reduced over the last two years.
38. Hollybank was always intended as a smaller provision, more intensive and providing more therapeutic care. It takes a maximum of four young people usually aged between 12 and 18 years old. The parties acknowledged that the children attending Hollybank had more complex needs.
39. The aim of the children placements is to provide stability for the young person. Mr Dwan explained that a manager may decide that a placement is not working but this decision may be overridden by senior management.
40. Mr Dwan explained that violent behaviour is not acceptable and all residential staff are trained to reduce such behaviour and to work through therapeutic models to reduce crisis situations. He explained that staff are also trained in physical intervention methods. The Claimant acknowledged that she had received such training.
41. Mr Dwan also explained that if a member of staff is assaulted, there will be a debrief with support from their supervisor and the staff member may be referred for counselling.

Staffing issues at Hollybank

42. The Manager at Hollybank was John Briggs. The Claimant supported Mr Briggs with the opening of the home and the first three young people were admitted in or shortly after April 2018. The Claimant's unchallenged evidence, which we have accepted, was that there was not a full team of permanent staff in Hollybank at the time. She explained that in August/September 2018 she informed Liz Perry (Residential Services Manager), copied to Mr Briggs, that she was becoming stressed as they constantly did not have enough permanent staff to cover the roster. When casual cover was not found, either the Claimant or Mr Briggs would need to cover the shifts [462-466]. Despite this, no formal supervision was held between the Claimant and either Mr Briggs or Ms Perry to discuss the Claimant's health and wellbeing or workload. The Claimant considered Mr Briggs to be defensive and aggressive and her unchallenged evidence, which we have accepted, was that he had once called her a "little Hitler".
43. At some point around the end of February / beginning of March 2019, the Claimant was asked by Mr Briggs and Ms Perry if she would step up as Acting Manager at Hollybank for three months. This was to enable Mr Briggs to help out at another home that didn't have a manager. The Claimant agreed although she did not wish to be a Registered Manager on the formal paperwork. An Acting

Assistant Manager was put in place to work alongside the Claimant but she left Residential Services in July 2019, leaving the Claimant as the only manager in Hollybank from that point onwards.

Child X

44. The parties agreed that Child X was male, 15/16 years old and approximately 6 ft 2 inches at the relevant time.
45. It was not disputed that, between April and June 2019, the Claimant voiced concerns regarding Child X's deteriorating behaviour and aggression towards staff and other young people. Concerns included the fact that X was committing burglaries and had weapons. The Claimant raised that X had brought weapons and cannabis into the home. A meat cleaver had been found in his room [275]. The Claimant's unchallenged evidence, which we have accepted, was that she had previously and tearfully made Mr Byrom aware that X was targeting staff and she was concerned that she would be assaulted as the Claimant believed that X had an issue with women and authority figures. The Claimant felt that X was focusing his aggressive outbursts on her.
46. During this time the Claimant made numerous requests for a disruption meeting to take place. The purpose of these meetings is to try to "disrupt" or break down a young person's pattern of behaviour and to create a new safe structure. In X's case they would be used to address his physical behaviour. Disruption meetings should involve every agency including the police and school so that everyone is aware of the level of risk and how to address it. The need for a disruption meeting was shared by other professionals involved in X's case who expressed their own concern about the threat posed by X continuing in the home [290].
47. There was a dispute between the parties about whether the Claimant, given her management role, was involved in the impact risk assessment of X before he joined Hollybank. Mr Dwan said she "would have been involved" because "this is the usual process for any admission". However, Mr Dwan was not involved himself therefore, as he accepts, his evidence was based on assumptions. Mr Dwan said that her manager at the time, Mr Briggs "would have consulted her". The Claimant denied any such involvement and Mr Briggs did not attend the hearing to give evidence regarding this. We have not seen any documentation suggesting that the Claimant was so involved. We have no reason to doubt the truthfulness of the Claimant's account. Consequently, we prefer the evidence of the Claimant, namely that she was not involved in X's impact risk assessment. Nevertheless, even if she was, it is evident from the findings made above that she believed and voiced that such risk assessment needed to be revisited.
48. At some point in May 2019, a female, small and 12-year-old resident alleged that a significantly taller, 14-year-old male had sexually assaulted her. The police advised that an alternative placement for one of the young people should be found. The Claimant considered it unfair for these two children to remain living in this small home in these circumstances. She felt her concerns were being ignored, that young people were at an unacceptable level of risk which caused her to feel distressed.

49. In May 2019, the Claimant applied for a role outside of residential services, as a Community Resource Worker. The role was on a lesser salary, but the Claimant felt desperate to leave residential services because of what she was experiencing. Her application was unsuccessful.
50. A disruption meeting took place on 17 June 2019 [292-3]. The Claimant had been requesting that such a meeting take place for several months. This did not result in any improvements.
51. The Claimant was assaulted by X firstly on 26 June 2019. X shouted and screamed at the Claimant and whipped her hard with his coat (hurting her shoulder) before pushing her hard in the chest area. He then threw a bean bag at her before pushing her again. X was arrested and charged with "assault by beating". He admitted the offence and was given a sentence. [300-20, 473-74].
52. After the assault the Claimant emailed management to inform them of it. She said: "I have been warning professionals of this for a long time now but to no avail, I feel it has fallen on deaf ears... I do not want X back at Hollybank Road. He is a danger to the young people living here and the staff team" [300]. The Claimant's requests were not met and X returned to the home without further discussion with the Claimant and without any risk assessments being undertaken. The Claimant said she was at a loss regarding what she could do. She said in evidence that she was repeatedly afraid of being "another statistic" meaning she was afraid that she could be seriously hurt, or worse, by X.
53. On 22 July 2019 which was X's first day seeing the Claimant back in the home after the above-mentioned assault, he assaulted the Claimant for a second time by pushing the Claimant into a wall [320 and 475].
54. Laura Bennett's evidence was that assaults by children like what the Claimant experienced on 26 June 2019 are not frequent occurrences and she had not been assaulted in such a way in her 16 years working for the Respondent. She did however say that assaults like what happened on 22 July 2019 were more common.
55. On 24 July 2019 the Claimant emailed Ms Perry to confirm that she was withdrawing from the Acting Manager post [321]. She explained in her email that this was because of the continued workload and staffing issues. Ms Perry did not respond. As a result, Johanne Cottle was made Acting Manager of Hollybank. Beforehand, Ms Cottle was several tiers junior to the Claimant.
56. On 27 July 2019, the Claimant attended a charity ball with Ms Cottle. During this event she became unwell with nausea and extreme diarrhoea. She had to leave the event and go to her hotel room. The condition continued for five more days.
57. The Claimant was absent due to ill health between 29 July and 1 August 2019. The reason for the Claimant's absence was recorded as 'bowels' [778]. The

Claimant considered this to be the beginning of the development of her bile acid malabsorption, referred to as “BAM” in these Reasons.

58. The Claimant asked Kirsty Barwick (BPP Assistant Hub Manager) to circulate an email from the Claimant on 29 July 2019 [96] to numerous people including senior managers such as Mr Byrom, Mr Briggs and Ms Perry. This expressed the Claimant’s concerns about staffing levels at Hollybank noting that there were two full time residential practitioner vacancies, one member of staff missing due to an investigation, an Acting Assistant Manager who had recently left and three members of staff off sick including herself. She also noted that Hollybank did not have a Registered Manager. The Claimant highlighted that Ms Cottle, who was the senior on the shift that afternoon, would need some support. Soon afterwards Ms Cottle expressed her own concerns about the staffing issues at Hollybank, referring to the situation as “untenable” [329].
59. On her return to work the Claimant did not receive a return to work interview or any other support from senior management. The staffing levels at Hollybank remained problematic.
60. During July and August 2019, the Claimant’s husband was unwell with serious heart problems. On 7 August 2019 the Claimant emailed Ms Cottle, Mr Byrom and Lisa Brett to let them know of her circumstances but she received no support from higher management. On 9 August 2019 the Claimant’s husband had a cardiac arrest. He recovered and spent the following five weeks in hospital awaiting an emergency quadruple heart bypass. Despite this, the Claimant felt that she had no alternative but to attend work. During this time X was verbally attacking and threatening her on a daily basis.

Commencement of long term absence

61. On 3 September 2019, while driving to work, the Claimant became unwell with a headache and swollen and tender glands. The headache was a 6/10 in terms of severity. She experienced feelings of lethargy as well as a tight and tingling sensation in her face and nausea. She managed to drive home and laid down for a few hours hoping that she would feel better but as of midday she remained unwell. She was unsure whether it was a stress symptom or something more serious such as a mini stroke. She was experiencing “constant diarrhoea” [55-58]. The Claimant was then signed off with work and home related stress.
62. Ms Cottle referred the Claimant to OH for an assessment. A report was produced on 17 October 2019. She was referred to counselling. OH recommended that the Stress Policy be followed and a stress management action plan be developed. The Claimant had expressed a preference to return to a non-residential setting, when she felt fit to return to work.

Grievance (1)

63. On 5 November 2019, the Claimant submitted a formal grievance [345]. She did so by completing the grievance form required by the grievance procedure. As

an outcome to her grievance, the Claimant requested that she be transferred to another role, outside of residential services.

64. Mark Trinder (Peripatetic Head of Service, Provider Services) was appointed to hear the grievance [357].
65. On 25 November 2019, a meeting was arranged for the Claimant, her trade union representative and Mr Trinder. This was outside of the timescales set out in the Respondent's grievance procedure. During this meeting the Claimant said she did not consider it appropriate for Ms Cottle to continue with the welfare visits as the Claimant considered this to be undermining.
66. In December 2019, Laura Bennett, Manager of the Skyview Residential Home at the time, was asked to take over as the manager of the Claimant's long term sickness absence. Ms Bennett's evidence was that she was told that she would just need to have one meeting with the Claimant initially. Ms Cottle remained the Claimant's line manager for all other purposes.
67. On 9 January 2020, a welfare meeting took place. Ms Bennett contends that the Claimant declined to participate in a stress risk assessment. The Claimant disputes declining this. Ms Bennett confirmed the outcome of this meeting in a letter dated 14 January 2020 [364]. In that letter Ms Bennett stated: "You declined to consider return to work strategies during the meeting". The Claimant did not challenge this at the time. Had the Claimant not declined to consider return to work strategies at this time, she would have corrected this, as she did with other incorrect statements made by the Respondent, considered later. Therefore, in this regard, we prefer the evidence of the Respondent and find that the Claimant did decline to engage in such strategies at this point.
68. On 27 January 2020, Mr Trinder arranged a meeting to verbally feedback the outcome of his investigations into the Claimant's grievance. This meeting took place on 7 February 2020. Again, this was outside of the timescales set out in the Respondent's grievance procedure. As an outcome to this meeting Mr Trinder offered the Claimant some time out of residential services to assist him with the business side of residential services. The Claimant expected to receive a written outcome following this meeting but did not. She chased Mr Trinder on 26 February 2020 and 23 March 2020 [387-8].
69. On 30 January 2020, the Claimant was informed that she was likely to be suffering from BAM [74]. She accepted that she did not make the Respondent aware of this at the time. She first made them aware in late September 2020, considered later in these Reasons.
70. A further welfare meeting between the Claimant and Ms Bennett took place on 6 March 2020. Ms Bennett confirmed the outcome of this meeting in a letter dated 6 March 2020 [385]. In this letter Ms Bennett referred to the meeting with Mr Trinder which took place on 7 February 2020 and the Claimant's expectation that she would receive something in writing regarding the alternative role. Ms Bennett informed the Claimant she should receive something in writing the following week.

71. Ms Bennett's evidence was that the Claimant informed her that there was nothing she could do in order to support her return to work and was unable to give a foreseeable return to work date. This is reflected in the above mentioned letter. The Claimant considered Ms Bennett's recording in this regard to be inaccurate. She emailed her on 27 March 2020 to state that the letter should be amended to state that she does want to come back to work, just not in children's residential services and she was too unwell to work at that point in time. She said she was willing to take a pay cut [406].
72. On 23 March 2020 Mr Trinder emailed the Claimant to confirm that, as her substantive post was in residential, she would need to return to residential services at some point [387].
73. The Claimant's trade union representative confirmed that she agreed that the Claimant could not be redeployed as there was a process to go through and the Claimant did not meet the criteria.

Grievance (1) – Outcome

74. On 24 March 2020 Mr Trinder confirmed the outcome of the Claimant's grievance in writing which was that aspects of her grievance had been upheld [391]. This included the lack of support which the Claimant had been provided with generally but also specifically as a result of X's behaviour. He explained that the reason for the delay was because he needed to interview a staff member who had been absent due to ill health. Mr Trinder did not inform the Claimant of her right of appeal. Further, the temporary offer of work that Mr Trinder had referred to during their meeting on 7 February 2020 no longer appeared to be an option.

Grievance Appeal

75. On 31 March 2020, the Claimant submitted an appeal against the outcome of her grievance to Mr Douglas (Strategic Director) [401].
76. On 1 April 2020, Mr Trinder emailed Mr Douglas and his PA [404]. The Claimant did not see this at the time, she only saw it as part of the Respondent's reply to a data subject access request that she later made. Upon reading this the Claimant believed that it confirmed what she was feeling at the time, namely that there was no acknowledgement of how she had been affected by the assault and the lack of support from management. In this email Mr Trinder stated:

"My honest view is this was never a complaint in the first place", "I stated in the first ever meeting with them that the long detail of the complaint was unrealistic in terms of evidence-based outcomes", "It has been clear that BB has no [intention] of returning to residential, her union has asked me twice to move her to a CRW post, she quoted the re-structure arrangements. I was clear this could not happen under equal opportunities", "BB views about children being placed are naïve, and her view around staffing ratios are unrealistic" and "my view is

that BB should return to work, or alternatively resign if she does not wish to continue in her role as a deputy manager”.

77. On 29 April 2020 a further welfare discussion took place between the Claimant and Ms Bennett. The Claimant said that she was too unwell to return to work and her preference was to not return to residential services but she had been told that this was contrary to the Respondent’s policy. She had also said that she had appealed against the outcome of her grievance but she did not know what was happening regarding such appeal which resulted in her feeling unheard and increased her stress and anxiety levels. Ms Bennett confirmed the outcome of this meeting in a letter dated 30 April 2020 [412].
78. On 28 May 2020 a further welfare discussion took place between the Claimant and Ms Bennett. The Claimant repeated that she felt unheard and her anxiety levels were increasing. Ms Bennett confirmed the outcome of this meeting in a letter dated 1 June 2020 [416].
79. Ms Bennett’s evidence was that the Claimant had told her during both meetings that the Claimant did not believe Ms Bennett could do anything to support her return to work. The Claimant disputed this. This was however recorded in Ms Bennett’s letters and the Claimant did not challenge this at the time. She did however challenge other points such as entries concerning annual leave [420]. Consequently, we prefer the evidence of the Respondent that, during these meetings, the Claimant said there was nothing that could be done by Ms Bennett to support her return to work. However, whilst the Claimant did not believe Ms Bennett could do anything herself, she had hoped that more senior management would be able to do so as part of the grievance appeal process which was underway.
80. On 22 June 2020 a referral was made for the Claimant to OH [127]. The referral was for an assessment, counselling and a stress management plan. This stated that the Claimant was ‘unwilling’ to work and ‘unwilling’ to return to residential. The Claimant was emphatic in her evidence that she was not unwilling to work but, instead, was in no fit state to work in residential services. We accept the Claimant’s evidence in this regard. There were numerous contemporaneous records of the Claimant, at around this time and before, stating that she was not well enough to return to work in residential services.
81. On 23 June 2020 a further welfare discussion took place between the Claimant and Ms Bennett. The Claimant highlighted that her grievance appeal remained outstanding and the Claimant continued to feel let down and unsupported. She explained that she was ready to return to work although the prospect of returning to residential services caused her stress and anxiety levels to rise. Ms Bennett confirmed the outcome of this meeting in a letter dated 23 June 2020 [418-419].
82. On 2 July 2020 the Claimant had a further telephone appointment with OH during which it was recommended that a stress management action plan be developed with her [108, 424-5]. Specifically OH stated: “This will allow you the opportunity to hear what Belinda perceives to be her stress and to consider with her how she can be supported at work”. The Claimant believed a stress

management action plan would have highlighted her BAM and the deterioration in her condition over the last 12 months as well as other health conditions.

83. On 20 July 2020, in a letter from modality partnership to Bradford Royal Infirmary, the Claimant's BAM was acknowledged [75]. The Claimant accepted that she did not inform the Respondent about this at the time, and she did so for the first time in late September 2020, considered later in these Reasons.
84. On 21 July 2020, in response to an email from the Claimant's trade union representative, Ms Cowell stated:
- "It seems an unusual situation which we have here and I think Belinda has some unrealistic expectations of the grievance process – it appears that she wants to be redeployed out of residential and just given a position somewhere else which we know is outside of the process, which is what is preventing a return to work".
85. On 23 July 2020, the Respondent emailed the Claimant in order to arrange a meeting to discuss the Claimant's grievance appeal [437]. This was significantly outside of the timescales set out in the Respondent's grievance procedure. On 12 August 2020, Irfan Alam (Deputy Director, Children's Social Care) wrote to the Claimant to confirm that he had been appointed to consider her grievance appeal and to invite her to a meeting on 28 August 2020. She was informed of her right to be accompanied [442-3].
86. On 24 July 2020 a further welfare discussion took place between the Claimant and Ms Bennett. Ms Bennett confirmed the outcome of this meeting in a letter dated 18 September 2020 [505]. The reason for the delay was Ms Bennett's annual leave and the requirements of her job role.

Grievance appeal hearing

87. On 21 August 2020, the Claimant submitted her statement of appeal and supporting documents for the appeal hearing [452, 456-461]. She requested financial compensation for her losses and a transfer out of residential services as her resolution.
88. On 28 August 2020, the Claimant's grievance appeal hearing took place [479-88]. Ms Cowell attended the hearing to provide HR support. The Claimant had trade union representation. The Respondent accepts that there was a considerable delay in conducting this hearing which it says was due to a backlog created by the lockdown arising from the COVID-19 pandemic.
89. The Claimant considered there to be mistakes in the minutes of this meeting which she corrected [489-99].
90. On 11 September 2020, the Claimant received the outcome of her grievance appeal [781-783]. Although some of her grievances were upheld, the Claimant's request for a transfer outside of residential services was denied. She was informed that there was no staff transfer policy to allow employees to move in circumstances such as hers and that the only way that she could move to

another service area would be by applying for jobs. He said that medical redeployment would only apply if management had a formal recommendation of ill health which advises that she was no longer medically fit to undertake the role that she was employed to do. The Respondent apologised for the delay.

91. On 18 September 2020 a further welfare discussion took place between the Claimant and Ms Bennett. During this meeting the Claimant referred to the outcome of her grievance and said that this had left her feeling deflated with the service. Ms Bennett confirmed the outcome of this meeting in a letter of the same date [506]. It was agreed during this meeting that Ms Bennett would refer the Claimant to OH to ascertain whether medical redeployment was a possibility.
92. Following this, the Claimant was referred to OH by Ms Cottle [508]. The referral was for an assessment, counselling and a stress management plan. The Claimant submitted that there were numerous errors in this referral including the point about her being unwilling to return to work to residential services or unwilling to return to work and the reference to welfare 'visits'. The Claimant maintained that she was not unwilling to return to work, she simply was unable to work in residential services. She said welfare calls took place but there was only one welfare visit. The Claimant disputes being offered a copy of this document by Ms Cottle before the referral was made. We accept the Claimant's evidence in this regard. There was no evidence of this referral being provided to the Claimant and Ms Cottle did not give evidence at this hearing. We have no reason to doubt the Claimant's trustworthiness regarding this. We find that the referral was not shared with the Claimant prior to the OH appointment taking place.

29 September 2020 – occupational health meeting

93. On 29 September 2020, an OH meeting took place with Heidi Throp, an Occupational Health Adviser. The Claimant's evidence was that she was not mentally well during his meeting and only answered the questions which she was being asked.
94. The report which was sent to Ms Cottle that day states [97]:
- a. The Claimant detailed having some physical health issues which seemed to be appropriately managed. Ms Throp did not envisage these impacting on the Claimant's ability to undertake her role should a return be planned. Ms Throp did not however refer to the Claimant's BAM at all in her report. The Claimant says that she informed Ms Throp that she had recently been diagnosed with BAM and she had other health issues including work related anxiety, stress, depression and concerns regarding her right hip. This is supported by the OH notes at page 109 in which OH have recorded that the Claimant was diagnosed with BAM in February 2020. The Claimant disputes informing Ms Throp that her BAM was being managed. The Claimant's evidence was that Ms Throp was dismissive of the information she was giving her regarding BAM. The Claimant felt that she was focusing more on her mental health given that her sick note

recorded the reason for her absence as being work related stress. The Claimant accepted in evidence that this was the first time she had mentioned BAM to anyone within or connected to the Respondent. The Claimant said that she did not write to OH to ask for the report to be corrected because at this point in time she felt 'helpless'. She felt that she was being ignored and was 'drowning'. We have accepted the Claimant's evidence. It is clear from the OH notes that the BAM condition was mentioned. It is understandable why the Claimant may have, at this point, felt as though she was being ignored. Her grievance had been delayed and she was not informed of her right to appeal. When she did appeal, that was also delayed. This was following several months of her concerns about X and staffing levels of Hollybank not being taken seriously. Ms Throp did not attend the hearing to give evidence about this and we have no reason to not believe the Claimant's evidence. Furthermore, as the Claimant was absent for a mental health related issue, OH may have wanted to focus on the Claimant's mental health issues rather than her BAM;

- b. The Claimant was not fit, at that point in time, to undertake the duties and responsibilities of her role. Ms Throp was unable to offer a time-frame for when the Claimant would be fit to return to her role in any capacity but to achieve this she would need to have a significant and sustained improvement in the symptoms that she was experiencing at this point in time;
 - c. Ms Throp advised that the Claimant was likely to remain symptomatic until the situation was resolved to her satisfaction and "it is clear that she has communicated what she believes this should look like to you already";
 - d. There was no further support or adjustments which could be suggested, other than those already advised previously (which included the stress management plan). This was even though the Claimant had mentioned her BAM condition to her and OH later acknowledged that this was likely to qualify as a disability (see later in these Reasons). Support or adjustments which the Respondent could have considered at this time were to further understand the impact of the Claimant's BAM on her ability to undertake her role in residential services; and
 - e. Ill health redeployment would not be appropriate at that stage. No reasons for this assessment however were given in the report. There is no evidence of the Respondent asking for reasons to be given. Considering the events that followed the Respondent simply took this recommendation at face value without engaging adequately in it.
95. The Claimant gave evidence during the hearing about the impact of her BAM. She explained that she has 'flare ups', which can result in her suffering from diarrhoea non-stop for a full week. This prevents her from leaving the house at all. She explained that stressful situations exacerbated the BAM symptoms (which resulted in the diarrhoea occurring more often) but acknowledged that

there was no medical evidence before us confirming this and her GP had not told her that there was such a link. She also said that an impact of her BAM was foul smelling faeces and having to use the toilet regularly.

96. On 29 September 2020 a further welfare discussion took place between the Claimant and Ms Bennett. During this meeting a discussion took place regarding an administration role in a leisure centre which the Claimant may be able to undertake on a temporary basis, to help her return to her substantive role, which the Claimant agreed to consider. The Claimant explained that she did not feel able to return to any residential home, not just Hollybank. Ms Bennett confirmed the outcome of this meeting in a letter dated the same day [513].
97. On 14 October 2020 a further welfare discussion took place between the Claimant and Ms Bennett. Ms Bennett confirmed the outcome of this meeting in a letter of the same date [515]. This letter referred to the discussion as a “final” welfare discussion. During this meeting Ms Bennett informed the Claimant that, as there was nothing further they could do to support her return to work, they would be looking to arrange a capability hearing, which might result in her employment coming to an end. It was recorded in Ms Bennett’s letter that unless there was anything else which she could do to enable the Claimant to return to work, this would be the last welfare call. This caused the Claimant to feel extremely distressed and helpless and said that she could only return to work if she was transferred out of residential services. The letter records that the Claimant was traumatised by her experiences at Hollybank and was frightened of being physically assaulted in the workplace. The Claimant asked Ms Bennett to wait until the end of the week before progressing to the capability hearing, to give the Claimant an opportunity to consider her options. The Claimant’s evidence was that she considered the outcome of a capability hearing to be her dismissal and she did not wish to have dismissal on her employment record.
98. On 15 October 2020 the Claimant emailed Ms Bennett asking for further information about the phased return and working in the leisure centre. She asked when she would be expected to return to residential [519]. She said that she did not feel mentally confident about returning to residential but working somewhere else for a defined and agreed length of time “may” increase her confidence to enable her to return to her substantive post.
99. In a letter which was erroneously dated 14 October 2020 [516], Ms Bennett wrote to the Claimant setting out what a phased return to work would look like. This consisted of four weeks undertaking administrative duties with the hours and days gradually increasing. The letter assumed this would be based in the leisure centre but Ms Bennett made the point that this was still to be confirmed. During week five the Claimant would visit a residential home and she would return to work at a residential home on week six. As the Claimant wished to engage with this process, the capability process was put on hold. Ms Bennett informed the Claimant that should her absence continue beyond 21 November 2020, the capability hearing would be rescheduled.
100. On 16 October 2020 Ms Bennett informed the Claimant that the work at the leisure centre that had been identified was no longer available but other

possibilities were being explored [521]. The proposed phased return to work plan was set out.

101. On 20 October 2020 Ms Cowell advised that a “very tight phased return with RTW/Risk assessment” be undertaken and the Claimant should be informed that if she goes off sick within the proceeding 12 months, the case would go “straight to a formal process” [531].
102. We have found that, from this point, the Respondent was starting to lose patience with the Claimant and, from its perspective, the Claimant either needed to return to residential services or she would be required to attend a capability hearing which, as we have concluded later in these Reasons, would have inevitably resulted in the Claimant’s dismissal. It had a closed mind to any other options, including medical redeployment. This is because of:
- a. The tone of Ms Cowell’s email, as quoted above;
 - b. The fact that Ms Bennett repeatedly referred to the welfare meetings at around this time as “final”;
 - c. The lack of engagement with what OH were advising in their reports, particularly regarding medical redeployment; and
 - d. The sentiments of Mr Trinder expressed in April 2020 namely that “should return to work, or alternatively resign if she does not wish to continue in her role as a deputy manager”.
103. On 26 October 2020 the Claimant informed Ms Bennett that she had been admitted to hospital with kidney stones [533].
104. On 10 November 2020 a further welfare discussion took place between the Claimant and Ms Bennett. Ms Bennett explained that the administration work at the leisure centre was no longer available. She said she had looked into whether other administration work could be offered but it was not possible as a result of the pandemic. She said that she could arrange for the Claimant to start a phased return to work at Newholme children’s home where she would not be working as an Assistant Manager but would instead be undertaking supernumerary duties. The Claimant said it was unlikely that she would end up undertaking supernumerary duties given how residential homes operate.
105. On 12 November 2020 the Claimant informed Ms Bennett that she had an appointment for investigative surgery on 1 December 2020 (concerning a kidney stone issue) and would not be able to start the phased return to work in the residential home until afterwards. She said that she did not wish to work from any residential home other than Hollybank as they would be alien to her and this would increase her stress. She however offered to do administration work from home in the meantime [552-554].

106. On 13 November 2020, a conversation between the Claimant and Ms Bennett took place. Ms Bennett suggested that, in order to relieve the Claimant's anxieties, she could come and work at Ms Bennett's residential home (Skyview) and undertake the phased return to work with her. Ms Bennett explained that this was proposed so that she could personally ensure that the Claimant was undertaking supernumerary duties. The Claimant agreed. However, we have found that the Claimant only did so because she felt her options were either to agree or to face a capability hearing which she believed would inevitably result in her dismissal. It was agreed that in the meantime she would carry out administration tasks from home. In her letter to the Claimant, sent after this meeting, on 23 November 2020, Ms Bennett stated in respect of the decision to allow the Claimant to undertake her phased return to work at Ms Bennett's home: "This was so I could ensure you were completely supernumerary and I could be available on site to offer any support you may require". We have found that Ms Bennett's proposal in this regard was well intentioned and supportive.
107. On 24 November 2020, the Claimant commenced a phased return to work. This was done at the Claimant's home during which she completed online training.
108. On 25 November 2020, Ms Bennett checked in with the Claimant [557]. She said that she did not want the Claimant sat thinking that she had just "left [her] to it". Again, we have found that Ms Bennett's conduct in this regard was well intentioned and supportive.
109. On 9 December 2020, the Claimant asked Ms Bennett whether she could have some flexibility regarding when she worked her hours such that she could spread her hours over the week. This was agreed [563]. Again, we have found that Ms Bennett's conduct in this regard was well intentioned and supportive.
110. On 14 and 16 December 2020, the Claimant emailed Ms Bennett regarding various matters [564]. She requested some annual leave from 28 December 2020 until 1 January 2021. Even though the Respondent was not granting annual leave requests around this time, it agreed to the Claimant's request. Again, we have found that Ms Bennett's conduct in this regard was well intentioned and supportive.
111. It had been agreed that her first day in the workplace would be 22 December 2020 and she would start at 10am.

Phased return at Skyview – day one

112. On 22 December 2020, the Claimant commenced a phased return to work at Skyview Children's Home. She was due to work (and worked) four hours on this date between 10am and 2pm. On this date:
- a. Ms Bennett had unexpectedly fallen ill. Although she felt so unwell she did not feel able to drive, as it was the Claimant's first day in work, she arranged for someone to drive her in. She stayed at the home with the Claimant for the full four hours, despite her being unwell;

- b. A return-to-work interview took place between the Claimant and Ms Bennett. However, Ms Bennett did not have the correct documentation to record what was agreed during that interview and did so on a piece of paper which has not been disclosed as part of these proceedings. A formal return to work form was completed however there is no evidence of this having been given to the Claimant prior to these proceedings. The version of the form that we have seen is neither signed nor dated by the Claimant nor Ms Bennett. Ms Bennett accepted in evidence that she did not complete this form properly because she was very unwell on this date. For all these reasons we have found that the completed return to work form that was disclosed as part of these proceedings was not shared with the Claimant and the Claimant had no opportunity to input into it;
- c. The Claimant and Ms Bennett discussed the Claimant's BAM. The Claimant accepted in evidence that this was the first time she had mentioned her BAM to Ms Bennett, and she had not mentioned it during their other welfare calls because it was personal, and she found it embarrassing.

However, what was discussed regarding the BAM on 22 December is in dispute. Ms Bennett says that the Claimant did not require any adaptations to be made for her to attend work at the residential home and this is recorded in the above-mentioned return to work form, save as for the toilet access mentioned below. On the other hand, the Claimant's evidence was that the need to make adaptations was not discussed with her at all; Ms Bennett did not raise it. The Claimant felt that she should have been risk assessed at this point because of her BAM but she was not. Ms Bennett agreed that no such risk assessment took place.

We prefer the evidence of the Claimant. Although the fact that the Claimant allegedly agreed that she did not need adaptations to be made is recorded in the return-to-work form, this was not shared with the Claimant and the Claimant had no opportunity to contribute towards it. The piece of paper that recorded the discussion which the Claimant and Ms Bennett had on this date has not been disclosed. Given the impact the Claimant says her BAM was having on her at the time, we consider it unlikely that she would have said that no adaptations needed to be made. Although it would have been beneficial for the Claimant to raise this prior to 22 December 2020, we can understand the Claimant's reasons for not doing so, particularly given that her welfare meetings with Ms Bennett over the preceding months had been telephone based rather than in person;

- d. It was discussed that the Claimant required access to a toilet and one was in the room next to where she would be carrying out her duties. It was agreed that she would be given a key however the parties acknowledge that no such key was given to her. The Respondent proposed that the toilet door be left open until she was given a key, but

the Claimant was concerned about this. She was concerned about one of the impacts of her BAM condition being foul smelling faeces and was worried about children being able to access the toilet after she had used it;

- e. It was agreed that the Claimant was in Skyview to do administration/supernumery work only. The Claimant was not there in her normal capacity as an Assistant Manager of a residential home;
- f. It was agreed that the Claimant's phased return to work would be extended by a further two weeks. She would continue to undertake administration work from Skyview between 9am and 5pm, Monday to Friday; and
- g. The Claimant was not introduced to any of the young people during this day. The Claimant considered this to be inappropriate as she was working in their home and anxieties were normally raised at around Christmas time.

113. It was agreed between the parties that, before she left work on 22 December 2020, Ms Bennett discussed with the Claimant the fact that she may not be able to attend work on the Claimant's second working day in the home, 24 December 2020. There was however a dispute between the parties regarding what actually was discussed. Ms Bennett felt she made it clear that it was very unlikely she would be in. The Claimant on the other hand was under the impression she would be in. We have not considered there to be a need to resolve this conflict. However, the pertinent point arising from this is that neither party raised with the other the prospect of the Claimant's phased return to work being put on hold until Ms Bennett returned to full health. This was despite the importance of the phased return to work being successful. We have found that the reason that the Respondent did not suggest this to the Claimant was the Respondent's increasing lack of patience with the Claimant, as explained earlier.

114. Ms Bennett explained that the Assistant Manager, Lee Walsh, would be in work at 9.30am and, if she arrived before him, she could go into the meeting room and look through the young people's files and become familiar with changes to the documents.

115. There is no evidence of Ms Bennett and the Claimant agreeing what Ms Bennett could say to Mr Walsh about the Claimant and why she was working in Skyview. There was no evidence of Ms Bennett asking Mr Walsh to stay in the home whilst Ms Bennett was there, in case she needed his support. Indeed, Ms Bennett confirmed that she had informed Mr Walsh that the Claimant did not require supervision because she had enough tasks to complete [594]. She also said it was not Mr Walsh's role to manage the Claimant.

Phased return at Skyview – day two

116. The Claimant's second day in this residential home took place on 24 December 2020. The Claimant arrived at 8.55am having agreed with Ms Bennett that she could work an earlier shift that day.
117. It was agreed that no managers were in attendance when she arrived. The Claimant's evidence was that the staff on shift did not know who she was so, consequently, she showed them her ID badge, explained that she was the Assistant Manager for Hollybank and that she would be working at Skyview for a while. The fact she informed them of this is not in dispute. The Claimant could not say how long for because she did not know herself.
118. It was accepted that Mr Walsh was not in the home for the entire time that the Claimant was there. In fact, he was not there for most of the time that the Claimant was there. The Claimant says he arrived 30 minutes after she arrived and only stayed for a further 30 minutes. At 1pm she left but Mr Walsh had not returned. The Claimant's evidence was that Mr Walsh had told her that he would only be gone for 1-1.5 hours so the Claimant expected him to return before she had left. The Respondent agreed that Mr Walsh had left the home in order to undertake Christmas preparations and that, by the time he had returned, the Claimant had left.
119. The staff had shown the Claimant to an office and gave her a file to look through until Mr Walsh arrived. The Claimant says she was left in the office with no keys to lock it if she needed a comfort break. She also had no key to the toilet. It was not disputed that she did not have such keys. The Respondent accepted that a staff member was asked to hold the office door open for her while she went to the toilet, albeit Ms Bennett did not consider it necessary for such staff member to have had to do so. The Claimant found this embarrassing.
120. Due to her introduction to the staff she felt as though she was being perceived as the manager in charge of the home. The Claimant's concerns in this regard were compounded when staff came to her with queries.
121. The Claimant's evidence was that she began experiencing symptoms of panic and anxiety resulting in chest pain, a racing heart, breathlessness and diarrhoea. She had what she considered to be a panic attack and called her husband for support. The Claimant says that this incident resulted in a significant deterioration in her mental health and she was unable to return to work. Ms Bennett's evidence was that her staff did not see the Claimant distressed and there was no indication that she was anxious or having a panic attack [594]. We accept the Claimant's evidence. The Claimant was the only person attending this hearing to give evidence who was present in the residential home on 24 December 2020. We have no reason to doubt the truthfulness of the Claimant's evidence regarding this. We consider it understandable why the Claimant might feel panicked given in particular:
- a. She had been away from residential services for a long period of time;
 - b. She had expressed significant reservations about returning to residential services;

- c. She had been assured that Ms Bennett would support her when she started her phased return to work at Skyview. This was the reason why this workplace was proposed to the Claimant, her having said that working in any residential home other than Hollybank would increase her anxiety levels; and
- d. No risk assessment had been undertaken regarding her BAM and she did not have straightforward access to a toilet which children may have used after she had used it.

Resumption of sickness absence

122. On 4 January 2021, the day that the Claimant was due to return to Skyview, she phoned Ms Bennett to let her know that she would not be returning to the residential home and would be self-certifying as sick. She said that she felt unsupported during her time there and would never set foot in a children's home again.
123. During this call the Claimant asked again to be transferred out of residential services. Ms Bennett records her response to the Claimant as follows: "she has already been made aware that a transfer has been explored and this is not an option". Ms Bennett had a closed mind from this point about the prospect of the Claimant being redeployed out of residential services. This was notwithstanding what the Claimant informed her about her BAM condition on 22 December 2020 and the impact attending Skyview on those two days had on her health.
124. In January 2021 the Claimant contacted Remploy for support with her reintegration into the workplace and to ascertain whether they could have discussions with the Respondent about redeployment due to ill health.
125. On 11 January 2021 the Claimant emailed Ms Bennett explaining what happened [576].
126. Shortly afterwards, an Access to Work MHSS Support Plan was put together through Remploy. As part of this, the Claimant's BAM was recorded together with the Claimant's perception that anxiety and stress can cause the condition to flare up.
127. On 13 January 2021, Ms Bennett emailed Ms Williams stating: "Belinda is awaiting a response from me and is using the fact I didn't ring her last week as part of her stress. How do I respond to her" [595]. Ms Bennett's choice of words in this email are illustrative of her lack of patience with the Claimant.
128. On 15 January 2021 Ms Bennett emailed the Claimant with an update. [596]. She also emailed Ms Thorp of OH requesting advice [597].
129. On 27 January 2021 the Claimant instructed a solicitor to write to the Respondent on a 'without prejudice' basis [600-602, 741]. The Claimant

proposed a settlement in exchange for an agreed termination. The Claimant's rights to pursue actions against the Respondent in the Tribunal were reserved.

130. On 28 January 2021 a further welfare discussion took place between the Claimant and Ms Bennett. Ms Bennett informed the Claimant that they would need to begin a capability process with her. She said there were no reasonable adjustments that could have been made to her phased return to work in order to see her return to work. The Claimant said that the only adjustment she required was to be transferred to another department within the Respondent.

131. Ms Bennett confirmed the outcome of this meeting in an undated letter [603]. In that letter she stated: "You ask me to explore where you will be redeployed to. I explain that this option has been explored already and was not a possibility and that the possible next steps would be looking at the capability procedure".

Occupational health referral – 8 February 2021

132. On 28 January 2021, Ms Cottle referred the Claimant to OH again. The Claimant's evidence was that the referral document was not discussed with her nor was she given a copy, despite the form indicating the contrary. We accept the Claimant's evidence. Ms Cottle did not attend this hearing and there is no evidence of this referral document having been shared with the Claimant beforehand. We have no reason to doubt the trustworthiness of the Claimant in this regard.

133. The referral stated that Ms Cottle wanted OH to confirm for a "final" time whether the Claimant was eligible for ill health retirement or redeployment and whether any adjustments could be made to enable her to return to work [145-150].

134. On 8 February 2021 the Claimant attended a further occupational health consultation with Ms Thorp. The report was sent to Ms Bennett that day. The key points from this report were:

- a. Ms Thorp cross referred to the reference to "physical health issues" in the September 2020 report and clarified that in this regard she was referring to conditions including the BAM which Ms Thorp described as "long term";
- b. Ms Thorp advised that, at that point in time, the Claimant was not fit to undertake the current duties and responsibilities of her role. She advised that she was unable to offer a time-frame for when the Claimant would be fit to return to her role in any capacity. She advised that if there was a role available within the Respondent that does not involve working in residential, the Claimant "may be in a position to undertake such a role, if this was to be feasible". However, in this same paragraph, Ms Thorp advised that medical redeployment would not be appropriate at that point in time; and

- c. Ms Throp considered it likely that the Claimant would be considered disabled as defined in the Equality Act. She recommended that the Respondent take this into account when considering the information contained within the report.

135. The Claimant considered the aspects of this report relevant to the medical redeployment point to be contradictory. We agree. Ms Cowell confirmed that when faced with unclear advice from OH, the manager receiving the report should ordinarily question or challenge it. This was not done in this case, the contents of the report were simply taken at face value. Ms Cowell accepted that, in hindsight, further clarification on this point ought to have been obtained. We find that Ms Bennett did not do so because she had lost patience with the Claimant by this point and had a closed mind to anything other than the Claimant attending a capability hearing.

136. It was unclear from Ms Throp's assessment which conditions she had in mind when advising that the Claimant was likely to be disabled. As a result, it is unclear how and to what extent the Respondent could reasonably consider this when reflecting on the information contained within the report. Again, no further questions were asked regarding this and the contents of the report were just taken at face value.

137. The Claimant challenged numerous aspects of this report, as follows:

- a. She had not seen the report before it was sent to Ms Bennett; and
- b. The report stated that during the September 2020 referral, the Claimant had told Ms Throp that the BAM was well managed. The Claimant denied this and referred to the 29 September 2020 case notes which did not include such a remark [109-110]. The Claimant's evidence was that she informed Ms Throp that she was trying to manage the condition but doing so was proving difficult. We accept the Claimant's evidence regarding this, for the reasons given earlier.

138. During this consultation, the Claimant raised with Ms Throp her concern that no reference to BAM was made in the September 2020 report. The case notes record Ms Throp has having written: "concerned that in the last report we didn't cover her bile malabsorption – advised would not have covered this as she wasn't going back to work – would like it covering in the report" [110-111]. The Claimant submitted that this supports her assertion that her BAM was not taken into consideration when considering her eligibility for ill health redeployment in September 2020.

Progression towards capability hearing

139. On 12 February 2021, Ms Bennett sent an email explaining that she had discussed the OH report with HR and they were happy to proceed towards a capability hearing for the Claimant [611]. She said she was going to arrange the "last" welfare discussion and the capability hearing needed to take place within

21 days of this happening. There is no record of Ms Bennett having any concerns with the above-mentioned contents of the OH report in this email.

Grievance (2)

140. On 18 February 2021, the Claimant submitted a further grievance [612-644]. She complained about the pressure that she perceived the Respondent placed on her to return to her substantive role, informing her that if she did not do so she would be entered into a capability process that could result in her dismissal. She complained about what happened at Skyview, mentioned earlier. She specifically alleged that the Respondent's failure to transfer her to a role in a non-residential setting amounted to a breach of the Respondent's obligation to make reasonable adjustments.
141. On 22 February 2021, the Claimant was admitted to hospital with chest pains. The following day she emailed Ms Bennett to say that she had had some tests at hospital, and it was thought that she was having a heart attack and the tests were negative. She was informed that she could have acid reflux which may have been caused by anxiety/stress [645].
142. On 2 March 2021 a further welfare discussion took place between the Claimant and Ms Bennett. During this meeting the Claimant again asked to be transferred out of residential services. Ms Bennett confirmed the outcome of this meeting in an undated letter [647].
143. On 12 March 2021, Hal Williams contacted the Claimant to let her know that he would be considering her grievance.
144. On 16 March 2021, Ms Bennett emailed Mr Williams to relay a conversation which she had had with Ms Cottle. Ms Cottle had requested that she (Ms Bennett) ask the Claimant for her works mobile phone. Mr Williams replied: "I'm just a bit worried that this might seem presumptive (of dismissal). Do we desperately need the phone back?" Ms Bennett confirmed she agreed [792].
145. On 19 March 2021, the Respondent wrote to the Claimant to confirm that her grievance meeting would take place that day. She was reminded about her right to be accompanied [667].
146. On 19 March 2021, the Claimant's grievance meeting took place.
147. On 23 March 2021, the Claimant emailed her solicitor regarding the grievance meeting. At the end of the email, she stated:

"To be honest Claire, due to my experience with Bradford Council and their grievance procedures, or lack of, I don't have any confidence in my grievance being dealt with fairly or in a reasonable time" [669].
148. On 25 March 2021 a further welfare discussion took place between the Claimant and Ms Bennett. Ms Bennett informed her that they would be moving

onto the capability procedure and would provide a date for the capability hearing. Ms Bennett confirmed the outcome of this meeting in an undated letter [673].

149. On 1 April 2021, the Claimant was provided with copies of the notes from the grievance meeting [675-7]. This recorded the Claimant's wish for the grievance to be dealt with formally.
150. On 8 April 2021, the Claimant was invited to attend a capability hearing with Mr Fawcett (Acting Assistant Director, Safeguarding and Review, Commissioning and Provider Services) on 29 April 2021 [678]. This was before she had received the outcome to her grievance. This letter stated: "The meeting will allow me to decide how we can move forward with this matter, but could result in you being dismissed from your post for reasons of capability".
151. On the same date the Claimant emailed Ms Bennett to say that a reasonable adjustment to enable her to return to work would be to move her to a non-residential role. She also said that she considered it would be unfair to commence the capability process until she received the outcome of her grievance [686].
152. Ms Bennett replied on the 12 April 2021 and stated that the Respondent's position was that they had made reasonable adjustments to enable the Claimant to return to work without success. She said that having taken HR advice, the capability process should be progressed even though her grievance hadn't been responded to. She said the capability hearing would give the Claimant the opportunity to highlight and discuss her concerns and make decisions based on full facts. She said that Mr Fawcett would make a decision at the hearing as to if he felt it appropriate to conduct and continue with the other areas that were outstanding [686].
153. On 16 April 2021 the Claimant emailed Mr Williams enquiring about the grievance outcome. She said it had been four weeks since the meeting and eight weeks since she submitted her grievance. She noted that Mr Williams had told her that she would receive the outcome of the investigations by 9 April 2021. She explained that the delay was further impacting upon her stress and anxiety conditions. On 19 April 2021, Mr Williams replied to apologise and confirm the outcome would be provided on 20 April 2021 [688].

Grievance (2) - Outcome

154. On 22 April 2021, the Claimant received the outcome of her grievance appeal [689]. This was sent to her at 2.05am in the morning. The Claimant says this woke her up and affected her ability to sleep for the remainder of the night.
155. The Claimant felt that there was no clear outcome to her grievance save that her points would be explored during the capability meeting which was due to be arranged. We do not agree with the Claimant in this regard. In the outcome letter Mr Williams did draw conclusions around her grievance points. However,

no right of appeal was offered. Nor were the statements gathered by Mr Williams as part of his investigations shared.

156. Mr Williams stated:

- a. "Belinda has been clear (and remains so) that her preference would be to be redeployed to a job outside of residential children's care. However, it has been consistently made clear to her by Bradford that this is not currently an option" [690]. He concluded: "the matters relating to Bradford's obligations (or otherwise) to offer Belinda alternative work in a non-residential setting are best explored in the forthcoming Sickness Capability Hearing. I am satisfied however that there was no duty (or even mechanism) for Belinda to be permanently offered a new role under the sickness procedures thus far, and that it was right for efforts to be focused on supporting Belinda to return to her substantive post" [691]; and
- b. The fact that the proposal for the Claimant to undertake work at the leisure centre had fallen through was unfortunate. He stated: "Whilst this was not the fault of any one individual and resulted from creative, well-meaning efforts to accommodate Belinda's needs, I recommend that Belinda receive an apology from Bradford for this" [692].

157. On 22 April 2021, the Claimant spoke to her solicitor and decided to resign. Her evidence was that she felt she had no alternative as she did not believe the Respondent was ever going to support her.

158. On 26 April 2021, the Claimant resigned [703]. She said she was resigning in response to a breach of the implied term of trust and confidence. The reasons cited in this resignation letter were as follows and she said that each of these matters were a last straw in a history of repudiatory conduct by the Respondent and referred to the matters sent out in her November 2019 grievance and her March 2020 grievance appeal:

- a. Failing to uphold and/or address the issues raised in her grievance dated 18 February 2021. In this regard she specifically complained about the decision to not transfer her into a non-residential role. She acknowledged what the Respondent said about the capability process but stated that she had "no trust and confidence in the [Respondent] that the capability hearing will result in the [Respondent] changing its long-held view by offering me a role in a non-residential setting". She had no reason to believe that a different decision would have been reached through the capability process;
- b. Discriminating against her on the grounds of her disability by failing to make reasonable adjustments. She noted the February 2021 OH advice and stated that the Respondent was under a duty to make reasonable adjustments. The Claimant stated that the Respondent had failed to discharge this obligation by not transferring her to a non-residential role;

- c. Failing to provide an outcome to the Claimant's grievance within a reasonable period of time and sending the outcome to the Claimant at 2.00am when she was absent on sick leave with anxiety and work related stress; and
- d. Pursuing capability proceedings against the Claimant before determining the outcome of her grievance.

159. On 27 April 2021, after she had resigned, the Claimant received a further letter from the Respondent regarding the outcome of her grievance [708]. She was offered a right of appeal. No apology was provided.

160. On 28 April 2021, the Claimant received a letter from the Respondent accepting her resignation and confirming that the capability hearing would not be going ahead [709]. Mr Fawcett signed this letter and stated:

"In terms of the capability procedure, I can assure you that an outcome of dismissal would have been only one of a number of options available to me should this have gone ahead, and this would have provided you with the opportunity to state your case fully and present any evidence to support your views".

The Law

Disability discrimination (duty to make reasonable adjustments)

161. Section 6 of the EA states:

- (1) *A person (P) has a disability if—*
 - (a) *P has a physical or mental impairment, and*
 - (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
- (2) *A reference to a disabled person is a reference to a person who has a disability.*

162. Section 20 of the EA states:

- (2) *The duty comprises the following three requirements.*
- (3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

Constructive unfair dismissal

163. Pursuant to section 95(1)(c) of the ERA:

".....an employee is dismissed by his employer if

..... the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

164. In **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221**, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'
165. In **Lewis v Motorworld Garages Ltd 1986 ICR 157**, the Court of Appeal held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract.
166. In **WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516 (EAT)** the Employment Appeal Tribunal held that the Tribunal was entitled to conclude that a contract of employment contained an implied term that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they might have. The right to obtain redress against a grievance was fundamental since the working environment might well lead to employees experiencing difficulties for a variety of reasons, including the fact that authority and control was sometimes exercised by persons insufficiently experienced to exercise it wisely.
167. In **Blackburn v ALDI Stores Limited [2013] IRLR 846 (EAT)** the Employment Appeal Tribunal held that a failure by an employer to adhere to a grievance procedure was capable of amounting or contributing to a breach of the term of trust and confidence in an employment contract.
168. In **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1**, the Court of Appeal held that, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign. The Court of Appeal in **Kaur** proceeded to offer guidance to Tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:
1. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 2. has he or she affirmed the contract since that act?

3. if not, was that act (or omission) by itself a repudiatory breach of contract?
4. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
5. did the employee resign in response (or partly in response) to that breach?

169. In ***Logan v Customs and Excise Commissioners 2004 ICR 1***, the Court of Appeal held that there is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer.

170. In ***Omilaju v Waltham Forest London Borough Council 2005 ICR 481***, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. In this case it was also held that any breach of the implied term of trust and confidence is a repudiatory breach of contract. This is because the very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage the relationship' (para 14).

171. In ***Chadwick v Sainsbury's Supermarkets Ltd EAT 0052/18***, the Employment Appeal Tribunal rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

172. In ***Morrow v Safeway Stores plc 2002 IRLR 9***, the Employment Appeal Tribunal held that where an employer breaches the implied term of trust and confidence, the breach is 'inevitably' fundamental.

173. In ***Abbycars (West Horndon) Ltd v Ford EAT 0472/07***, the Employment Appeal Tribunal held that 'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon'.

174. In ***Nottingham CC v Meikle [2004] IRLR 703 (CA)*** it was held that the repudiatory breach need not be the sole cause or even the principal cause for the resignation provided the employee resigned in response at least in part to the breach. The fact that the resignation may have been as a result of a number of acts or inactions by an employer, some of which do not amount to a breach

of contract, does not vitiate the resignation in response to those acts that constitute a repudiatory breach.

Submissions

175. Both parties gave oral submissions. These submissions are not set out in detail in these reasons but both parties can be assured that we have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

Disability discrimination – failure to make reasonable adjustments

176. The first question we have considered is whether the Respondent had a provision, criterion or practice of following a procedure which meant that it did not listen to nor communicate adequately with the Claimant. The Claimant confirmed that she believed that this was in place between September 2020 and April 2021.

177. We have concluded that it did not.

178. Between these dates, the Claimant was listened to and communicated with adequately in many respects. This is evident from the welfare meetings that she had with Ms Bennett as well as the Respondent's approach to the second grievance, all of which are explained in detail earlier.

179. Ms Bennett also engaged with the Claimant significantly on the run up to the commencement of the phased return to work and, save as for what happened from 22 December 2020 onwards, tried hard to ensure that the placement at Skyview would be a success. We have referred to numerous instances of Ms Bennett's conduct being well intentioned and supportive in this regard.

180. There was certainly a lack of engagement in the Claimant's request for redeployment (as considered later in these Reasons) but, in all the circumstances, this did not equate to the Respondent applying a procedure of not listening to or effectively communicating with the Claimant, which is the issue we are required to consider as part of determining this claim.

181. If we had found that the Respondent had such a provision, criterion or practice, we would have had to gone onto consider whether this provision, criterion or practice put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability. Although there was no need for us to do so, as this could be dealt with straightforwardly, we have addressed this point in our conclusions.

182. The substantial disadvantage was that the Claimant was placed in an environment with her disability having a dramatic adverse effect as well as feeling fearful. She said her disability results in her fouling herself uncontrollably.

She said this was exacerbated when the Claimant was placed under stress and anxiety.

183. There was no objective evidence of a procedure of not listening to nor communicating adequately with the Claimant, placing the Claimant at this disadvantage. Not redeploying the Claimant, or engaging sufficiently with her request for redeployment, may well have been done, subject to the below point. However, that is not the case we are required to determine.
184. Further, and in any event, the Claimant herself accepted that there was no medical evidence of there being a connection between this alleged procedure and fouling herself uncontrollably.
185. For this claim to be made out, there needs to be the pleaded provision, criterion or practice which puts a disabled person at the pleaded substantial disadvantage in comparison with persons who are not disabled. For the reasons cited above, we do not believe there was.
186. As is clear from some of the conclusions we have drawn in respect to the constructive unfair dismissal claim (below), had the case been pleaded in a different way, there is potential for this claim to have been made out. However, it is not our role to rewrite the Claimant's claim at the deliberations stage; that would be significantly prejudicial to the Respondent.
187. As the Claimant's claim for disability discrimination failed at these two hurdles, we have not gone on to consider the remaining elements of the legal test. We have also not made any determination regarding whether the Claimant was disabled between the disputed period (September 2020 and January 2021) because it is not necessary to do so.
188. The claim for disability discrimination is not well-founded and is dismissed.

Constructive dismissal

189. As the Respondent submitted that we should, we have reached our conclusions regarding this claim with reference to the questions set out in **Kaur**. We have considered the other authorities mentioned above in particular when assessing whether there was a breach of the implied term of trust and confidence.

What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation?

190. This was the outcome of Claimant's second grievance. This was not in dispute.

Had she affirmed the contract since that act?

191. No. She made the decision to resign on the same day that she received this outcome and, after seeking advice on the contents of her resignation letter, she submitted it several days later. The Respondent accepted that this did not amount to an affirmation, and we agree.

If not, was that act (or omission) by itself a repudiatory breach of contract?

192. No. However, it was not an entirely innocuous act and did contribute to the breach of the implied term of trust and confidence.

193. Although we have made some positive findings about the conclusions reached by Mr Williams, we note that Mr Williams did not:

- a. deal with the Claimant's grievance in accordance with the timescales set out in the grievance procedure; or
- b. offer the Claimant a right to appeal when sending her his decision. Whilst he did so subsequently, this was after the Claimant had resigned and therefore has limited relevance to this point.

194. These were issues which formed part of the course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence, considered below.

195. Nor was his grievance investigation completely transparent, given that he did not share with the Claimant the minutes of the investigation meetings that he had gathered.

If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

196. Yes. When assessing this we have considered the culmination of events from 2019 through to the Claimant's resignation. We have not repeated the detailed findings of fact made earlier but drawn conclusions from those findings, as follows:

197. The Claimant was placed in a dangerous position whilst working at Hollybank. These concerns were shared by other professionals.

198. The Claimant repeatedly raised concerns about the staffing levels within Hollybank and the affect the same was having on her health and well-being. She was concerned about the impact of the same on the children and examples have been given earlier in these Reasons making it clear that these concerns were not unfounded.

199. Her concerns were largely ignored by the Respondent during the months preceding the commencement of her long-term sickness absence in September 2019.

200. The Claimant was assaulted at work by X; an assault that she had predicted and warned management about in the months before. The assault resulted in a report to the police and a criminal conviction. Although we agree with the Respondent that, in the role that the Claimant was undertaking, it was the case that the Claimant was expected to work with children who were displaying challenging behaviours, this was the type of assault that Ms Bennett acknowledged herself, with her wealth of experience in residential services, did not frequently occur in children's homes.
201. The Claimant was genuinely afraid of returning to Hollybank whilst X remained there. It was reasonable for her to be afraid. He had already shown aggressive tendencies towards her and assaulted her. He had a meat cleaver in his room. He was going to be annoyed with the Claimant for reporting him to the police after the initial assault, resulting in him being arrested. She said in evidence that she was concerned about being "another statistic" meaning that she was genuinely worried that X could cause her serious injury. She sought interventions but no progress was made. Because she was assaulted by X for a second time, on the first day that they saw each other after the original assault, we agree that her concerns were not misplaced.
202. The Claimant raised a grievance. The progression of this was delayed. She was not offered an appeal but raised one anyway. The progression of this was also delayed. The grievance procedure was not complied with in respect to the timescales. The Claimant felt ignored. She was required to chase. Given the inaction on the part of the Respondent to the concerns the Claimant had raised in the months preceding the start of her sickness absence, we have concluded that it was reasonable for the Claimant to feel this way.
203. During her lengthy sickness absence, she made repeated attempts to be redeployed outside of residential services. Although we have concluded that there were unlikely to have been sufficient grounds to redeploy the Claimant, under the Respondent's policies, prior to September 2020, there may have been sufficient grounds to do so from September 2020 onwards.
204. As a Tribunal considering this pleaded claim, it is not our role to determine whether the grounds have been met. This would be a matter for the Respondent, considering reliable medical advice in conjunction with its policies.
205. However, we can and have concluded that the Respondent failed to effectively engage with the Claimant's request for medical redeployment from around September 2020 onwards. We have concluded this because the Respondent had decided that the Claimant should either return to residential services or leave the Respondent altogether. It had a closed mind to any other option for the Claimant.
206. In September 2020, the Claimant made OH aware of her BAM. They gave it such little significance that they did not even refer to it specifically in the report. No meaningful questions were asked about it because OH had decided to focus on the Claimant's mental health condition. No adjustments or support, specific to her BAM, were suggested.

207. In this report, medical redeployment was not recommended but no reasons for this were given. The Respondent decided to follow this advice blindly because it was losing patience with the Claimant. She had been away from her role for a long period of time. Ms Bennett only expected to have to undertake one welfare meeting with her, but the management of the Claimant's absence became much more than that. The person who dealt with the Claimant's first grievance, Mr Trinder, had, earlier that year, said that the Claimant should either return to her role or resign. HR had said that a "very tight" phased return to work was needed and if she went off sick again, she should go "straight into a formal process".
208. The Respondent placed the Claimant in a vulnerable position during her phased return to work at Skyview. Ms Bennett's preparation for this was well intentioned and demonstrated support to the Claimant. However, the Respondent's conduct during the placement was deplorable.
209. Although Ms Bennett was too unwell to support the Claimant adequately, no consideration was given to delaying the placement until Ms Bennett was well enough to provide proper support. This was even though Ms Bennett had persuaded the Claimant to participate in the placement by informing her that she would be there to support her. This is likely to have been because the Respondent was losing patience with the Claimant at this point and did not wish to delay the process any further, as explained above.
210. The Claimant had expressed significant reservations about returning to a residential home and was only doing so because her options were either that she does so or face a capability hearing which she felt (reasonably, as explained later), would result in her dismissal.
211. She had expressed reservations about working at any residential home other than Hollybank, because doing so would increase her anxiety given the uncertainties surrounding any new home. Ms Bennett had offered the Claimant the chance to work at Skyview because she would be there to support her. The Claimant felt reassured and agreed.
212. Although the Claimant had disclosed to Ms Bennett that she had BAM, no risk assessment was undertaken. No adjustments or additional support were discussed. Ms Bennett did not take this seriously or was perhaps too unwell to adequately engage with the Claimant regarding it.
213. Despite the symptoms of the BAM involving the Claimant needing regular access to a toilet, and foul-smelling faeces, the Claimant was not given a key to either the nearby toilet or the office in which she was working. The effect of this was that the Claimant had to ask a colleague to keep the office door open whilst she went to the toilet. Children living in the home would have been able to access the toilet after the Claimant had used it. The Claimant found this embarrassing.

214. Ms Bennett did not attend work on the second day due to her ill health. Her deputy provided no support to the Claimant and was barely in the home whilst the Claimant was there. Ms Bennett acknowledged that it was not his job to support the Claimant, evidencing Ms Bennett's intention for the Claimant to be present on that day without any support. The Claimant suffered a panic attack, left and did not return.
215. A further OH appointment took place in February 2021. The report contained conflicting advice about whether medical redeployment may be suitable for the Claimant. It expressly stated that it wasn't, but the findings suggested that it could well be. It said that the Claimant was not fit to undertake her substantive role and there was no timeframe within which she may be. It said that if there was a role outside of residential, the Claimant may be able to undertake it. The inconsistencies with this were not further explored by Ms Bennett who used the report to instead simply proceed with the capability process. Ms Cowell accepted in evidence that, in hindsight, further questions ought to have been asked regarding the contents of this report. The Respondent chose not to do so because that would have delayed the progression of the capability process.
216. The report also referred expressly to the Claimant's BAM and advised that the Claimant had a condition which was likely to qualify as a disability. No questions were asked to ascertain whether the BAM was the disability being referred to by OH. Assuming it was, no specific adjustments, relevant to the BAM, were considered despite this being a requirement of the Respondent's sickness absence management procedure. The Respondent believed it had already made sufficient adjustments, in particular, with regards to the earlier phased return to work. It had a closed mind to making any more.
217. The Claimant raised a further grievance, this time specifically referring to her status as a disabled person and stating that it would be a reasonable adjustment for her to be redeployed outside of residential services. The decision reached was that this would be addressed during the capability process.
218. The Claimant formed the view that the inevitable outcome of the capability process was her dismissal. We consider it reasonable for her to have done so, for the following reasons in particular:
- a. The Respondent had not followed its grievance procedure when dealing with her grievances or grievance appeal. It had not engaged properly with the medical advice received from OH in September 2020 or February 2021. She could not be confident that they would follow their capability process either;
 - b. The running order of the capability hearing makes it clear that the presumption is that the person will be dismissed, unless they can persuade the Respondent otherwise. It says the manager will set out the case for the termination of employment including the evidence upon which this is based, and the action taken, including redeployment if appropriate, to address the matter. It states: "The employee and/or their

representative will explain why their employment should not be terminated and provide any evidence in support of their position”;

- c. The only options that the Claimant had been given were to return to residential services or face a capability process. As stated below, redeployment could have been explored prior to a capability hearing. There was unlikely to be any changes following the capability hearing; and
- d. Although unaware of this, in the background were emails from various people suggesting resentment towards the Claimant, seeking to speed up the formal capability process or treat her as though her employment had already terminated (e.g., by asking her to return her phone).

219. We have given careful consideration to the Respondent’s suggestion that the Claimant may have ‘jumped too soon’ and that an outcome of the capability hearing may have been her redeployment out of residential services. However, on balance, we do not consider this to be likely, for the following principal reasons:

- a. The Claimant repeatedly requested such redeployment and was repeatedly told this would not be an option for her. In the latter months, the refusal was unequivocal and on the border of being abrupt;
- b. The Respondent’s policies state that the Respondent could have engaged in the redeployment process without conducting a capability hearing. We refer to 8.8 B and C of the managing attendance framework and (ii) of the capability hearing running order quoted earlier. Therefore, from a policy perspective, we consider the Respondent to have been able to engage properly with this before. There does not appear to be any policy reason why the Respondent could not have engaged with this prior to conducting a capability hearing; and
- c. The person who would have made that decision did not attend the hearing to give evidence about the steps he might have taken and have such evidence challenged.

220. Certainly, from September 2020, the Claimant was on long term sickness absence as defined in the Respondent’s sickness absence management procedure. The Respondent’s policies quoted earlier state that ill-health redeployment can be triggered when the Claimant was in the position she was in during September 2020 and certainly in February 2021. The issue was that the advice given by OH was contradictory and neither Ms Bennett nor HR engaged with that advice. They had a closed mind to doing so because their goal was to proceed to the capability hearing where the Claimant would inevitably be dismissed.

221. This conduct, summarised in this section of these Reasons, is a course of conduct which, in our judgment, viewed cumulatively, amounts to a breach of

the implied term of trust and confidence. Any breach of this implied term is repudiatory.

222. Although perhaps not calculated to destroy or seriously damage the relationship of trust and confidence, it was very likely to have done so. The Respondent had no reasonable or proper cause for acting, or failing to act, in such a way.

223. It was a series of actions, and inactions, which resulted in the Claimant, very reasonably, feeling as though she needed to return to a role which she, very reasonably, considered to be dangerous, or face a capability process which would result in her dismissal.

224. Through that, she faced challenges with having her grievances, and grievance appeal, considered adequately in accordance with the Respondent's policies. She was forced into an unsafe placement at Skyview. There was no engagement with her requests for reasonable adjustments, in particular after OH had advised that she was likely to be considered to be a disabled person. After her second grievance was responded to, she very reasonably, felt that she either needed to resign or be dismissed following a capability hearing. She chose the former because she did not want to have dismissal on her employment record.

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

225. Yes, this was firmly set out in the Claimant's resignation letter and there is no evidence of the Claimant having other motivations to resigning e.g., to accept another role outside of the Respondent. Whilst part of her motivations for resigning were that she did not want to have dismissal on her employment record, this is inextricably linked to the breach of implied term of trust and confidence found.

226. Consequently, the Claimant's claim for constructive unfair dismissal is well-founded and succeeds.

Employment Judge McAvoy Newns
27 July 2022

Sent to the parties on
29 July 2022