Case Number: 2204715/2021

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss P Omisore		Royal Free London NHS Foundation Trust

Heard at: London Central **On**: 13, 14, 15 and 16 June 2022

Before: Employment Judge H Stout
Tribunal Member T Ashby
Tribunal Member I Allwright

Representations
For the claimant: Amanda Hart (counsel)
For the respondent: Hollie Patterson (counsel)

JUDGMENT

The judgment of the Tribunal is that:

(1) The Claimant was constructively unfairly dismissed (Employment Rights Act 1996 (ERA 1996), Part X);
(2) The Respondent contravened the Equality Act 2010 (EA 2010), ss 20-21 and 39 by failing to comply with the duty to make reasonable adjustments for the Claimant's disability by:
    a. Failing, from October 2020 onwards, to deal with her grievance reasonably and in accordance with the ACAS Code of Practice on Disciplinary and Grievance procedures;
    b. Failing to redeploy her in or around December 2020, or prior to 15 June 2021;
    c. Failing to maintain her sick pay at half pay from March 2021 onwards;
(3) There should be a 5% *Polkey* reduction;
(4) There should be an uplift for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures, the percentage of which is to be determined at the Remedy Hearing.

REASONS

1. Miss Omisore (the Claimant) was employed by the Royal Free London NHS Foundation Trust (the Respondent) from 19 September 2016 to 27 June 2021 as a Clinical Pathway Administrator. Following a period of ACAS Early Conciliation between 22 July 2021 and 18 August 2021, the Claimant commenced these proceedings on 24 August 2021. In these proceedings, she claims that she was unfairly constructively dismissed, and that the Respondent failed to comply with its duty to make reasonable adjustments for her disability.

The type of hearing

2. This has been a remote electronic hearing by video under Rule 46 which has been consented to by the parties.

3. The public was invited to observe via a notice on Courtserve.net. Some members of the public joined. There were no significant issues with connectivity.

4. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

5. The issues to be determined were agreed to be as follows (issues ~~struckthrough~~ are issues withdrawn by the Claimant at the hearing):

Constructive Unfair Dismissal

1. The Claimant relies on the implied term of trust and confidence

   The Claimant alleges the following as singularly or together constituted a fundamental breach of the implied term of trust and confidence;

   ~~1.1 Zoe Choudhry telling the Claimant in about August/September 2020 that she should get another job - the Claimant understood this to mean that she should resign.~~

   1.2 Amaryllis Garland insisting and pressurising the Claimant to try to make her return to work at a desk next to Ms Quaglia (EQ) (instead of allowing her to work in Moore's office where she had been moved to so as not to work in the same office as EQ) in about April 2020. (In contrast Garland allowed Charmane Pindura to work from home).

   1.3 Fiona Moore making comments on the phone on several different occasions criticising her sickness absence such as "I feel like you are pulling a fast one" and "You're lucky I haven't put you on stage 1 at this time. You have had enough

sick days to be put on stage 1" and "don't raise your voice at me" when C was crying and not allowing Cs rep Jim to join in the call (April - June 2020)

1.4 Not moving the Claimant to another department as suggested by OH in a report dated 29/9/2020 and by the Claimant's GP by letter dated 14/10/2020 - Zoe Choudhry on the advice of HR refused to agree to this. (The Claimant contends that she could have worked in any other department, of which there were many).

1.5 ~~Not referring the Claimant to or in fact giving her in house psycho-therapy as suggested by OH on 29/9/2020~~

1.6 Responding to C's prolonged absence from work by putting the Claimant on work performance stages from 16/6/2020 onwards which progressed to stage 2 on 2/12/2020 and stage 3 on 15/6/21, instead of treating her condition as a disability, and/or getting to the root of the problem or providing a reasonable solution to the problem which was causing her absence.

1.7 Preventing the Claimant at the stage 3 meeting on 15/6/21 from talking about the reasons why she was signed off sick and confining the discussion simply to the number of sick days off, while continuing to not treat her absence as a disability, or consider redeploying her to a different department as a reasonable adjustment prior to 15/6/21.

2. Was the Claimant entitled to resign, in all the circumstances, in response to such a breach?

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

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

Disability Discrimination (Failure to make reasonable adjustments)

5. Was the Claimant a disabled person within the meaning of s6 EqA 2010 at the relevant time(s)?
6. The Claimant states that she had work related stress and anxiety which started before 2019 but became more significant in April 2020.
7. The Claimant consulted with her GP about work related stress from April 2020 onwards and did not take any medication initially but did receive counselling from early 2021 onwards. She has subsequently been prescribed medication [Sertraline 50 mg] from April 2022. She says that her teeth grinding started in 2018.
8. If the Claimant was disabled then did the Respondent know or could it reasonably have been expected to know that the Claimant was disabled?

9. The Claimant relies on the following PCPs:-

9.1 Requiring C to work alongside EQ

9.2 Requiring the Claimant to work in a team from which she had become alienated

9.3 Requiring regular performance and attendance from employees

9.4 Imposing staged performance management procedures in response to prolonged sickness absence

9.5 Cutting pay after a certain period of sickness absence has expired

10. Was the Claimant put at a substantial disadvantage in comparison with persons who are not disabled? The Claimant states that:

10.1 PCP 1 and / or PCP2 put her at a substantial disadvantage in that they caused her to become stressed and anxious, preventing her from being able to return to work

10.2 PCP 3 and / or PCP 4 put her at a substantial disadvantage in that it put her at threat of dismissal for absences which were related to her disability

10.3 PCP 5 put her at a substantial disadvantage since she lost pay for absences which were related to her disability

11. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant was put at that disadvantage

12. The Claimant contends that the following reasonable adjustments should have been made

~~12.1 Allowing Claimant to work permanently in a different office from EQ~~
12.2 Redeploying C to a different department~~s~~
12.3 Giving her in-house psychotherapy
12.4 Not placing the Claimant into a formal process leading to potential dismissal because of her sickness absence.
12.5 Not progressing that procedure until the root cause at work of the Claimant's sickness absence had been resolved.
12.6 Carried on paying full pay during sickness absence rather than cutting it under terms of contract.

~~13. Unlawful Deductions from Wages (s23 ERA 1996)~~

~~The Claimant is to identify any holiday pay and arrear wages she may be claiming in her~~
~~Schedule of Loss.~~

Remedy

14. The following questions may be relevant in assessing any damages to which the claimant may be entitled to:

14.1. Is the Claimant entitled to a basic award and if so, how much?
14.2. Is the Claimant entitled to a compensatory award and, if so, what level of award it would be just and equitable for the Claimant to receive, in particular: Did the Claimant mitigate her losses following dismissal?
14.3. Did the Claimant receive any monies from the Respondent?
14.4. Would the Claimant have been dismissed in any event?
14.5. Did the Claimant contribute to the dismissal?
14.6. Is the Claimant entitled to an award for injury to feeling and, if so, at what level
~~14.7. Should any award for general damages for discrimination include compensation for anxiety and teeth grinding?~~

The Evidence and Hearing

6. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents.

7. We explained our reasons for various case management decisions carefully as we went along.

8. We received written witness statements and heard oral evidence from the Claimant and, for the Respondent, from Mrs Moore (the Claimant's line

manager), Ms Garland (Service Manager) and Mr McFetters (Senior Operations Manager).

9. We received written skeleton arguments from Ms Hart for the Claimant and Ms Patterson for the Respondent, supplemented by oral submissions.

Adjustments

10. The hearing proceeded in the usual manner with short breaks mid-morning and mid-afternoon and a longer break at lunchtime. The Claimant required more breaks during her evidence, which we permitted. At times she became so upset that quite long breaks were required. With the parties' agreement, we accommodated all such requests. We also accommodated Mrs Moore's request for an additional break when she asked.

The facts

11. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

12. The Claimant was employed by the Respondent from 19 September 2016 to 27 June 2021 as a Clinical Pathway Administrator.

13. Her duties included preparing clinics, dealing with patient queries, chasing patient clinical investigations such as scan and blood test results, scheduling follow-up appointments and ensuring clinic letters are typed up.

14. The Claimant worked in a small administrative team of two alongside Ms Pindura supporting the Neuroendocrine Tumours (NET) team of nurses and doctors which included as Lead Nurse Ms Quaglia. The NET team sat together at a group of 15 desks arranged in four groups (marked turquoise on the Respondent's plan at 663[1]) in one area of a large open-plan (but sub-divided) office for 134 desks. The Claimant's desk (marked O on her plan at 662) was on a small bank of two desks, next to Ms Whyland (Dietitian). Ms Quaglia sat one bank of desks away at the desk marked H on the Claimant's plan.

15. The Claimant's line manager was Mrs Moore. She has worked for the Respondent for 15 years as a Patient Pathway Manager supervising a team of six oncology administrative staff. The Claimant and Ms Pindura were not

[1] Page references are to the main hearing bundle.

part of Mrs Moore's team and she was not involved in managing their work or clinical duties as her office was in a different building, but she did have responsibility for managing annual leave and any general concerns.

16. Ms Garland became the Service Manager for the NET team in around October 2018. From October 2020 she became Assistant Operations Manager for Gastroenterology and Endoscopy. Ms Garland was not Mrs Moore's line manager but they worked together on line management issues for the NET team.

The Respondent's policies

17. The Respondent has a Bullying and Harassment Policy. This provides for informal stages: A – talking to the person concerned; B – facilitated conversation; and C – mediation. Route D is Formal Investigation. The policy provides that formal investigations are required where there have been allegations of very serious behaviours, or facilitated conversations or mediation have been unsuccessful, and that formal investigation *"is always available to any employee who doesn't feel comrtable with either of these options"*. In a formal investigation, a neutral commissioning manager is identified and appointed who in turn appoints a suitable and neutral investigation manager. An investigation is then carried out by an investigating manager with support from an Employee Relations (ER) representative. The investigating manager must carry out *"a thorough, fair investigation to appropriately establish the facts of the matter"* to include *"the collection of statements and where appropriate, interviews with those involved"*. Although the policy does not specify that the complainant should be interviewed, Mr McFetters confirmed that this would be the normal process, as well as interviewing the person against whom the complaint was made and witnesses. The possible outcomes include proceeding to formal disciplinary if the complaint is upheld, or alternative management action if disciplinary is not warranted, or *"no action, because the allegation has not been substantiated or there is insufficient evidence"*. Employees have the right to appeal the outcome of the formal investigation under the Respondent's Appeals Procedure. (We have not been provided with the Appeals Procedure.) The Bullying and Harassment Policy contains no time limit for bringing forward complaints. The Respondent also has a Grievance Policy (592). That policy *"encourages"* employees to raise concerns *"in a timely manager, which must normally be within 3 months of the cause, unless in exceptional circumstances"* (602).

18. In response to the Covid-19 pandemic, in April 2020, the Respondent drafted, but did not publicise or circulate to employees, a revised Standard Operating Procedure (SOP) (611) to be used in all circumstances where a formal investigation of a bullying and harassment request was received. This removed the requirement for investigation, setting a procedure for an ER representative to discuss with the employee's manager to *"determine the facts"* and decide whether disciplinary action was warranted or the situation could be resolved informally. If disciplinary action was not warranted, the ER representative was to put forward recommendations for facilitated

conversations. The mediation route was not available. If serious allegations had been made, the ER representative could recommend moving to a formal disciplinary investigation. If the ER representative, having spoken to the line manager (only) decided that the allegations were not serious, that was the end of the process, with no right of appeal or recourse. As set out below, this was the procedure that was followed in the Claimant's case, although she was not told at any point that this was how her case was being dealt with. Nor was this acknowledged by the Respondent in its response to the claim or in their witness statements.

19. We observe at this juncture that the revised SOP appears to have been formulated without reference to the ACAS Code of Practice on Disciplinary and Grievance Procedures, which provides that all employee grievances (defined in paragraph 1 as 'concerns, problems or complaints') should, if set out in writing (paragraph 32), be dealt with by way of a process that includes, at least, a meeting with the employee, an outcome, and a right of appeal to a manager not previously involved (to include another meeting). The ACAS Code of Practice contains no merits threshold or Covid exception.

20. The Respondent has a Staff Wellbeing and Managing Stress Policy (528). The policy sets out symptoms of stress and requires managers to take reasonable steps to identify and manage factors in the department that may lead to excessive stress. It emphasises the importance of relationships to stress levels and of encouraging employees to report issues. The policy includes a pro forma for a Stress Risk Assessment (548). Mrs Moore and Ms Garland were both familiar with the principles in the policy, although they had not referred back to the policy itself when dealing with the Claimant.

21. The Respondent has a Managing Attendance and Sickness Absence Policy and Procedure which has different procedures for managing short and long-term sickness (long-term being a single absence of 14 consecutive days). Under the policy, line managers are required to manage absence sensitively, with situations that may lead to health problems being identified at an early stage and stress risk assessments being undertaken where appropriate. It states at paragraph 4.6 (505) that Managers must seek guidance and specific advice on all aspects of the EA 2010 from ER. This appears in the policy as part of general paragraphs on all equality issues and is not specific to disability. Under the Respondent's absence procedures the trigger for formal management is a single absence of 14 consecutive days sickness absence (504). Employees and managers have a duty to agree how to maintain regular contact during absence and to supply doctor's notes to cover periods of absence exceeding 3 calendar days. After 14 days' absence the policy provides for an Informal review, then a monitoring period of between 4 and 6 weeks. Stage 1 Formal normally occurs after 8 weeks. There is then a further monitoring period (normally 6 to 8 weeks) before Stage 2, and a further period (again normally 6 to 8 weeks) before Stage 3. The policy provides that all meetings options of reasonable adjustments, phased return to work and reasonable adjustments must be considered. At Stage 3 employment may be terminated, or there may be a further review period, redeployment, or ill

health retirement. The employee has a right to be accompanied by a trade union at all formal stages.

22. Regarding redeployment, the policy states that redeployment should be considered at all meetings, in the light of advice from OH. The policy states:

> Temporary Redeployment may be suitable for employees who are fit to return to work in some capacity but need a period of rehabilitation before resuming the full duties of their substantive post, and may include a reduction in hours/change of job description.
>
> Permanent Redeployment is appropriate where the Occupational Health and Wellbeing Centre have advised that the employee is no longer able to perform their substantive role, or where they are not able to advise when the employee is likely to be fit.

The Claimant's relationship with Ms Quaglia

23. From 2018 the Claimant had to work regularly with Ms Quaglia, the Lead Nurse for the NET team. The Claimant and Ms Quaglia did not get on. Mrs Moore was aware of this, viewing it as a clash of personalities. Ms Garland was also aware of it and attributed the difficulties to Ms Quaglia occasionally reporting (reasonable) issues with the Claimant's work.

24. On 17 December 2019 the Claimant learned that she had been accepted into an interior design school to do a BA Hons degree (140). So far as the Claimant was concerned, this was initially not about a change of career, but about doing something creative alongside her NHS job, as she believed many of her colleagues did. However, when she became unhappy with things at the Respondent she told her GP in July 2020 that she was planning to change career (660).

25. The Claimant shared this news with her colleagues at work, including Ms Quaglia, though she felt she was put under pressure to share the news with Ms Quaglia. Ms Quaglia then told Mrs Moore about it and (the Claimant believes) expressed immediate concern about the possibility of the Claimant reducing her hours to make time for the course. This was one of the incidents about which the Claimant later complained in her grievance. It was not investigated by the Respondent, and we have not heard all the evidence relevant to it either, so we make no further findings on it.

26. On 19 December 2019 the Claimant texted Mrs Moore: *"really sorry for messaging you late. [Ms Quaglia]'s actions keep on playing on my mind. I'm going to start paying for a tribunal and take this up with them. I can't continue with this going into 2020."* Mrs Moore replied: *"Don't do anything drastic – I'm off tomorrow – I'll talk to you on Monday. I think she'll back off now as she knows she's upset you – go in tomorrow and just act normally and I'm sure it'll blow over. If you do want to take things further you can of course but my advice would be to sleep on it. See how you feel on Monday and we can talk then"*.

27. Mrs Moore felt that the Claimant tended to be quite 'volatile' and 'dramatic' and hyper-sensitive to criticism, but even so she accepted that it was unusual for someone to mention taking something to a tribunal and that the Claimant had not done this before. In oral evidence, she could not remember what had prompted the text message. She did not know whether it was what had happened regarding the design course. She said that by 'backing off' she did not mean that Ms Quaglia had crossed a line, just that (whatever it was), if the Claimant was upset Ms Quaglia would back off and 'probably ask Ms Pindura to do whatever it was' that needed doing.

28. On 23 December 2019 the Claimant met with Mrs Moore to discuss her concerns about Ms Quaglia. Mrs Moore suggested arranging a facilitated conversation (by which the Respondent means an informal mediation where conversation is facilitated by another member of staff). The Claimant agreed to this and Mrs Moore notified her on 13 January 2020 that she would arrange this and provided the Claimant with copies of the Respondent's Bullying and Harassment Procedure (98). It is the Respondent's standard practice to send out the policy like this as in principle it operates an open culture that encourages reporting of bullying and harassment.

29. The facilitated conversation took place on 15 January 2020. Mrs Moore facilitated the conversation and Ms Garland was also present. The Claimant complained about the way that Ms Quaglia behaved towards her. Ms Quaglia was surprised by the strength of the Claimant's feelings and apologised. Ms Quaglia's position was that none of the conduct about which the Claimant complained was intentional. She agreed, however, to try to greet the Claimant directly in future and to take performance concerns directly to the Claimant rather than raising them with Mrs Moore (even though the usual approach at the Respondent is to speak to a person's line manager about issues). Ms Quaglia emailed Mrs Moore and Ms Garland after the meeting to confirm this, adding that from her perspective the meeting was *"a very unpleasant experience"* (100).

<u>The Claimant's flexible working request</u>

30. On 6 February 2020 the Claimant made a request for flexible working, asking to reduce hours from full time (37.5 hours per week) to part time (30 hours per week), compressing those hours into 3 x 10 hour days (103-106). On the form she indicated that she was not making the application as a request for reasonable adjustment for any disability. She did not explain on the form, but the reason for the request was to allow herself more time to study for the Design course, and Mrs Moore and Ms Garland were aware of this.

31. Mrs Moore and Ms Garland discussed the Claimant's request. Their view was that someone was needed to cover the phones 9-5 every day of the week, that it would not work to seek a job-share for someone only doing 1 day per week, that 2 days needed to be offered and that it was not reasonable for the Claimant to do 3 extended days to make up the time as neither patients nor

other hospitals should be contacted outside core hours so work outside core hours was not sufficiently useful.

32. On 17 February 2020 the Claimant met with Mrs Moore and Ms Garland to discuss the flexible working request. Mrs Moore emailed (110) to confirm what was discussed at that meeting. This included that she could take Fridays as unpaid leave provided the service was not impacted, commencing that week. Mrs Moore also checked with the Claimant that she understood the financial implications of her flexible working request and the Claimant accepted what the reduction in pay would be if she reduced to 3 days per week (116). Mrs Moore let Ms Quaglia know what had been decided (115).

33. On 20 February 2020 it came to Mrs Moore's attention that Ms Pindura was also due to be on annual leave on the first Friday (21 February). As is apparent from the additional email the Claimant provided during the hearing (separate "page 155"), Ms Quaglia alerted Ms Garland and Mrs Moore to the fact that this meant that both the Claimant and Ms Pindura were due to be off on the Friday and complained that the plan to let the Claimant have Fridays off had not yet been discussed with the team. Mrs Moore then spoke to the Claimant who told her that she had arranged for Ann (who was employed by the consultant, Professor Caplin, using charitable funds to carry out a different job) to cover the phones. Mrs Moore expressed the view that (rather than Ann covering the phones) the Claimant ought instead to work the Friday and take Monday off instead, but the Claimant considered Ann would be *"fine"*. (The Claimant's evidence was that Mrs Moore said she was *"fine"* with Ann covering the phones, but this is contradicted by Mrs Moore's email of the same date and we take the email to reflect the true position.) Mrs Moore consulted with Ms Quaglia and Ms Garland who were also not happy about both the Claimant and Ms Pindura being away on the same day. Mrs Moore realised in the light of this incident that she needed to make clear to the Claimant that she could not take Fridays off if Ms Pindura was also off and she explained that in an email on 21 February 2020 (121). The Claimant did take 21 February off, and Ann covered the phones.

34. Also on 21 February, Mrs Moore emailed Ms Quaglia, copying in Professor Caplin (the lead doctor for the NET team), explaining what was happening with the Claimant's flexible working request (127). In response to this, Professor Caplin complained about the use of Ann to *"help prep and service the clinics"* stating *"that in itself is unacceptable to use such charitable funds for these service needs"*.

35. We observe at this point that one element of the Claimant's later grievance was that Ms Quaglia had improperly influenced the Claimant's flexible working request. As the Respondent did not investigate the Claimant's grievance, the parties have not put before us all the evidence in relation to this issue, but it is relevant to the issues we have to decide to note that it is apparent from the face of the above email chains that Ms Quaglia was not kept 'in the loop' about the handling of the Claimant's flexible working request and that Ms Garland and Mrs Moore had in fact made their decision about how to respond to the request before even telling Ms Quaglia what they had

decided. It does not follow, though, that the Claimant is wrong in her assertion that Ms Quaglia had, in general terms, 'poisoned' Ms Garland's and Mrs Moore's minds against the Claimant. Another element of the Claimant's grievance was that she considered it was Ms Quaglia who had complained to Professor Caplin about the Claimant having arranged for Ann to cover the phones on the Friday. Again, we do not have to determine what Ms Quaglia's role was in relation to this in order to determine the issues that are before us, but we observe that although the email chain shows Professor Caplin raising his concerns directly with Mrs Moore, without any apparent involvement from Ms Quaglia, the emails are not inconsistent with Ms Quaglia having informed Professor Caplin about the situation. Nonetheless, what is relevant to the issues that we do have to decide is that, whatever Ms Quaglia's involvement, it was clearly reasonable for the Respondent (i.e. for all members of the Claimant's team including Ms Quaglia) to object to both: (a) the Claimant and Ms Pindura being off on the same day since they were a team of two and supposed to cover for each other; and (b) the use of Ann to cover the phones when she was employed using charitable funds for a different purpose. While such an arrangement might have been necessary if Ms Pindura and the Claimant were unexpectedly off sick on the same day, it was not reasonable for that to happen just because the Claimant wished to take unpaid study leave.

36. By letter of 21 February 2020 to the Claimant, Mrs Moore formally refused the Claimant's part-time working request (123), identifying the business reasons for doing so. Mrs Moore proposed an alternative of a reduction in hours to 22.5 hours per week over 3 days (0.6FTE), dependent on being able to recruit someone to the 0.4FTE post. The Claimant accepted in oral evidence that on the face of it the reasons given in this letter for refusing her request were reasonable and that Mrs Moore and Ms Garland had done the best they could to accommodate her request. Ultimately, someone was recruited to work the 2 days to cover the reduction in the Claimant's hours. They started in July 2020, by which time the Claimant was off sick.

37. The Claimant was informed of her right of appeal in respect of the flexible working request decision. She did not initially appeal.

38. However, on 2 March 2020 the Claimant and Mrs Moore met. At this meeting they discussed what had happened regarding cover on 21 February 2020 and Mrs Moore communicated to the Claimant that Ms Quaglia and Professor Caplin had been unhappy about Ann being used as cover. The Claimant says that Mrs Moore showed her the emails about this and other matters, but Mrs Moore says she did not share any emails with the Claimant as she knew how sensitive the Claimant was and that the emails would upset her. We noted that the Claimant was vague in oral evidence about which emails she said she was shown and we accept Mrs Moore's evidence that she did not show these emails to the Claimant as they are clearly 'management' emails including discussion of Ms Pindura that it is highly unlikely Mrs Moore would have shared with the Claimant. The Claimant assumed that it was Ms Quaglia who had complained to Professor Caplin and she asserted this to Mrs Moore and also asserted that it was Ms Quaglia who had persuaded the Respondent

to reject her flexible working request. Mrs Moore sought to reassure her that this was not the case.

39. Mrs Moore advised the Claimant that she could raise a formal bullying and harassment complaint, sending her the policy again on 2 March 2020 (130). She did not mention here that the Claimant could appeal the flexible working request because she did not understand the Claimant to be asking to do that. It does not follow however, contrary to the suggestion made by Ms Hart in cross-examination, that the Claimant had not complained about Ms Quaglia influencing the response to the flexible working request. That is in character a bullying and harassment complaint and not necessarily an appeal point, and we find that it was as a bullying and harassment complaint that it was understood by Mrs Moore at the time.

40. At the same meeting, the Claimant requested to work from a different desk and Mrs Moore offered her personal office in the oncology team, which the Claimant accepted. By email of 2 March 2020, Mrs Moore notified the team that the Claimant would be working from 'the oncology offices' this week (129). Ms Quaglia replied *"Why????"* and Mrs Moore explained that the Claimant felt she was being harassed and watched in the NET offices and as she had spare desks that week because Cedric and Patricia were away, she offered the oncology offices as an interim solution. Ms Quaglia replied *"But there is no one in the office today as everyone is in clinic! I thought things were better, obviously not … ok. Let me know if you think there is anything I can do or if I need to speak with the rest of the team"*. Ms Garland was away that week. When she returned, she saw this update and Mrs Moore also told Ms Garland that the Claimant was considering raising a grievance.

41. The Claimant initially sat in a desk in Mrs Moore's office, but that did not work very well as Mrs Moore has to work on confidential matters. Mrs Moore said the Claimant only sat in her office for a morning; the Claimant thought it was longer, the dispute is not material. There is no dispute that the Claimant remained in the oncology offices until the end of March 2020, sitting for most of the time at the desk(s) of employees who were away on annual leave.

42. On 5 March 2020 the Claimant sent Mrs Moore a draft of a grievance and they met on 9 March 2020 again to discuss matters. Following this, Mrs Moore emailed Ms Garland (135):

> Just spoken and reiterated that the decision about the hours was nothing to do with Liz but she feels strongly that its because Liz had painted a bad picture of her that her requests were denied. I said I didn't think she had enough to raise a grievance but she said if HR wouldn't do it she would go to the CQC… so I said she should finish it and we would send to HR and see what they say. I've now got a headache ☹

43. We find this email to be the best evidence of what Mrs Moore understood the Claimant's grievance to be about at the time, and also as to her view of the merits of the grievance. It is clear from this both that (i) Mrs Moore believed the Claimant's grievance to be principally about Ms Quaglia having influenced the response to the flexible working request and that (ii) she did

not think the grievance was meritorious. The Claimant asserts that Mrs Moore had promised to provide a statement in support of her grievance and help her with writing it. Mrs Moore denies this and we accept Mrs Moore's evidence because it is consistent with this contemporaneous email and Mrs Moore has proved to be the generally more reliable witness.

First grievance

44. On 11 March 2020 the Claimant raised a formal grievance about Ms Quaglia. The grievance was eight pages long, included one email as evidence and detailed, coherent allegations. With the exception of the complaints about the flexible working request, all the specific incidents identified in this pre-dated the informal mediation in January 2020. The grievance set out 10 incidents, but it is significant to note that most of them relate to things that the Claimant *believes* Ms Quaglia to have done rather than things that she *knew* Ms Quaglia to have done. The Claimant wrote: *"[EQ] has a habit of seeming pleasant to you in front of other colleagues and she has a softly spoken voice. You wouldn't have any idea that she has all of these issues with you because she goosips with other colleagues about you and complains to senior members of staff trying to tarnish your name. She has built a culture where she thinks it's acceptable to bully certain staff members in less obvious ways."* The Claimant used the term *"microaggression"* to describe what she had experienced, explaining *"I am constantly being undermined and criticized .. I am constantly being watched or eavesdropped"*. The Claimant drew parallels with the way she believed that Ms Quaglia had treated another colleague previously.

45. The Claimant first sent her grievance to Mrs Moore alone and Mrs Moore told her to send it to HR.

46. Ms Garland immediately sought advice from Joe Matthew of HR regarding the grievance, writing, "[The Claimant] *thinks the decision to decline the flexible request was influenced negatively by the NET lead nurse. This is not true; the decision to decline the request was made by [Mrs Moore] and I. We then sought a compromise …"*. She added regarding the grievance *"The attached also contains several untrue statements …"*. In oral evidence, she explained that the statements she considered to be untrue were: first, that Ms Quaglia had not complained to Mrs Moore about the Claimant taking holiday (Mrs Moore had told Ms Garland that did not happen); secondly, the Claimant's reference to a friendship between Ms Garland and Ms Quaglia, when that was not the case, they had a professional relationship but were not friends, and Ms Garland has never seen Ms Quaglia outside work intentionally apart from going for a drink in Easter 2019; thirdly, the assertion that that relationship had influenced the decision on the flexible working request.

47. On 16 March 2020 the Claimant asked for the first time about appealing the flexible working request outcome (148).

48. On 23 March 2020 (156) Mr Matthews contacted the Claimant regarding her grievance and appeal against the flexible working request decision. The Claimant in response clarified that she did not wish to pursue the flexible working request appeal, but did wish to raise a formal grievance (169). On 27 March 2020 Mr Matthews asked the Claimant to clarify whether her grievance was a bullying and harassment complaint and asked her to submit the complaint for him to review (168). The Claimant replied that it was a bullying complaint and pointed out that he (Mr Matthews) had previously confirmed he had received her formal grievance form which documented the incidences.

49. During March the Claimant continued to sit in the oncology offices, which is in a different building from the NET team. Ms Garland was not happy about this as it impaired team-working arrangements. With the Claimant in another office she could not easily be spoken to by team members, nor could pieces of paper (the team still uses paper) be handed easily between them. Ms Garland did not express this view to the Claimant directly, but the Claimant was aware that she had expressed these views to Mrs Moore.

50. On 31 March 2020, because she was aware of Ms Garland's views, the Claimant moved back to her own desk and Mrs Moore emailed her to confirm: *"I understand you have moved back to your office which I am sure is better for you in terms of being with your own team, at your own desk. Please continue to work there from now on. If there are any future issues which make you uncomfortable please do let me know, however under the current circumstances the NET team need you to be with them, and I agree with them that this is better for the service particularly in these difficult times"*. The latter was a reference to Covid-19 pandemic, which had a significant effect on the Respondent which is a leading infectious diseases hospital and was one of the first to take Covid patients and made significant changes to its services, ceasing to deliver 'non-essential' treatment and services in many other areas during the pandemic.

51. The Claimant returned to the NET office, but spoke to Mrs Moore immediately to ask whether, as the office was virtually empty, she could sit at a different desk. Mrs Moore agreed and the Claimant then told all her colleagues, including Ms Quaglia, where she would be sitting. The Claimant went to sit in the desk marked R on 662 so that she was effectively sitting in another department altogether (Hepatology). The Claimant was very worried after this, concerned that Ms Quaglia would (as she perceived it) complain about her again.

52. On 2 April 2020 (167) the Claimant chased Mr Matthews for a response to her 27 March email and Mr Matthews replied apologising for his lack of response. He explained that he would deal with her complaints under the bullying and harassment policy. He stated that the out of time complaints could not be considered and he would therefore only be looking at items 7, 8, 9 and 10. He also said that the informal route or facilitated conversation

needed to come first. He asked her to confirm how she wished to proceed and to provide any additional evidence in support of the allegations.

53. The Claimant replied immediately confirming that she had attempted facilitated conversation and would now like to go through the formal route. She asked for a date when this would take place. By further email of 15 April 2020, Mrs Moore emailed stating that the Claimant had asked her to confirm that an informal facilitated conversation took place on 15 January 2020. Conspicuously, the Claimant did not follow this up by any email either to Mrs Moore or Mr Matthews to the effect that Mrs Moore was also to submit a statement in support of the grievance, or anything like that.

54. The Claimant in oral evidence in answer to Tribunal questions about whether she had submitted any evidence as requested said that she had tried to contact Mr Matthews to tell him in confidence that Mrs Moore was going to provide a statement, but she was not successful in contacting him so was aware that she had not managed to provide any additional evidence. However, when questioned further by the Respondent's counsel, the Claimant said that *"to be honest, I was expecting to receive a meeting date"*. We find that the true position is that the Claimant did not attempt to submit supporting evidence because she was expecting to receive from Mr Matthews an invitation to a meeting to discuss her grievance as provided in the Bullying and Harassment Policy. We do not accept that she tried to call him several times to say that Mrs Moore was going to provide a statement, as Mrs Moore had not offered to provide a statement and we do not consider that the Claimant even believed at the time that Ms Moore was going to provide a statement. If she had, she would have responded to Mrs Moore's email of 15 January 2020 by asking about it, but she did not do so.

55. On 16 April 2020 the Claimant was (in her words) *"overwhelmed with paranoia throughout the day about what the next complaint would be by [Ms Quaglia]. In an attempt to remedy my paranoia I texted my manager"*. In her text to Mrs Moore, she stated that there had been no issues but she set out what work she had done in case 'another inaccurate complaint' was made about her (173). Mrs Moore confirmed that this was a very 'unusual' text by the Claimant.

56. That same day Ms Quaglia left a note on the Claimant's desk with some hand cream and asked her if she wanted to go for a coffee. The Claimant took a picture of this (in her words) *"just in case there were claims that she didn't know where I was located in the office"*.

57. On 20 April 2020 the Claimant began working from home as a result of Covid concerns about her mother (179). Mrs Moore by email enquired how she was getting on and made clear that when she returned she would need to work from her own desk as Ms Quaglia had complained about communication issues and Ms Pindura (who was working from home) had had to come into prepare a clinic. We observe that Ms Quaglia in complaining to Mrs Moore rather than the Claimant about communication issues, and Mrs Moore in passing that on, had departed from what was agreed following the facilitated

conversation on 15 January 2020. This was careless and unfortunate. The Claimant replied that she *"feel comfortable returning back to my desk considering all the issues I have raised and try to rectify with [Ms Quaglia]. On numerous occasions I have been contacting HR to raise a formal investigation, which I know you and [Ms Garland] is aware of".* She dded that she did not see which desk she sat at as an issue as all staff members in the NET team had been told where she was *"especially [Ms Quaglia] as she left a note on my desk"*. She assured that she would maintain lines of communication with Ms Quaglia.

58. Mrs Moore forwarded the Claimant's email to Ms Garland saying *"So annoyed!"* and asking for Ms Garland's view on a draft response. Mrs Moore's draft response indicates that her understanding at that point was that there was no ongoing investigation into the Claimant's grievance. Mrs Moore in oral evidence said that she thought she had been told by Mr Matthews that the allegations were not substantiated. Mrs Moore also said in oral evidence she was annoyed with everything at that point: Covid, stress, as well as the Claimant's issues, there had been a difficulty finding the Claimant who was not at her desk and she was unhappy with the Claimant's response about clinic prep as well as moving desks.

59. Mrs Moore also checked with Mr Matthews how she should reply to the Claimant (181) stating that her understanding was that there would not be any investigation into the Claimant's allegations as she had not provided supporting evidence and she wanted to check that she could therefore insist that the Claimant sit with the rest of the team. Mr Matthews replied that the Claimant needed to continue with open communication with Ms Quaglia and to sit in the same office as the rest of the team and that there was no need for adjustments as it was not as if the Claimant and Ms Quaglia were alone in an office together. Mr Matthews' email does not give any indication that he is still dealing with the Claimant's grievance. Anyone reading his email (in the context of Mrs Moore's query) would have thought the grievance was concluded.

60. Mrs Moore then emailed the Claimant at 11.20 on 21 April 2020 stating: *"You will need to return to your own desk on your return so you are available to work as part of your team. It has become apparent that you being in a different department to the one you work in has had a negative impact on the efficiency of a busy team and as such this cannot continue. If when you return you feel another facilitated meeting would help improve your working relationship then we are happy to try and arrange this, but you need to be aware this is a two way conversation and that you will both have equal time to speak".*

61. The Claimant's wellbeing then deteriorated further and later that day her GP signed her off work with anxiety. Mrs Moore forwarded this to Ms Quaglia (185) stating *"she has got herself signed off until the 25th of May"*. It was put to Mrs Moore by Ms Hart in cross-examination that this made it sound like she did not believe the Claimant, but in oral evidence Mrs Moore denied this saying that she knew the Claimant was stressed and was sympathetic. In the

light of Mrs Moore's subsequent email exchange with Ms Garland, we accept Mrs Moore's evidence on this point and find her terminology merely reflects the general understanding that the content of a GP fit note normally reflects the outcome of a discussion between patient and GP rather than the purely independent view of the GP.

62. The Claimant's grievance was then concluded by Mr Matthews. He did not invite her to a meeting, carried out no investigation, did not interview the Claimant or any witnesses, but dealt with it as a paper exercise of deciding whether, in effect, there was a 'case to answer'. He found there was not and emailed the Claimant with the outcome on 23 April 2020 (187). He did not deal with incidents 1 to 6 on the basis that they had occurred more than 3 months before the grievance. He explained in relation to each of incidents 7, 8, 9 and 10 why there was 'no evidence' to substantiate the Claimant's claim that Ms Quaglia had done any of the things that the Claimant alleged. He did not offer any right of appeal, but did recommend mediation when the process opens back up post the pandemic.

63. We have not received any evidence from Mr Matthews, but it appears from emails and material submitted to Mr McFetter in December 2021 when he reviewed the Claimant's case, that Mr Matthews was following the Respondent's draft varied Standard Operating Procedure that the Respondent introduced (or considered introducing) in response to the Covid pandemic. In addition, he 'borrowed' the three-month time limit from the Respondent's grievance policy – there is no such time limit in the Respondent's bullying and harassment policy.

64. The Claimant did not receive the grievance outcome on 23 April because it went to her work email. She was told about it in a telephone call with Mrs Moore on 28 April 2020 (189) and did thereafter check her work email and view the outcome.

Claimant signed off sick

65. The Claimant remained off sick from 21 April 2020 until her resignation in June 2021. She did not return to work.

66. At the beginning of the Claimant's sickness absence, in accordance with the Respondent's normal procedures, Mrs Moore telephoned the Claimant every week, but she did not always answer the phone. After a call on 19 May 2020, Mrs Moore emailed Ms Garland recounting that the Claimant was *"extremely tearful and shouting … She said whenever she thinks of work she gets palpitations"*. Mrs Moore's email also states: *"She also said that she was made to feel bad about abandoning [Ms Pindura] – I told her we were supporting [Ms Pindura] and she is fine. … [Ms Pindura] actually asked if I thought she was making it up as nothing has changed since she was at work and she seemed fine then"*. Ms Garland replied: *"I believe she is genuinely feeling anxious but the more time she is getting signed off to avoid coming in*

will not help her feel less anxious and HR have said there is no case to be made for investigating a B&H claim against [Ms Quaglia]. I'm concerned about her mental health but feeling anxious about someone is not evidence that they are a bully". To which Mrs Moore responded: *"That's fine. She certainly sounded very emotional. If you like we could alternate calling her just to give you a chance to assess the situation rather than getting it second hand from me. She will be triggering on sick leave which is something else we will need to clarify with her"* (189-90).

67. In oral evidence, Mrs Moore accepted that it was clear at this point that the Claimant's condition was serious, but she had no view on how long it was likely to continue, although it did not sound likely that she would be returning to work any time soon.

68. On 20 May 2020 Mrs Moore referred the Claimant to Occupational Health (OH). The Claimant met with OH on 2 June 2020 and OH reported the same day, the report being shared with Mrs Moore on 16 June 2020 (217). OH recommended that *"a Stress Risk Assessment is done at work as work related stress has been cited"* and that the Claimant should be allowed time off for counselling. At that point her GP fit note was due to expire on 30 June 2020. OH did not refer to any likely return to work date, but did refer to a phased return and support on return. Further counselling and support was recommended and the Claimant was advised to contact Care First. Care First is an external service that the Respondent uses which provides Counsellors and Information Specialists who can guide employees on the Respondent's Bullying and Harassment Policy and pathway and support them. OH ticked boxes indicating that the Claimant's condition was likely to recur and require follow-up support and likely to continue if not resolved (210). OH further stated *"I have not arranged to review [the Claimant] as there is nothing else [OH] could do"*.

69. On 17 June 2020 Ms Garland and Mrs Moore asked Mr Matthews for advice as to whether, if there was a stress risk assessment and the Claimant said she could not sit next to Ms Quaglia, could her request not to sit next to Ms Quaglia be refused if it was cited as the cause of her stress. Mrs Moore and Ms Garland said in oral evidence that this was about seeking advice because the Claimant not sitting with the team was problematic, but it was all about 'hypotheticals' as the Claimant did not come back to work. They did not consider conducting a stress risk assessment before the Claimant returned to work because they did not think that was the process and Mr Matthews did not advise that. We accept their oral evidence, which was plausible.

Informal stage Absence Management process

70. In the Claimant's case, because of the allegations in the grievance. Mr Matthews advised commencing with an informal stage, which Mrs Moore arranged for 22 June 2020. The invitation to the meeting indicated (228) that the meeting would include discussing what reasonable arrangements could be made to enable her to return to her role. The Claimant accepted in oral

evidence that in principle it was reasonable for the Respondent to seek to manage her absence.

71. In advance of the meeting, Mrs Moore met (virtually) with Mr Matthews and Ms Garland and in the abstract they discussed whether it was reasonable to require the Claimant to sit next to a member of staff who she believed had bullied her and Mr Matthews considered it reasonable as the allegations had not been upheld.

72. At the meeting on 22 June 2020, the Claimant was very upset. She had wanted her trade union representative to be present, but he had been told not to attend as it was an informal meeting. She agreed to go ahead without him, but made clear that she wanted a trade union representative with her for future meetings. The Claimant wanted only to discuss her bullying complaint and not her sickness absence. Mrs Moore had been told by Mr Matthews to focus on the sickness absence and that is what she said to the Claimant. The Claimant informed Mrs Moore that (as was true) she had done an online assessment with Care First which rated her mental health as *"hazard"* and that she had been referred for counselling. Mrs Moore said that she remained calm throughout the meeting as she had been trained to, although she said it was 'diffficult' because the Claimant was so upset and shouting. At this meeting Mrs Moore reassured the Claimant that a stress risk assessment would be carried out if she returned (244).

73. Mrs Moore sent an email report of the meeting to Ms Garland and Mr Matthews straight afterwards (241) in which she wrote *"[she] seemed very angry and has literally shouted at me for half an hour. I asked her several times to stop however she seemed unable or unwilling to do so"*. She made a more formal record which was sent to the Claimant (242). In a later email of 17 August 2020 Mrs Moore (292) described the Claimant's conduct at this meeting as *"aggressive and irrational"*.

74. The Claimant alleges that at this meeting Mrs Moore said *"You're lucky I haven't put you on stage 1 at this time. You have had enough sick days to be put on stage 1"* and *"don't raise your voice at me".* She also alleges that in one of their telephone calls, Mrs Moore said, *"I feel like you are pulling a fast one"*.

75. As to the allegation that Mrs Moore said *"You're lucky I haven't put you on stage 1 …"*, Mrs Moore accepts she said something like this because she explained to the Claimant that, given she had been off for 8 weeks, the Respondent could have gone to Stage 1 (under the policy the trigger is 14 days absence). She denies using the word *"lucky"*. The Claimant said in oral evidence that the problem was that Mrs Moore said this abruptly or abrasively and that it was not appropriate to use these words at all given that her anxiety arose from the situation at work. She said *"it is not okay for someone to say something like that to you"*. We find that Mrs Moore did use the word *"lucky",* or that (at least) she said words to that exact effect. Mrs Moore may also have come across as 'abrupt or abrasive' because the Claimant was shouting at her, so it is likely that her tone would have been affected by the stress of that

situation, albeit that we find it implausible that Mrs Moore would have become as agitated as the Claimant was because, as Mrs Moore explained, she has been trained to remain calm in such situations.

76. As to *"don't raise your voice at me"*, Mrs Moore accepts that she said words to this effect because the Claimant was shouting at her. The Claimant also accepted that she was shouting at Mrs Moore and that Mrs Moore's reaction was therefore *"okay"*, but she felt the problem was that Mrs Moore was also shouting. We find that Mrs Moore was not shouting for the reasons that we have already given about the way she would have approached the conversation.

77. As to, *"I feel like you are pulling a fast one"*, Mrs Moore does not recall saying this, Mrs Moore first saw this allegation in the Claimant's email of 17 August 2020 (293) and she immediately wrote to Mr Matthews and others saying that the Claimant was 'lying' about this (292). The Claimant maintains that Mrs Moore said this. She says that 'all along' Mrs Moore was *"gaslighting"* her, by which she means that Mrs Moore was trying to make out that she had done something wrong when she had not. The Claimant maintains that Mrs Moore was not sensitive in her handling of her sickness absence and the Claimant feels that the Respondent did not believe her about her sickness absence because of the comments that Mrs Moore was making.

78. We are not satisfied that Mrs Moore said *"I feel like you're pulling a fast one"*. The Claimant has not been specific about the telephone call in which she contends Mrs Moore said this and we find it highly unlikely that she did say something so unprofessional. Mrs Moore's email to Ms Garland of 19 May 2020 (190) in which she tentatively raises the issue of whether the Claimant is genuinely sick by referencing the fact that Ms Pindura has questioned it, and then accepts Ms Garland's assessment that the Claimant is genuinely anxious and she is concerned about her mental health, makes it clear to us that she would never have said to the Claimant so bluntly that she was 'pulling a fast one'. Although Mrs Moore may have had doubts about the genuineness of the Claimant's sickness at the start, she would not in our judgment have been so unprofessional as to have questioned it in calls with the Claimant. This is especially so where she had found the Claimant from the outset to be very emotional and upset. The fact that she expressed 'annoyance' about the Claimant in her email to Ms Garland of 20 April (two months previously) does not in our judgment help us with this issue. Finally, we note that there appears to be a pattern in the Claimant's thinking that she believes others are thinking the worst of her. We have in mind what had become the Claimant's paranoia (to use her own word) about complaints by Ms Quaglia, and what she said in her grievance about the effect that this was having on her other relationships (*"I feel so uncomfortable talking to anyone because I know they'll take [Ms Quaglia's] side"*). The fact that the Claimant believes Mrs Moore said 'I feel like you're pulling a fast one' when she did not fits with the Claimant's thought patterns.

79. In the conversation on 22 June 2020, it was agreed that the Claimant would call Mrs Moore weekly if she remained off sick, and that there would be a further review in 8 weeks.

80. However, the Claimant spoke to Care First, and they said that she did not need to answer calls from Mrs Moore if she did not want to. The Claimant spoke to ER about this and understood that they were taking action, but ER did not communicate this request to Mrs Moore. The Claimant describes herself during this period as suffering panic attacks at calls from Mrs Moore.

81. On 8 July 2020 the Claimant complained to Giovanna Leeks (256), Head of ER about Mrs Moore's conduct and about the 'failure by Mr Matthews to carry out an investigation or follow the correct protocols' in relation to her bullying complaint. She included the whole complaint again. Ms Leeks forwarded the Claimant's email to Nicole Myers (ER Specialist) (255), who emailed the Claimant and her trade union representative Jim Mansfield stating that she would like an opportunity to discuss the Claimant's email, but that her understanding was that there was insufficient evidence to carry out a formal investigation and that the Claimant had already had a facilitated conversation with Ms Quaglia in the past. A meeting was arranged for 23 July, but the Claimant's union representative did not confirm the date so it was rescheduled for 10 September 2020 (276, 297).

82. Also on 8 July 2020, the Claimant emailed Dayo Ajibola (276) (HR Business Partner) referring to a phone conversation they had apparently had the previous week and stating that she did not want to speak with Ms Garland, Mrs Moore or Mr Matthews any more. Mr Ajibola replied to say that he had spoken to Mr Matthews who had 'taken on board' her request. However, it is evident from emails (270-286) that there was a delay in Mr Matthews actioning this. It was only 3 August 2020 that Mr Matthews appears to have recognised it as a request to change the Claimant's line manager. Even then, Mr Matthews failed to tell Mrs Moore about this.

83. So far as Mrs Moore was concerned, after the meeting on 22 June 2020, the Claimant did not keep in contact as agreed. By 3 August 2020 the Claimant had not been in contact for over a month and her fit note had expired. Having taken advice from Mr Matthews, Mrs Moore emailed the Claimant, detailing attempts to contact her and asking her to call on 4 August (287). On 4 August, when the Claimant had not called, Mrs Moore followed up with a further email.

84. On 6 August 2020 Mrs Moore invited the Claimant to a Stage 1 Formal Long Term Sickness Absence meeting (288). The Claimant did not reply and Mrs Moore followed up on 11 August 2020.

85. On 17 August 2020 the Claimant emailed Mrs Moore and Ms Garland saying that she had made HR aware that she no longer wished to continue making phone calls and that HR had said they would arrange another point of contact. It was in this email that she first accused Mrs Moore of saying to her that she thought she was *"pulling a fast one"*.

Stage 1 Absence Management process

86. At this point, the Claimant's request to change her line manager was actioned and, on 18 August 2022, Ms Garland informed the Claimant that Ms Chaudhry (Ms Garland's manager) (295) would take over as the manager for the Stage 1 absence meeting on 20 August 2020 (301). The Claimant found Ms Chaudhry to be a supportive manager (353). At this meeting the possibility of redeployment was briefly discussed and it was agreed it would be looked at further at the meeting the Claimant was due to have with Ms Myers of HR on 10 September 2020.

87. The Claimant and her trade union representative met with Ms Myers on 10 September 2020. An email from Ms Myers indicates that she was intending at that meeting to clarify that the bullying policy had been followed *"to completion"* (297) and the Claimant accepted that this was what she was told in the meeting.

88. By email of 16 September 2020 Ms Myers followed up confirming the outcome of the meeting (314). She confirmed that the previous bullying and harassment issue had been dealt with as per policy and the appeal period had lapsed so the issue remained closed. She noted that the Claimant was considering raising an informal grievance about Mrs Moore and would liaise with her TU representative about this. She added: *"You also expressed a desire to be redeployed I advised that is not a decision I can make and as there were no such recommendations in the outcome of the Bullying & Harassment investigation, there is no formal process to accommodate this. However, as with all staff, you are welcome to apply to any vacancies and go through the normal recruitment process"*. There were a number of Band 4 and 5 Clinical Pathway admin roles available at that time and Ms Myers provided the Claimant with links to them. We pause to observe that the advice from Ms Myers was incorrect as the Claimant was being managed under the Managing Attendance and Sickness Absence Policy which does provide for redeployment.

89. On 18 September 2020 the Claimant had a conversation with Ms Chaudhry, who made a file note of the call (320). This noted that the Claimant was unhappy with the outcome of the meeting with Ms Myers and that HR were not able to recommend redeployment. Homeworking was discussed but the Claimant did not think that would resolve matters as she would still need to communicate with Ms Quaglia. The Claimant said that if she was not redeployed she may need to resign. The Claimant said there was nothing else that could be done to support her return to work at that point.

90. On 29 September 2020 the OH Advisor (OHA) gave their opinion that the Claimant remained unfit for work. It was noted that she had been having counselling sessions although this was incorrect as none had been arranged for the Claimant either via her GP or Care First at that point. (The Claimant had just sought advice from Care First.) The Claimant is recorded as telling OH that she was still expecting HR to investigate her bullying complaint. The OHA wrote *"In light of the above circumstance she is likely to benefit from*

being referred to the OHP [i.e. OH Practitioner] *for further assessment and if redeployment is to be considered"*. The OH also wrote: *"I am planning referral to the in-house psychologist and OHP if redeployment is to be considered"*. The Claimant read this as a recommendation for redeployment, but it is not clear. Our reading of it is that the OHA was stating that they would refer to in-house psychology and the OHP if management considered redployment. Ms Chaudhry also found it unclear; she indicated to the Claimant that she would discuss redeployment with HR (326). OH also recommended a stress risk assessment. The Claimant's condition was noted as an *"ongoing issue which may require further assessment and resolution"*.

91. From about October 2020 the Claimant's pay was reduced to 50% in line with the Respondent's sick pay policy.

92. The Claimant's GP by letter of 14 October 2020 (325) wrote that the Claimant had been diagnosed with work related stress and anxiety. He wrote *"it is important for her Mental Health that she will be relocated to a different department and not let our patient return to the same office, which is the source of her stress. It is important to address the source of the bullying she has been subjected to. I hope you'll be able to allow our patient to work elsewhere"*. This letter was provided to Ms Chaudhry (330).

93. Ms Chaudhry sought advice from HR about this redeployment request. She informed HR that the Claimant was being managed under the sickness procedure and provided a copy of the GP's letter. Mr Dwomah (HR Business Partner) and Ms Varney (Employee Relations Advisor) both agreed by emails of 4 and 5 November 2020 that as the Claimant was not being put 'at risk' (i.e., we understand it, of redundancy) redeployment was not an option and she would have to apply competitively for advertised roles. Again, the advice given was wrong, and not in accordance with the Respondent's policy on Managing Attendance, as Mr McFetters accepted in oral evidence, acknowledging that there may have been a 'mix up with processes'.

94. On 2 December 2020 the Claimant was assessed by OH again (343), this time by a Consultant, Dr Assoufi. Dr Assoufi advised that she remained unfit for work and that it was difficult to predict when she would be able to return to work, but he expected she would be unfit for at least two months. He stated that she requires long-term psychotherapy. He asked her to contact Care First for counselling and noted that her GP had also referred her for counselling.

<u>Stage 2 Absence Management process</u>

95. On 2 December 2020 the Claimant met with Ms Chaudhry for the formal Stage 2 sickness absence meeting, together with her trade union representative (337). The Claimant again confirmed that she could not return to work or work from home because she would have to work with the individual who had caused her work-related stress. Ms Chaudhry recorded that the Claimant was *"not well enough to return back to work in her previous*

position". The Claimant complained again about the handling of her bullying complaint (focusing on this occasion on the application of a 3-month time limit to her complaints that is not in the policy). At this meeting it was communicated to her that redeployment was not an option as the Claimant was not 'at risk', but that the Claimant was able to apply for alternative roles and Ms Chaudhry offered to assist the Claimant with interview preparation.

96. On 15 January 2021 the Claimant had an informal catch up with Ms Chaudhry (346). The Claimant had applied for one of the Band 5 roles and was waiting to hear the outcome (she was not successful). The Claimant complained that she had not received any formal psychological support and Ms Chaudhry indicated that she understood there was a waiting list.

97. On 9 February 2021 the Claimant spoke to Ms Chaudhry and Ms Chaudhry sent her notes following (347). At this meeting the Claimant told Ms Chaudhry that she was still not well enough to return to her post and did not intend to return to her post because of both what had happened with Ms Quaglia and with the rest of the department. Ms Chaudhry agreed to look into what had happened with the psychotherapy referral. The Claimant said again that she felt let down by the Respondent's handling of her bullying complaint. Ms Chaudhry informed the Claimant that she was leaving the Respondent and would hand over to Ms Allibone (Operational Manager for the NET Service).

98. In March 2021 the Claimant exhausted her contractual sick pay and her pay reduced to nil.

Stage 3 Absence Management process / Resignation

99. Stage 3 of the sickness absence management process was handled by Mr McFetters, a Senior Operations Manager who is often involved at Stage 3 of the process for employees in the division.

100. By letter of 11 May 2021 he invited the Claimant to a meeting on 25 May 2021 (361). At the Claimant's request this was rescheduled twice and took place on 15 June 2021 (382). The Claimant attended, with her Trade Union representative Jim Mansfield. Mr McFetters was assisted by Ms Davies (Senior ER Advisor). Ms Allibone attended to present the management case.

101. The meeting commenced with introductions and Mr McFetters explaining the process. He noted that the Claimant had not submitted any documentation in advance of the meeting and the Claimant explained she had started something but become too overwhelmed. The process followed was to be presentation of the management case, questions, then presentation of the Claimant's case and questions, followed by a decision by Mr McFetters.

102. The management case was presented as being that the Claimant had had a total of 419 days of sick leave since 21 April 2020. There had been three OH reports and no return to work date in prospect. The most recent report of 20 May 2020 recommended the Claimant have time off work and counselling.

The management case was presented on the basis that OH had recommended redeployment, but that HR had advised this was not an option as the Claimant's role was not 'at risk' and she could still "physically" do the job (385). Management argued that the long-term absence could not be sustained, that the Claimant did not feel able to return to the role, but it needed to be filled.

103. At the meeting the Claimant sought to discuss the bullying and harassment complaints in greater detail, but Mr McFetters had been told by HR that those complaints had been dealt with and he sought to focus on her sickness absence. He also tried to get her to focus first on asking questions of the management case rather than presenting her 'defence'. Mr McFetters and Ms Davies questioned Ms Allibone about whether the stress risk assessment could have been done as part of a review/wellbeing call even though it is normally advised to be done on return. They also asked about what consideration had been given to redeployment.

104. The meeting then moved on to the employee statement of case. During this, the Claimant became upset and they took a break to enable her to speak to her Trade Union representative and when she returned she said that she would be handing in her resignation. The meeting notes of her return to the meeting are as follows (388):-

> PO [the Claimant] states even now and doing this process she feels this is the wrong process being asked about stage but nothing addressed, HR was never transparent with investigation, poor advise and professionalism throughout these issues presented which is why she has been off. PO did request for redeployment, GP also wrote to HR to request redeployment, OH also advised redeployment but HR very reluctant to do that, PO feels she is at the point where it has taken a toll on her and will be handing in resignation letter and this has been poorly managed and will be immediate effect on the grounds of bullying
>
> JMc [Mr McFetters] suggests to go through meeting and appreciate these meetings are difficult esp for PO, also very important JMc and CD here both sides and come to a judgement, if can go through process and consider options.
>
> JM [Claimant's TU rep] states PO has no intention of coming and nothing Trust can do to bring her back unless bullying is tackled from this meeting but from outset this is looking at sickness …PO states her voice has been silenced … No one has addressed, what did HR actually do what investigation did they do? … some issues not addressed due to 3 month period but no one knows about this 3 month period … PO wants to hand in resignation

105. Later in the meeting (390) the Claimant stated:

> PO feels she should not have come to stage 3 but this is solely related to B&H and if unable to discuss no more to discuss

106. At the end of the meeting the Claimant asked about the resignation process and was told it was the normal arrangement of writing to manager to give 4 weeks' notice.

107. In indicating that she wished to resign, the Claimant referred again to the issues of redeployment and psychotherapy support. Her representative made

clear that unless the bullying was tackled properly there was nothing the Respondent could do to get her back.

108. The issue of redeployment was then discussed further. At the end of the meeting, Mr McFetters concluded that redeployment had not been fully explored and he decided there should be a 12-week redeployment period to allow the Claimant to find an alternative role. The Claimant understood that this was what she was being offered.

109. The meeting finished with the Claimant being given an opportunity to consider her position. Mr McFetters understood that the Claimant was serious about resigning, but he did not think at the end of the meeting that she was definitely going to resign.

110. On 27 June 2021, the Claimant handed in a written notice of resignation, said to be 'with immediate effect' which was back-dated to 15 June 2021 (394). The first sentence stated that she was resigning *"on the grounds of bullying in the form of constant microaggression and macroaggression … which was never resolved"*.

111. By letter of 1 July 2021 (403) that resignation was accepted by the Respondent. The Claimant was paid for her notice period.

112. By letter of 8 July 2021 Mr McFetters sent the Claimant written confirmation of the outcome of the Stage 3 meeting (406).

113. There was ACAS Early Conciliation between 22 July 2021 and 18 August 2021.

114. On 24 August 2021 the Claimant commenced this claim.

115. In the meantime, by letter of 9 August 2021 the Claimant raised a further grievance (408). Although the Respondent does not normally investigate grievances where an employee has resigned, on this occasion Mr McFetters decided to do so. He proceeded by carrying out what is best described as an internal review of the Claimant's case. He did not meet with the Claimant, but he did carry out some internal investigations. He met with Mrs Moore (418-419), Ms Garland (no notes), and Ms Quaglia (420-421). He also obtained further information from Mr Matthews and Employee Relations (422-428).

116. By letter of 17 December 2021 Mr McFetters informed the Claimant that he had completed his review of her allegations (429). He agreed with Mr Matthews that there was no evidence to substantiate the bullying allegations she had raised against Ms Quaglia. He noted that there had been a delay in dealing with her grievance by Mr Matthews, but expressed the view that this was acceptable given the impact of the Covid pandemic on the Respondent. He stated formally that the Claimant's request for redeployment had not been handled in accordance with the Managing Attendance and Sickness Absence policy, but that this mistake had been rectified at the Stage 3 meeting.

Referral for psychotherapy

117. As noted above, the Claimant had a telephone consultation with Dr Assoufi (OH) on 2 December 2020 at which he advised that she should have long-term psychotherapy, but did not make any specific referral. He advised her to contact Care First for counselling sessions and noted that her GP has referred her for counselling, but this may take a long time to arrange.

118. As the report was not clear as to what was being recommended, Ms Chaudhry followed up with the OH administrator Lesley Todd who said that she would ask Dr Assoufi to speak to the Claimant to clarify how to access the service (347). Later that day, Ms Todd confirmed to Ms Chaudhry (348) that Dr Assoufi had spoken to the Claimant and explained about the psychotherapy. The Claimant had been under the understanding that she was on a psychotherapy waiting list. Having spoken to Dr Assoufi, he clarified that OH support was limited and he had signposted her to Care First and her GP. The Claimant informed Helen Allibone of this in March 2021 (358) and also confirmed that by that time she had received support from IAPT, to which she had been referred by her GP. It therefore appears that the Claimant was not signposted to the Respondent's Clinical Psychology Service (467) as Dr Assoufi did not tell her about it (or she did understand him to have said that).

119. By email of 12 April 2022 (641), sent in response to an enquiry by the Claimant after she had left the Respondent, OH explained that following the Claimant's appointment with OH on 2 June 2020 she was referred to Care First. At the next appointment on 29 September, OH planned to make a referral to the Respondent's in-house psychology team, but this was not made. When the Claimant queried this, OH explained that they did not book a psychology appointment as their records showed that she had commenced counselling with Care First. The OH on 2 December 2020 suggested psychotherapy and recommended that the Claimant contact Care First. No referral to in-house psychology was made and the Respondent does not have an in-house psychotherapy.

120. Mr McFetters added in his witness statement (and clarified in oral evidence) that even if the Claimant had been referred to the in-house psychology service she would not have been treated during that period as during the first 18 months of the Covid pandemic the service was prioritising treating those staff dealing with the Covid response, which would not have included the Claimant.

Disability

121. The Claimant's fit notes gave her reasons for absence as follows:
    a. April 2020 – "anxiety"
    b. May 2020 -"anxiety"
    c. June 2020 -"stress-related problem"
    d. July 2020 – "stress at work"
    e. August 2020 -"stress at work"

f. September 2020 -"stress-related problem"
g. October 2020 -"stress-related problem"
h. November 2020 -"stress-related problem"
i. December 2020 -"stress-related problem"
j. February 2021 -"stress-related problem"
k. March 2021 -"stress-related problem"
l. June 2021 – "stress at work".

122. The Claimant first contacted her GP about anxiety on 21 April 2020 (661). She contacted the GP again on 22 May 2020 who advised self-referral to Improving Access to Psychological Therapies (IAPT). The Claimant contacted IAPT following this but did not get on their referral list. She saw her GP a number of times during the summer of 2020. On 30 October 2020 she asked again about therapy and was provided with another link to IAPT (655). The Claimant eventually received counselling from IAPT in April/May 2021 (379).

123. When the Claimant met with OH 2 June 2020 they recommended she contact the Care First counselling service (210). The Claimant attended the Care First counselling service offered by the Respondent (624). It was available to the Claimant all the time she was at the Respondent. The Claimant was given a contact number for Care First. The records of contact with Care First are at 201. The Claimant contacted them four times between 16 and 30 June 2020 (201), then there was a follow-up in February 2021. In June 2020, they advised her to contact her GP because her anxiety HADS scale was at 'hazard' level (434, 199). Although these contacts with Care First have been referred to as 'counselling' they are not 'counselling' in the formal sense of that term, but telephone advices on bullying and harassment. When the Claimant met with OH in September 2020, she told OH that she had had "counselling sessions and several sessions with care first she felt had been helpful" (323). The Claimant said that she did not pick up on this inaccuracy when she reviewed the OH report as she was stressed out and fatigued and going through a lot.

124. The Claimant had a telephone consultation with Dr Assoufi on 2 December 2020 at which he assessed to be unfit for work and reported *"it is difficult at this point in time to predict when she will be able to return to work. I expect she will be unfit for at least two months"*. He advised that she should have long-term psychotherapy, but did not make any specific referral. He advised her to contact Care First for counselling sessions and noted that her GP has referred her for counselling, but this may take a long time to arrange.

125. The Claimant says that as a result of the impact on her mental health of her difficulties with the Respondent, she struggled with her Design course, seeking extensions to deadlines (451). She was permitted up to 2 weeks for each extension, although with her 5000-word dissertation she only needed a 4-day extension in February 2021 as she had been working on that for 12 months.

126. After the Claimant had left the Respondent, the Claimant attended an Emotional Support Group from 15 September 2021 until 10 January 2022 (452).

127. The Claimant's dentist noted in 2019 that she suffered from Bruxism (teeth grinding at night). She attributes this to stress at work, although she was not aware of it. She put the start date for this as 2018 in consequence of her own view that it was attributable to stress at work, but we have received no medical evidence to support this causal connection.

128. In the Claimant's impact statement prepared in January 2022 the Claimant describes symptoms of *"feelings of despair, alienation, isolation, low mood, confusion, fatigue, insomnia and anxiety, frustration and anger"* as if those symptoms started in April 2020. However, there is no mention of insomnia in her OH or GP notes at the time and we find that it is unlikely that she was suffering from insomnia during 2020. In her April 2022 impact statement addendum (443) she describes symptoms as they have been since leaving the Respondent. She sees these symptoms as related to what happened at the Respondent. It was put to her that she has been conflating how she feels now with how she felt at the time, but the Claimant disagreed with that. She said that she felt these things at the time in April 2020 and that from that point on she was not functioning well at all, but was lying on her bed not doing anything.

129. The Claimant's medical notes from 2020 do not include all the symptoms she now lists in her witness statement, but they do include significant symptoms including *"palpitations"* (i.e. heart racing), anxiety, panic episodes and fatigue on 26 June 2020 (660), 1 July 20 (659),14 August 2020 (657) and 10 April 2021 (651). We accept that the Claimant was suffering these symptoms at the time.

130. In her addendum impact statement the Claimant describes how much worse her health is now in April 2022 than it was previously. She has difficulties sleeping and with concentration. At her new work she is now being office cleaner rather than doing anything more difficult because of her mental health issues. She is paranoid about criticism, anxious, tense. She gets frequent headaches, feels overwhelmed, worried and sad. She feels her heart palpitate harder than usual and stomach cramps. For the first time, she has now been prescribed anti-depressant medication (she says that the GP did not prescribe it before because of addiction concerns, but accepts it may also have been because her symptoms were not so bad before), she bites her nails, and socially isolates herself, not seeing friends or talking to work colleagues. In March 2022 she split up with her partner as she felt it would be selfish to be with him in her current state. In March 2022 her Emotional Support Group also ended and her anxiety is worsening again. She had a panic attack at work and has given up dance classes, running, yoga, etc due to feeling mentally drained.

131. In April 2022 the Claimant's GP notes indicate that she has now been diagnosed with *"Mixed anxiety and depressive disorder"* and was prescribed anti-depressants and referred again to IAPT.

The Respondent's knowledge

132. None of the Respondent's witnesses gave any express consideration at any point to whether the Claimant met the definition of disability. No advice was sought on that. OH did not mention it in their reports. The Claimant did not raise it. During the Claimant's employment the Respondent had access to the Claimant's OH reports and GP letter of 14 October 2020, and were aware of what the Claimant had told them about her condition. The Respondent did not have the Claimant's GP records or other medical records.

Conclusions

Disability

The law

133. By s 6 of the EA 2010, a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. The term 'substantial' is defined by s 212 EA 2010 as 'more than minor or trivial'.

134. The Tribunal must have regard to the government's guidance *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) (the Guidance) insofar is it considers it relevant: EA 2010, Sch 1, para 12. There is also guidance in Appendix 1 to the Code of Practice on Employment published by the Equality and Human Rights Commission (EHRC), which the Tribunal must take into account if it considers it relevant: Equality Act 2006, s 15(4).

135. In *Elliott v Dorset County Council* (UKEAT/0197/20/LA) Judge Tayler emphasised that the Tribunal must consider the statutory definition, which takes precedence over anything in the EHRC Guidance or Code of Practice and (at [43]): *"The determination of principle is that the adverse effect of an impairment on a person is to be compared with the position of the same person, absent the impairment. If the impairment has a more than minor or trivial effect on the abilities of the person compared to those s/he would have absent the impairment, then the substantial condition is made out."* The focus must be on the identification of day-to-day activities, including work activities, that the Claimant cannot do or can do only with difficulty: *ibid* at [82].

136. The Guidance at D4 states: *"The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-*

day activity, account should be taken of how far it is carried out by people on a daily or frequent basis."

137. The Guidance at B7 states that the account should be taken of how far a person can reasonably be expected to modify their behaviour to prevent or reduce the effects of an impairment on normal day-to-day activities. *"In some instances, a coping or avoiding strategy might alter the effects of the* impairment *to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities"*. The Guidance goes on to give the example of someone with allergies avoiding certain foods, or someone with a phobia avoiding the triggering thing. At B9 the Guidance makes clear that where someone avoids doing something that causes pain, fatigue, or substantial social embarrassment, it would not be reasonable to conclude that they were not disabled. At B10: *"In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment"*.

138. By para 2 of Sch 1 to the EA 2010, the effect of an impairment is long-term if: (a) it has lasted for at least 12 months, or (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

139. The question of long-term effect is to be judged at the date of the act of discrimination concerned: *Tesco Stores Limited v Tennant* (UKEAT/0167/19/OO) at [7].

140. Where the issue is whether the effect is "likely" to continue for 12 months, the question is whether it "could well happen" or is a "real possibility". It is not a balance of probabilities question: *Boyle v SCA Packaging Limited* [2009] ICR 105, HL.

141. When determining whether or not a person has a disability, the Northern Ireland Court of Appeal in *Veitch v Red Sky Group Limited* [2010] NICA 39 at [19] held: *"The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself preclude a finding of fact that a person suffers from an impairment that has a substantial long-term adverse effect."*

142. In relation to suffering symptoms of anxiety and low mood there is a distinction to be drawn between a mental condition which would constitute an impairment and what is simply a reaction to *"adverse life events"*: *J v DLA Piper UK LLP* [2010] ICR 1052, [42]-[43], considered in *Herry v Dudley*

Metropolitan Council [2017] ICR 610, [53]-[56]. We in particular have had regard to [56] of *Herry* per Judge Richardson:

> 56. Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment tribunal to assess.

Conclusions

143. The Claimant submits that she was substantially adversely affected by the mental impairment of stress/anxiety from the point at which she went off sick on 21 April 2020, and that on the basis of the OH report of 2 June 2020 the condition was likely to be long-term.

144. The Respondent submits that the Claimant was not 'substantially' affected by her condition at any point because the reason why she was not in work was because she did not feel that she could work with Ms Quaglia, and not because of her stress and anxiety. The Respondent points to the fact that the Claimant did while off sick complete her degree course, including a 5,000-word dissertation. The Respondent submits that although she suffered episodes of anxiety, her day-to-day life was not substantially affected, and that what happened in the Claimant's case was that she had an entrenched position regarding Ms Quaglia, and this was the reason she was not attending work, rather than because of any mental impairment. Without prejudice to the foregoing, the Respondent accepts that from December 2020 (343) the Claimant's condition was likely to last for 12 months and that everyone who was aware of Dr Assoufi's OH report would have known that.

145. We find that the Claimant's condition was a mental impairment rather than 'merely' an entrenched position or reaction to adverse life events from the point at which the Claimant went off sick on 21 April 2020. This is in part because of the significant discrepancy between the apparent nature of the matters that led to the Claimant becoming ill, and the seriousness of the mental health condition that developed in response to those matters.

146. Although the Claimant's grievance has not been investigated, and there may have been more to Ms Quaglia's conduct towards the Claimant than we have seen, on the basis of the evidence before us the Claimant's feelings about

Ms Quaglia do appear by April 2020 to have become (in her own word) paranoid. The Claimant's grievance shows that she was assuming the worst about Ms Quaglia, whether or not she herself had any knowledge of what had happened, and even in relation to such innocuous matters as Ms Quaglia leaving her some handcream and suggesting they should go for coffee. Even on the face of the Claimant's own grievance, this was – at its highest – a complaint about subtle conduct by Ms Quaglia (*"microaggressions"*) which rarely, if ever, manifested itself in anything that Ms Quaglia had actually said or done directly to the Claimant, and which in all cases were, individually, complaints about what are even on the face of the Claimant's grievance minor management issues. Further, at least in relation to the one issue where we have seen the evidence (i.e. what happened with using Ann for cover on 21 February), Ms Quaglia (if it was her at all) was justified in raising concerns about the Claimant's actions.

147. However, there is no doubt that the Claimant genuinely perceived Ms Quaglia to have been bullying her over an extended period of time, and the evidence is that the effect on the Claimant of her feelings about Ms Quaglia (and the Respondent's failure even to investigate her bullying complaint), was relatively extreme. Although it was not until April 2022 that the Claimant's condition deteriorated to the extent (and had lasted long enough) to be diagnosed by her GP as a *"disorder"*, it was from the outset recognised by her GP (and, from June 2020, by OH) as being a genuine anxiety/stress condition that rendered her unfit for work.

148. Further, we accept the Claimant's evidence about its impact on her in her activities of daily living outside work from April 2020 onwards. As the Claimant describes, and as is supported by her medical notes, and her presentation (*"irrational and aggressive"*, *"very emotional"*) in telephone calls with Mrs Moore in the summer of 2020, the Claimant was suffering significantly from symptoms of anxiety which made it difficult for her to do anything other than lie in bed at home. It also led to her requiring multiple extensions for her Design coursework even though, being off work, she ought to have had lots more time in which to do that work than she had expected she would when she started the course. We do not find that the fact she was (with extensions) able to do the Design coursework means that she was not substantially adversely affected. She was having substantial difficulty with the coursework even though the Design course was not what had provoked the anxiety/stress reaction and ought to have been a 'safe space' for her.

149. We acknowledge that redeployment was raised by OH and the Claimant, and recommended by her GP, which suggests that she was fit to work in another department, but it does not follow from this that she would have been able to function 'as normal' in a new post. This is especially so given that the Claimant's grievance was never going to be dealt with by the Respondent, and thus even if redeployed that would have continued as a source of stress/anxiety for her. The evidence is that the Claimant's condition has in fact deteriorated since leaving the Respondent, so even if redeployed it is unlikely that (unless the Respondent had dealt with the grievance properly) the Claimant would have been immediately 'fully fit' to work. In other words,

this is not a case of the Claimant being prevented by mental impairment from carrying out only one particular job. On the balance of probabilities, it would have affected her in any redeployed role as well (assuming at this stage – unlike when we consider *Polkey* below – that all of the Respondent's unlawful conduct still occurred).

150. The mental impairment of stress/anxiety thus had a more than minor trivial effect on the Claimant's ability to carry out day-to-day activities not just in the one job (which she could not carry out at all), but also in her home life and would have affected her even in a redeployed role.

151. We then turn to the question of at what point it became likely that the Claimant's condition would last 12 months. We do not accept the Claimant's submission that this point was reached in June 2020. Although it was obvious at that point that the Claimant's condition was relatively serious, and OH was not able to give any likely date for return to work, the Claimant had only been off for two months and in our judgment it cannot reasonably be inferred from the absence of a return to work date being given by OH that there was a real possibility as at June 2020 that the Claimant would remain off sick for 10 further months. If that had really been a possible prognosis at that stage, we would have expected OH to mention it.

152. By the OH report of 29 September 2020, however, we find that the balance has tipped. By that point the Claimant had been off work for 5 months, her GP fit note had her signed off until the end of October 2020 and OH advised that this was likely to be extended and the condition was likely to continue, with no end date suggested. Recommendations for treatment were also vague. This is not a case where anyone was suggesting that if she, for example, had a course of 12 counselling sessions she would likely be fit to return to work at the end of it. It is also clear by this stage, following the Claimant's meeting with Ms Myers on 10 September 2020, that the Respondent is not going to investigate her grievance, and as this is a significant factor causing the anxiety it must follow that it is likely the Claimant's feelings of anxiety will continue too. As such, in our judgment, given that the Claimant's condition had already lasted for five months, and there was no prospect of any significant changes in the future (whether with regard to her grievance or treatment for her condition) there was in our judgment by the end of September 2020 a real possibility that her condition would last for at least as long again, and thus that it was likely to last 12 months.

153. It follows that we find that the Claimant was disabled within the meaning of s 6 of the EA 2010 from October 2020 onwards.

<u>Failure to make reasonable adjustments (EA 2010, s 15)</u>

The law

154. Under s 20 of the EA 2010, read with Schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person. By section 212(1), 'substantial' in this section also means 'more than minor or trivial'.

155. A respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know both that the complainant has a disability and that he or she is likely to be placed at the relevant substantial disadvantaged (EA 2010, Sch 8, para 20): see further *Wilcox v Birmingham CAB Services Ltd* (UKEAT/02393/10) at [37].

156. In considering a reasonable adjustments claim, a Tribunal must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant: *Environment Agency v Rowan* [2008] ICR 218, EAT at [27] *per* Judge Serota QC. The Tribunal must also identify how the adjustment sought would alleviate that disadvantage (ibid, at [55]-[56]), although an adjustment may be reasonable even if it is unlikely wholly to avoid the substantial disadvantage: *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [29]. The nature of the comparison between disabled and non-disabled people is not like that between claimant and comparator in a direct discrimination claim: it is immaterial that a non-disabled person with all the characteristics of the disabled person but for the disability would be treated equally, what matters is whether *"the PCP bites harder on the disabled, or a category of them, than it does on the able-bodied"* as a result (for example) of the disabled person being more likely to be disadvantaged by the PCP than a non-disabled person: see *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [58].

157. The duty to make reasonable adjustments may (indeed, frequently does) involve treating disabled people more favourably than those who are not disabled: cf *Redcar and Cleveland Primary Care Trust v Lonsdale* [2013] EqLR 791.

158. What is reasonable is a matter for the objective assessment of the Tribunal: cf *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments, nor with the employer's reasoning: *Royal Bank of Scotland v Ashton* [2011] ICR 632, EAT.

159. Although the EA 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995

are matters to which the Tribunal should generally have regard, including but not limited to:

a. The extent to which taking the step would prevent the effect in relation to which the duty was imposed;
b. The extent to which it was practicable for the employer to take the step;
c. The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities;
d. The extent of the employer's financial and other resources;
e. The availability to the employer of financial or other assistance in respect of taking the step;
f. The nature of the employer's activities and the size of its undertaking;
g. Where the step would be taken in relation to a private household, the extent to which taking it would: (i) disrupt that household or (ii) disturb any person residing there.

160. In relation to contractual sick pay, although there is no automatic obligation on the Respondent to extend contractual sick pay beyond the usual entitlement an employer should consider whether it would be reasonable for them to do so: Code, para 17.21. However, if the reason for the absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment to make: Code, para 17.22. The Code reflects the caselaw: see the Court of Appeal decisions in *Meikle v Nottinghamshire County Council* [2005] ICR 1 at [61]-[62] and *O'Hanlon v Revenue and Customs Comrs* [2007] ICR 1359 (CA) at [81] and [86] per Hooper LJ and at [94]-[95], [99]-[101] *per* Sedley LJ.

161. Under s 136 EA 2010, the Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may even be as late as the tribunal hearing itself. Once that threshold has been crossed, the burden shifts to the Respondent to show that the proposed adjustment is not reasonable: *Project Management Institute v Latif* [2007] IRLR 579, EAT.

Conclusions

162. We record, first, that in our judgment the Respondent had knowledge of the Claimant's disability from the point that she was disabled (i.e. October 2020) onwards. This is because the Respondent had most of the material that we have had before us. Although it did not have the Claimant's full medical records, in our judgment those were not critical to our determination that the Claimant met the definition of disability in the Act. The Respondent had the OH reports, the GP fit notes and the direct evidence of the Claimant's

behaviour at meetings during this period. From that, we find that the Respondent had all the material facts before that demonstrated that the Claimant met the definition of disability from October 2020 onwards and all those dealing with the Claimant at that point ought therefore to have known that she was disabled. The question of whether the Respondent was aware that the Claimant was at the relevant substantial disadvantage we deal with in relation to each PCP below.

163. We take each of the alleged PCPs in turn, although there is significant overlap between some of the Claimant's claims under this heading:-

164. First, as to the requirements to work alongside Ms Quaglia and to work in a team from which the Claimant had become 'alienated', the parties have taken these together and there is no dispute that if (as we have found) the Claimant was disabled, then she was placed at a substantial disadvantage by these requirements, with which she was unable to comply as a result of a mental impairment which, from October 2020, met the definition of disability. Moreover, the Respondent knew or ought to have known that the Claimant was at that disadvantage because it had before it materially the same evidence as we have before us.

165. The Claimant contends that a reasonable adjustment would have been to redeploy her. The Respondent accepts that, if it had followed its Absence Management policy, it could and should have redeployed the Claimant at Stage 2, i.e. that from December 2020 there should have been a 12-week period during which redeployment was sought for the Claimant. However, the Respondent nonetheless submits that this would not have been a reasonable adjustment because the Claimant was entrenched in her view that she had been mistreated by the Respondent and bullied by Ms Quaglia and so, although redeployment should have been arranged, the Respondent submits that it had little prospect of succeeding and therefore would not have been a reasonable adjustment.

166. We reject the Respondent's argument. While, as we have noted above when addressing the question of whether the Claimant was disabled, there is some doubt as to whether the Claimant would have been able to function wholly 'as normal' in any redeployed role given that the position would have been that the Respondent would still have refused to deal with her grievance, we nonetheless consider that there was a good prospect that the Claimant would have been able, if redeployed in or around December 2020, to make at least a successful start in a new role. At that stage, redeployment would have been a demonstrable response by the Respondent to the Claimant's GP's recommendation and as such would have redressed to some extent the Respondent's prior failing in relation to her grievance. This would have been the Respondent at least 'listening' to her GP and to her. Further, the Claimant has managed since leaving the Respondent to obtain alternative employment and although she still has ongoing mental health problems, we can infer from the fact that the Claimant has been able to work in a different environment that she would have been able to work at the Respondent if redeployed to a different department out of contact with her old team. We therefore find that

redeployment from December 2020 (or, at any rate, prior to the Stage 3 hearing on 15 June 2021) would have been a reasonable adjustment.

167. The second reasonable adjustment for which the Claimant contends in relation to the first two PCPs is providing the Claimant with in-house psychotherapy. In closing submissions, the Claimant accepted that this was a typographical error and that what was recommended by OH on 29 September 2020 was in-house psychology, not psychotherapy as the Respondent does not have in-house psychotherapy. This claim is therefore a claim that provision of in-house psychology would have been a reasonable adjustment. However, we find that it would not have been a reasonable adjustment for two reasons. First, it was never actually recommended by OH and it would not have been reasonable for the Respondent to organise it without an OH recommendation. The OH report of 29 September 2020 was not, as we read it, a recommendation for in-house psychology but a record that the OHA planned to refer to in-house psychology if redeployment was considered. The OH email of April 2022 (641) makes clear that by the time OH considered the matter again a referral to in-house psychology was not recommended by Dr Assoufi, and that is also consistent with what he told the Claimant in his conversation in February 2021. OH did recommend Care First, and that was available to the Claimant at all times. Secondly, even if OH had recommended in-house psychology, because of the pandemic the Respondent had prioritised its in-house psychology services for those staff affected by the pandemic. That is in our judgment a reasonable allocation of resources given the importance of front-line Covid response services to the wider public at that time.

168. As to the PCPs of 'requiring regular performance and attendance from employees' and 'imposing staged performance management procedures in response to prolonged sickness absence', there is no dispute that these were PCPs. The Respondent does not accept that these requirements put the Claimant at a substantial disadvantage because it contends it is reasonable for the Respondent to manage absence of all kinds and in the Claimant's case timescales for the absence management process were significantly extended, it was a supportive process and she was not dismissed. However, we accept that these PCPs placed the Claimant at a substantial disadvantage because as a disabled person she was unable to return to work and the absence management process therefore (to use the *Griffiths* term) 'bit harder' on her and other disabled people than on non-disabled people. It did so even though it did not lead to her dismissal because it was still a formal procedure leading to the threat of dismissal and that was a more than minor or trivial disadvantage to the Claimant as a disabled person who was not able because of her disability to do anything to avoid being subject to that process.

169. The Claimant contends that reasonable adjustments to avoid this substantial disadvantage would have been not to manage her absence at all, or not to have progressed that process without treating the Claimant's absence as disability-related or until the root cause of her sickness absence had been resolved. We find, first, that it was reasonable of the Respondent to apply the Absence Management process to the Claimant. It would not be reasonable

for the Respondent not to manage disability-related absence at all. The Respondent needs to protect its interests as an employer, and to manage absence to avoid unreasonable waste of public funds on non-working employees. It also needs to manage absence in order to ensure that reasonable adjustments are made for the disabled where possible, including through reasonable adjustments and redeployment, as its Managing Absence policy provides. It was therefore reasonable for the Respondent to manage the Claimant's absence and, so far as the timescales used by the Respondent in moving from informal to each of the formal stages, the Respondent extended its normal timescales significantly. We would have expected no different treatment in that respect even if the Claimant had met the definition of disability from April 2020 onwards and the Respondent had known that.

170. However, we do consider that as a reasonable adjustment the Respondent should have addressed the root cause of the Claimant's absence by dealing properly with her grievance. A very significant part of what upset the Claimant, and contributed to her being off sick with stress and anxiety, was the failure by the Respondent to deal properly with her grievance. She felt, as she put it both to us and at the Stage 3 meeting, 'silenced' by the Respondent, and that is in fact exactly what happened. In breach of the ACAS Code of Practice, Mr Matthews did not invite her to a meeting to discuss her grievance. In breach of the Respondent's own Bullying and Harassment policy, he declined even to consider incidents that had occurred three months prior to her putting in her complaint. Unreasonably, he determined her grievance solely on the basis of discussion with her line manager, and carried out no investigation at all with any witnesses. That was especially unreasonable given the nature of the grievance which was, as we have noted, subtle. There may have been something in it (we have in mind in particular Ms Quaglia's apparently frustrated and possibly condescending *"Why????"* when told that the Claimant had moved to the oncology offices which gives some clue to her attitude toward the Claimant), but it would have needed careful consideration as to whether Ms Quaglia *had* been subjecting the Claimant to undue criticism and scrutiny. That could only have been assessed by reviewing all relevant documentation and interviewing all relevant witnesses.

171. After Mr Matthews completed his paper exercise, the Respondent refused at every juncture to allow the Claimant to discuss her bullying complaint, treating the matter as concluded by Mr Matthews' paper exercise. That conduct exacerbated the Claimant's distress and thus (we infer) her mental health condition. It would have been reasonable for the Respondent, at any stage, to rectify Mr Matthews' default and by dealing with her grievance as the ACAS Code of Practice required it to do, and by carrying out a reasonable investigation. Had it done so, we find it likely that, even if the ultimate outcome was that her grievance was rejected, the Claimant would have felt significantly less distressed and would probably have been able to return to work. Or, at least, there is a good chance that she would have done. That is especially so if, as would surely have been the case, the Respondent had maintained its offer of mediation / another facilitated conversation.

172. The final PCP concerns the Respondent's sick pay policy. The Claimant contends, and the Respondent broadly accepts, that if there was a prior failure to make a reasonable adjustment which led to the Claimant being off work for longer than she would otherwise have been and thus suffering the further disadvantage of losing pay under the Respondent's sick pay policy, that it would (the Respondent says 'might') have been a reasonable adjustment to adjust the sick pay policy too. In this case we find that if, after October 2020, the Respondent had made the reasonable adjustments of properly investigating her grievance and redeploying her, the Claimant would (on the balance of probabilities) have made a successful return to work before her pay dropped to nil in March 2021. In the circumstances, given that those prior reasonable adjustments had not been made, we consider that it would have been a reasonable adjustment for the Respondent to avoid the further disadvantage occasioned to the Claimant by its sick pay policy and to have continued paying her at half pay from March 2021 onwards.

Constructive unfair dismissal

The law

173. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be 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"*.

174. It is well established that: (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

175. Not every breach of contract is a fundamental breach: the conduct of the employer relied upon must be *"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"*: *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761. The assessment of the employer's intention is an objective one, to be judged from the point of view of a reasonable person in the position of the claimant. The employer's actual (subjective) motive or intention is only relevant if *"it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person"*: *Tullett Prebon v BGC Brokers LLP and ors* [2011] EWCA Civ 131, [2011] IRLR 420 at [24] per Maurice Kay LJ.

176. In this case the Claimant claims breach of the implied term recognised in *Malik v Bank of Credit and Commerce International* [1998] AC 20 that the

employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important: conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract because the essence of the breach of the implied term is that it is (without justification) calculated or likely to destroy or seriously damage the relationship: see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A and *Morrow v Safeway Stores* [2002] IRLR 9.

177. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal held (at [55] per Underhill LJ, with whom Singh LJ agreed) that, in the normal case where an employee claims to have been constructively dismissed as a result of a breach of the implied term of trust and confidence, it is sufficient for a tribunal to ask itself the following questions:
(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)
(5) Did the employee resign in response (or partly in response) to that breach?

178. In determining whether a course of conduct comprising several acts and omissions amounts to a breach of the implied term of trust and confidence, the approach in *Omilaju v Waltham Forest LBC* [2004] EWCA Civ 1493, [2005] ICR 481 is to be applied: see *Kaur* at [41]. The approach in *Omilaju* is that a breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so, and the 'final straw' may be relatively insignificant, but must not be utterly trivial. Where prior conduct has constituted a repudiatory breach, however, the claim will succeed provided that the employee resigns at least in part in response to that breach, even if their resignation is also partly prompted by a 'final straw' which is in itself utterly insignificant (provided always there has been no affirmation of the breach): *Williams v The Governing Body of Alderman Davie Church in Wales Primary School* (UKEAT/0108/19/LA) at [32]-[34] *per* Auerbach J.

179. If a fundamental breach is established, the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In *United First Partners Research*

v Carreras [2018] EWCA Civ 323 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons. It is not necessary, as a matter of law, that the employee should have told the employer that he is leaving because of the employer's repudiatory conduct: see *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425, at 431 per Pill LJ.

180. Finally, although the Court of Appeal's decision in *Kaur* limits the role for the question of 'affirmation' in a constructive dismissal case, it remains the case that, in accordance with ordinary contractual principles, an employee who affirms the contract in response to a fundamental breach (or series of incidents amounting to a fundamental breach) loses the right to resign and claim unfair dismissal. The general principles set out by the EAT in *WE Cox Turner (International) Ltd v Crook* [1981] ICR 823 remain good law: "*Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged may be evidence of an implied affirmation... Affirmation of the contract can be implied. Thus,* if *the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to affirm the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract."* However, in the employment context an employee will not necessarily affirm a contract by remaining in post and not resigning immediately. As the EAT stated in *Quigley v University of St Andrews* UKEATS/0025/05/RN at [37]:

> "…in the case of an employment contract, every day that passes after the repudiatory conduct will involve, if the employee does not resign, him acting in a way that looks very much like him accepting that the contract is and is to be an ongoing one: if he carries on working and accepts his salary and any other benefits, it will get harder and harder for him to say, convincingly, that he actually regarded the employer as having repudiated and accepted the repudiation. The risk of his conduct being, as a matter of evidence, interpreted as affirmatory will get greater and greater. Thus, if he does stay on for a period after what he regards as repudiation has occurred he would be well advised to make it quite clear that that is how he regards the conduct and that he is staying on only under protest for some defined purpose such as to allow the employer a chance to put things right. It needs also, however, to be recognised that even that might not work if it goes on too long; it is all a matter of assessing the evidence."

181. Finally, if the employee establishes that the resignation was in law a dismissal, then it is for the employer to show a reason for the dismissal, which can feel like an artificial exercise in the context of a constructive dismissal case. The Court of Appeal addressed this problem in *Berriman v Delabole Slate Limited* [1985] ICR 546 where the Court said that, in the case of a constructive dismissal, the reason for the dismissal is the reason for the employer's breach of contract that caused the employee to resign. This is determined by analysis of the employer's reasons for so acting, not the employee's perception (*Wyeth v Salisbury NHS Foundation Trust UK* EAT/061/15). If the employer establishes a potentially fair reason, the

Tribunal must then consider whether dismissal was fair in all the circumstances within s 98(4) ERA 1996.

Conclusions

182. We have considered the specific breaches of the implied term of trust and confidence alleged by the Claimant, and the parties' submissions in relation to them, and we have concluded as follows:-

183. As to what led the Claimant to return to the open-plan office in which the NET department were situated on 31 March 2020, we find that neither Ms Garland nor Mrs Moore did anything unreasonable. Neither of them actually asked the Claimant to move back to her desk. To the extent that they desired her to return to her desk, that was in our judgment reasonable because it is evidently easier in a clinical environment for team members to be able to speak to each other directly rather than calling or emailing, especially if hard copy papers need to be handed around. However, at the end of March 2020, there was no 'insisting and pressurising' and no conduct that comes anywhere near breaching the implied term of trust and confidence.

184. As to what happened on 20 April 2020 when Mrs Moore asked the Claimant by email to move from desk R back to desk O, we find that this does contribute to a breach of the implied term of trust and confidence. Mrs Moore was the communicator of the message rather than Ms Garland, but they were in agreement about it. It was likely to damage the relationship of trust and confidence because the import of Mrs Moore's emails to the Claimant was, from her point of view, that her bullying complaint was not even going to be looked into and she simply had to move back to her desk even though it made her feel uncomfortable. It is not Mrs Moore's fault that that was the effect of her message because, at the point when she wrote the first email of 20 April asking the Claimant to return to her desk, she was under the impression that the Claimant's grievance had been concluded and when she wrote a second time she did so on Mr Matthews's advice. We stop short, however, of finding that this message in and of itself of constituted a breach of the implied term of trust and confidence for three reasons. First, because the Claimant had not formally been permitted to move desks because she had raised a grievance, so there was not formally a link between moving desk and the handling of the grievance (although it seems likely that it must have played a part in why Mrs Moore let the Claimant move offices in the first place). The link was only explicitly created when the Claimant on 20 April objected to moving back to desk O while her complaint was still outstanding. Secondly, because the desks were in an open-plan office and not right next to each other. Thirdly, because, if Mr Matthews had dealt properly with the Claimant's grievance, and if he had communicated that to the Claimant before Mrs Moore required her to move back to her desk, the requirement to move back to her desk would have been reasonable. If an employee raises a grievance about another employee, and it is (following due process) found to be unsubstantiated, then ordinarily it will be reasonable for the employer to require the complainant to start working again as normal, even if the

employee says that they feel 'uncomfortable' with it. As it is, what happened is perhaps best characterised as a *"near miss"* in terms of reasonableness. If more care had been taken over the timing of the communications, the Claimant would have had the grievance outcome before receiving the instruction about the desk and that instruction would have been a reasonable one. However, what happened was not reasonable. Requiring an employee who has stated explicitly that they feel 'uncomfortable' about returning to a desk near to the person about whom they have submitted a lengthy formal grievance before that investigation is concluded is in our judgment likely to damage the relationship of trust and confidence, albeit not seriously so given the three factors we have identified.

185. As to the comments alleged to have been made by Mrs Moore when managing the Claimant's sickness absence, these do not contribute to a breach of the implied term:

    a. We find that Mrs Moore did say *"don't raise your voice at me"* and it was entirely appropriate for her to do so given that the Claimant was shouting at her;

    b. We find that Mrs Moore did say, *"You're lucky I haven't put you on stage 1 at this time. You have had enough sick days to be put on stage 1"* or words to that same effect. However, we do not find that this contributed to a breach of trust and confidence as even if the word 'lucky' was used it really amounted to a simple description of the factual position. Someone who had been absent for 8 weeks was 'lucky' not to have been moved straight to the formal procedure given that the trigger point was 14 days;

    c. We found as a fact that Mrs Moore did not say, *"I feel like you're pulling a fast one"*.

186. As to the failure to redeploy the Claimant at Stage 2 of the Absence Management process, this was a failure by the Respondent to follow its own Sickness Management policy and a failure by the Respondent to comply with its duty to make reasonable adjustments for the Claimant as a disabled employee. We find that as such it was conduct that was likely seriously to damage the relationship between employer and employee and there was no just cause for it. This was therefore a breach of the implied term of trust and confidence.

187. As to the Respondent's failure to deal with the Claimant's grievance as required by the ACAS Code of Practice, or reasonably at all, we repeat what we have said above in relation to failure to make reasonable adjustments. We add that the Respondent also failed to offer the Claimant a right of appeal. We reject the Respondent's argument that the Claimant could still have appealed by reference to the Bullying and Harassment Policy. The Respondent itself was not following that policy and the likelihood is that, if the Claimant had tried to appeal to Mr Matthews, he would have told her she had no right of appeal. In any event, the Respondent failed to offer the right of

appeal as it was required to do. Such conduct in relation to any bullying complaint would likely breach the implied term of trust and confidence. In the Claimant's case, where this was the response to a grievance that (despite the weaknesses that we have noted) was on its face a substantial complaint about an 18-month bullying campaign, put together by the Claimant with great care and of significant importance to her, there is no doubt that this conduct was likely to destroy the employment relationship. There was no justification for it as it was in breach of the Respondent's own policy, a breach of the ACAS Code of Practice and in breach of the ordinary requirements of fairness and reasonableness (as well as, later, a failure to make reasonable adjustments for her disability). We acknowledge that the grievance was submitted just as the Covid pandemic began, but while that might excuse delays in dealing with it, or failures to update the Claimant on progress, it does not in our judgment excuse the substantive failings we have identified.

188. As to what happened at the Stage 3 meeting, we find that the offer of redeployment came too late to remedy the prior breach of the implied term in that respect. Six months is a very long delay, even allowing for the impact of the pandemic. However, what was key about the Stage 3 meeting was that Mr McFetters made it clear that the Respondent regarded the bullying complaint as closed and would not be revisiting it. He made that clear during the meeting and it was this that upset the Claimant and led to her saying she would resign. By the end of the meeting, the position was still that the grievance would not be investigated. Mr McFetters is not to be criticised for maintaining that position at that stage because he had been told that the grievance had been dealt with. However, it had not. Essentially, therefore, the Respondent, despite being given multiple opportunities to remedy the prior fundamental breach, was maintaining that it would not do so. That was the final straw and it was in response to this continued breach of the implied term of trust and confidence that the Claimant resigned. That is clear from the first sentence of her resignation letter as well as her evidence to us. Her resignation letter also refers to other matters, including those which we have found to be (or contribute to) breaches of the implied term of trust and confidence, in particular the failure by the Respondent to redeploy the Claimant at the time that was recommended by her GP.

189. For the avoidance of doubt, we find that the Claimant did not affirm the contract because she did not return to work at any point. Her continued participation in the Absence Management process was at all times in the hope that the Respondent would remedy its failure – she complained repeatedly about the Respondent's failures. She was unwell during this period and that must be taken into account too and must partly explain why she did not resign earlier. There was no affirmation.

190. In the premises, the Claimant was constructively dismissed. The Respondent does not seek to argue it had a fair reason for dismissal, so we find her constructive dismissal to be unfair.

Polkey

The law

191. If the Tribunal concludes that a person was constructively dismissed but is satisfied that if the Respondent had not acted unlawfully the employee could or might have resigned anyway, the Tribunal must decide what the percentage chances were of the resignation taking place at a particular point in time. That is the *Polkey* principle as explained in *Contract Bottling Ltd v Cave* [2015] ICR 46 as adapted to a constructive dismissal situation; see also *Zebrowski v Concentric Birmingham Limited* (UKEAT/0245/16). The same principle applies in discrimination claims: the Tribunal must determine what would have happened if there had been no discrimination: see *Chagger v Abbey National plc* [2009] EWCA Civ 1202, [2010] ICR 397. The EAT has recently confirmed in *Shittu v South London and Maudsley NHS Foundation Trust* [2022] EAT 18 that a loss of chance basis should be used, and that the decision in *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352, concerning a balance of probabilities test for losses which depended on what the claimant would have done, should not be applied to employment cases.

Conclusions

192. The Respondent invites us to find that the Claimant would not have returned to work and/or would resigned in any event even if it had not acted unlawfully. The Claimant submits that we should not speculate either as to whether the Claimant's complaint would have been upheld if it had been investigated or as to what the impact of that would have been on the Claimant.

193. We, however, consider that we must do our best to consider what the likely outcome would have been if the Respondent had not acted unlawfully, i.e. if the Respondent had dealt with her grievance in accordance with its policy and ACAS Code of Practice from the outset, if it had not required her to return to desk O before the grievance had concluded and if it had redeployed her.

194. We consider that if the Respondent had done all of those things, there is a 95% chance that the Claimant would have remained in the Respondent's employment. We reach that conclusion even though in our judgment there is a very high probability (a 90-100% chance) that even if the Respondent had properly investigated the Claimant's grievance and handled it in accordance with the ACAS Code of Practice, the Respondent would still have found the grievance not to be substantiated.

195. This is because we consider that it was the Respondent's failure to deal properly with the grievance that was the most significant factor in the Claimant becoming so ill. In so saying, we acknowledge that the Claimant went off sick before she had received the grievance outcome, but she did so in response to emails from Mrs Moore the import of which was (as we have noted) that the Respondent was not going to respond to her grievance at all. At the point when she went off sick, she had raised her grievance 6 weeks'

previously and not yet been invited to a meeting, but was required to return to sit close to Ms Quaglia even though she had made clear that it made her feel uncomfortable and her grievance was still outstanding. If she had, whether prior to or after that point, been invited to a meeting to discuss her grievance and had the grievance investigated reasonably and a right of appeal afforded, we consider it likely (60-80%%) that she would have returned to work in the same role even if the grievance was not upheld, provided the offer of a further facilitated conversation/mediation was maintained (as we consider we must assume it would have been). This is because if due process had been followed, she would very likely have felt 'listened to' even if she disagreed with the outcome. She might even have been shown enough evidence in the course of the process to satisfy herself that Ms Quaglia had not behaved as badly as she thought she had. In reaching these conclusions, we take into account that although the Claimant was not a wholly reliable witness, she was generally a reasonable one. For example, she accepted that the Respondent's reasons for refusing her flexible working request were on their face reasonable and that Mrs Moore and Ms Garland were 'trying their best', she accepted that it was reasonable in principle for the Respondent to manager her sickness absence and she accepted that she had been shouting at Mrs Moore on 22 June 2020. In other words, we find that the Claimant is the kind of person who is able to see other people's point of view (even now, after all that she has been through) and that it is likely that if due process had been followed, coupled with facilitated conversation/mediation, she would likely have remained in her old role role.

196. However, even if we are wrong about that and the Claimant would still have gone off sick if her grievance was not upheld after 'due process', we consider that the situation would then have been readily salvageable by redeployment if that had been organised promptly at Stage 2 as the Respondent accepted it should have been. We put the prospects of the Claimant remaining in employment if the Respondent had both properly investigated her grievance and redeployed her if she nonetheless went sick at 85-95%.

197. We also consider that there is a very small chance (0-10%) that the Claimant's grievance would have been upheld and thus the vindicated Claimant would have remained in employment in employment for that reason.

198. Putting all the above together, and acknowledging that this is not an exact science despite our efforts at putting percentages on the chances, we consider that this is one of those rare cases where we can say with a high degree of confidence (95%) that if the Respondent had not acted unlawfully, the Claimant would not have resigned but would have remained in employment.

Uplift for failure to comply with ACAS Code of Practice

199. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that (in cases such as this to which that section applies) *"it appears to the employment tribunal that – (a) the claim to*

which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

200. In this case, a relevant Code of Practice, namely the ACAS Code of Practice on Disciplinary and Grievance Procedures (March 2015) applies and the Respondent has failed to comply with every element of that Code in relation to the Claimant's grievance of 11 March 2020, save for the part of paragraph 40 that provides for a written outcome to be sent to the employee.

201. We do not, however, attempt at this stage to put a % on the uplift that should be awarded because of the caution urged by the Court of Appeal in *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] EWCA Civ 545, [2011] ICR 1290 that consideration should be given before doing so to the overall value of the award. The precise % uplift will therefore remain an issue for the remedy stage.

202. We record here that we will want at that stage also to hear submissions about whether the Claimant's email of 8 July 2020 and her resignation letter were both also grievances and, if so, whether the Respondent also failed to deal with those as required by the Code of Practice.

Time limits

203. Neither party raised as an issue the question of time limits under EA 2010, s 123, but as jurisdiction is a matter the Tribunal must consider, we record that in the light of our findings as set out in this judgment, the claimed failures to make reasonable adjustments were all continuing as at 22 April 2021 (i.e. the date three months prior to the Claimant contacting ACAS, and thus the relevant date for the purposes of s 123(1)(a), having regard to the extension in s 140B) and were thus in time.

Overall conclusion

204. The unanimous judgment of the Tribunal is:

(1) The Claimant was constructively unfairly dismissed (ERA 1996, Part X);
(2) The Respondent contravened the EA 2010, ss 20-21 and 39 by failing to comply with the duty to make reasonable adjustments for the Claimant's disability by:
    a. Failing, from October 2020 onwards, to deal with her grievance reasonably and in accordance with the ACAS Code of Practice on Disciplinary and Grievance procedures;
    b. Failing to redeploy her in or around December 2020, or prior to 15 June 2021;

c. Failing to maintain her sick pay at half pay from March 2021 onwards;

(3) There should be a 5% *Polkey* reduction;

(4) There should be an uplift for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures, the percentage of which is to be determined at the Remedy Hearing.

205. As agreed at the hearing, the Remedy Hearing will take place by video on Thursday, 13 October 2022 at 10am (1 day).

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Employment Judge Stout

30 June 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

30/06/2022

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FOR THE TRIBUNAL OFFICE